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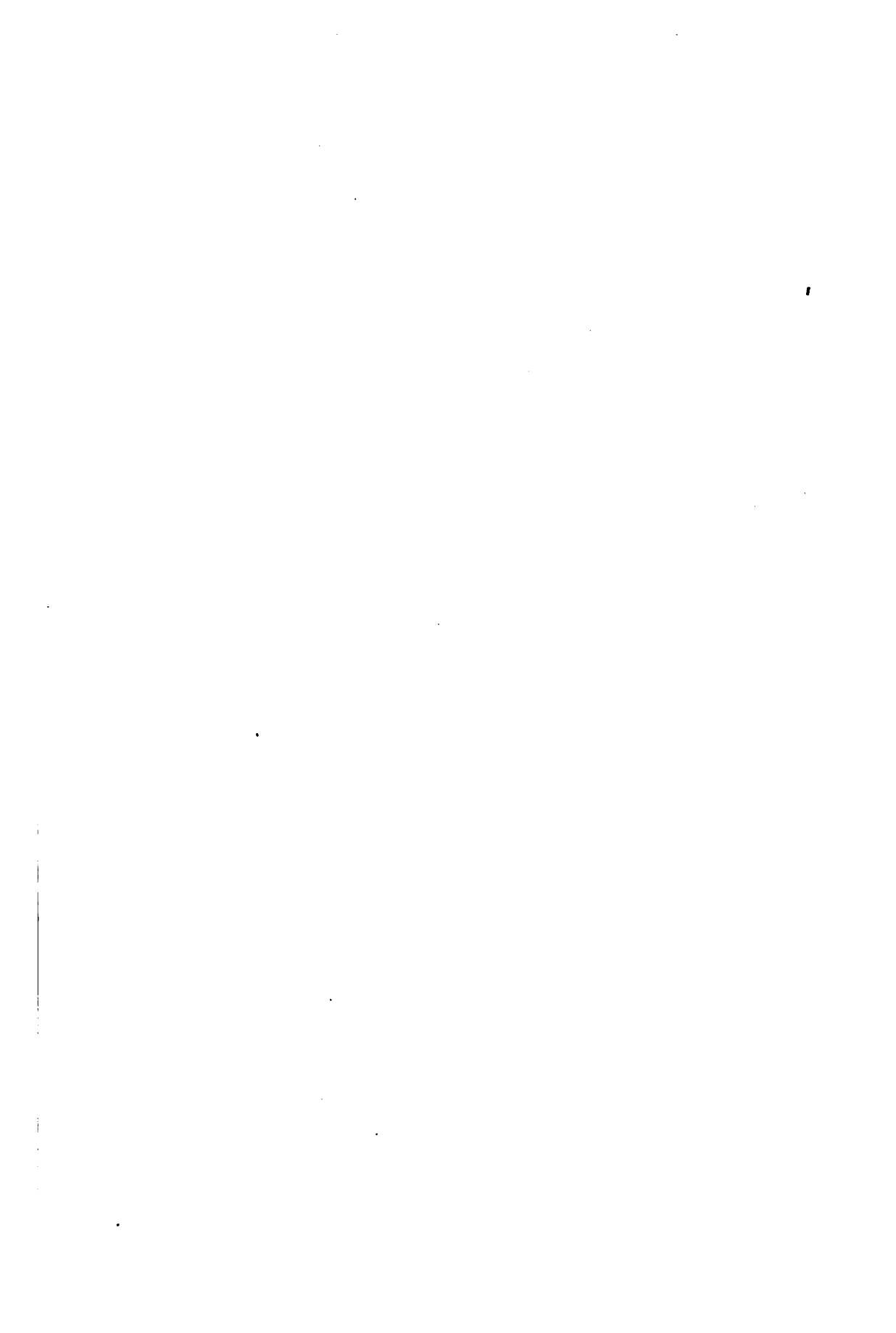
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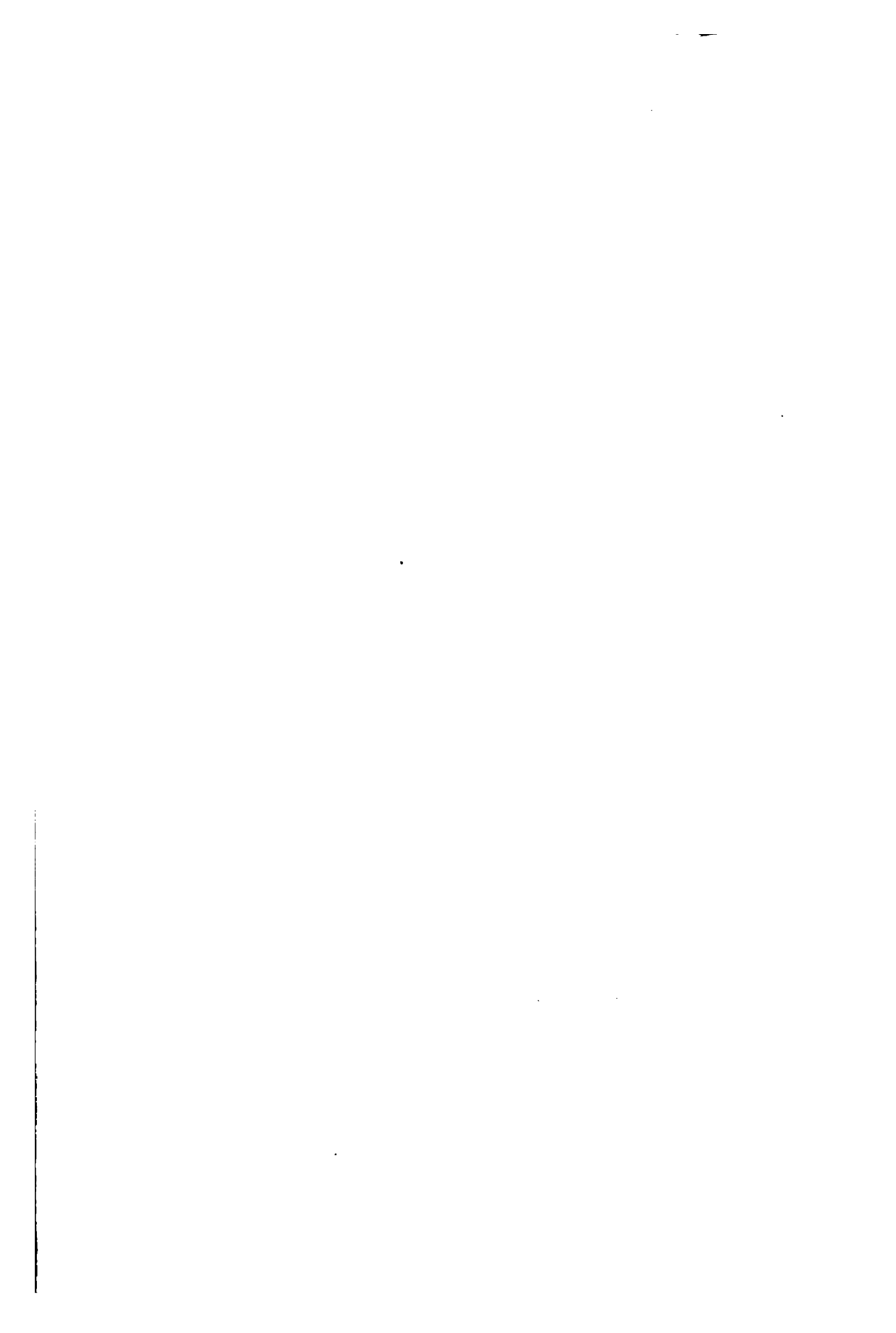


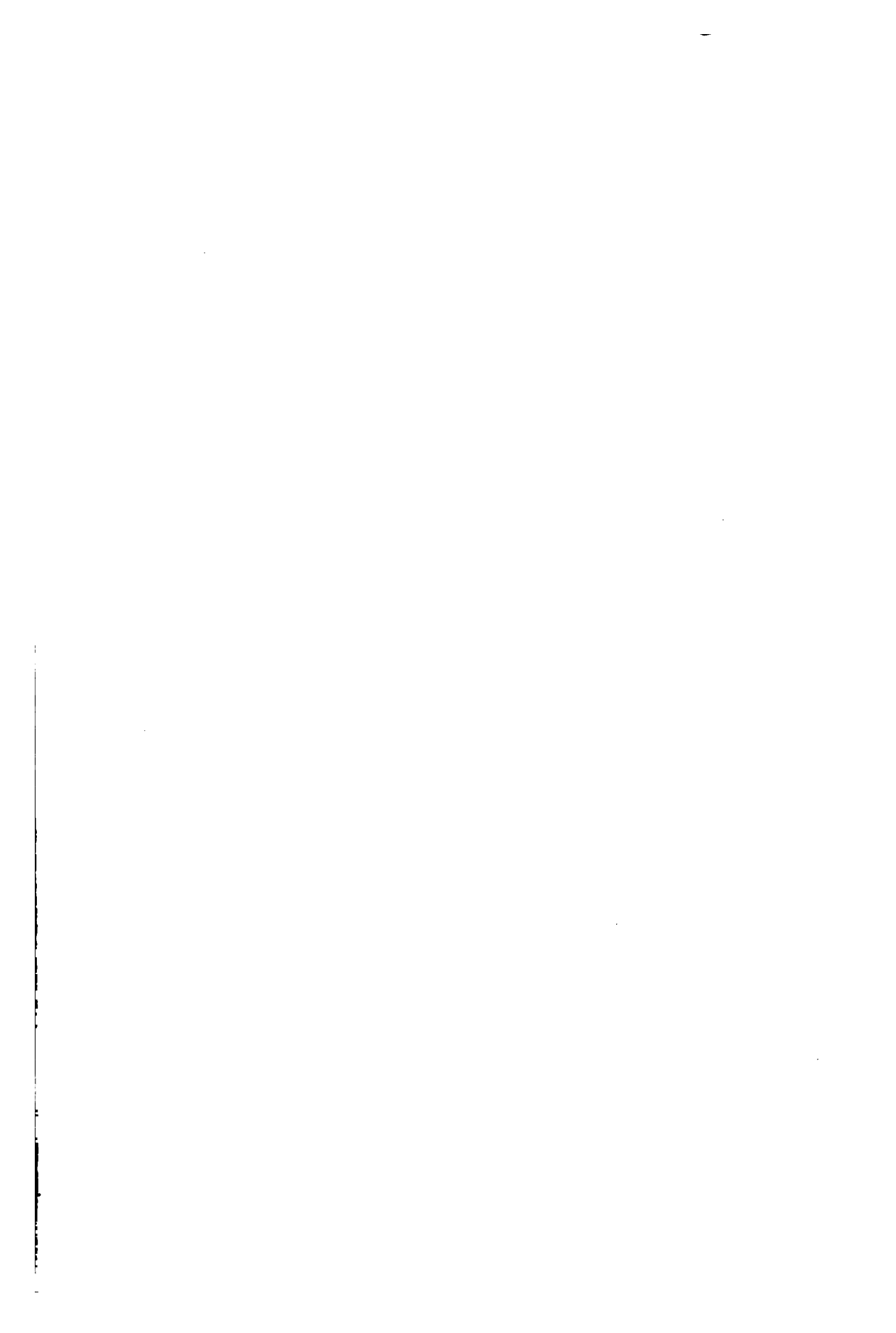
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2

BENEVOLENT ORDER—EXPULSION.

[Hamilton District Court, May 2, 1883.]

STATE OF OHIO EX REL. POPE V. KNIGHTS OF THE GOLDEN RULE

1. A member of a mutual benevolent order who has been expelled from his lodge cannot appeal to the courts to reinstate him where he has not exhausted his right to appeal within the rules of the order. And the fact that the appellate officer is among those who voted to expel him is no reason why he should not resort to the appeal.
2. In case of the refusal of an appellate officer to hear an appeal, the remedy would be by mandamus against such officer.

JOHNSTON, J.

The petition alleges that defendant is a duly chartered subordinate division in Cincinnati, Ohio, of a society known as the Knights of the Golden Rule incorporated under the laws of Kentucky.

The relator substantially avers that some six months previous to the proceeding he became a member of this order; that he in all respects complied with its constitution and by-laws, but that notwithstanding that fact about October 10, 1882, the order entertained upon the complaint of one of its members a petition to expel the relator from membership, that a copy of the complaint or what purported to be the complaint was served upon him but that it was informal and not in accordance with the general laws of the order and that the order thereafter without having complied with its constitution and by-laws proceeded to entertain and consider charges against him; that the proceedings were irregular and defective and illegal, that he actually took no part in the investigation and that contrary to all law and all rules of evidence, they proceeded to hear testimony to sustain the charges against him and found him guilty and

expelled him November 15, 1882. That he at once gave notice of an appeal from the decision of the castle to the grand commander of the state of Ohio; that he in a few days thereafter answered stating that inasmuch as he had been one of the active participants in the castle in procuring his expulsion therefrom, he would not entertain the appeal nor make any decision thereon, and respectfully referred him to the supreme commander who it seems was domiciled at Corinth, Mississippi.

He says that this right of appeal having been cut off, he has no remedy but to appeal to a civil court for redress, and that by invoking the writ of mandamus. An answer was filed and the case heard upon the testimony.

The relator is an attorney and several of the members appear to be printers and publishers and for about sixty days they resorted to circulars and finally to the columns of the daily journals of this city for a redress of their grievances and to the knights journal, and relator finally adopting a very popular suggestion, hired a hall and there he expressed himself, as claimed by the members at length, in a derogatory manner against the action of this order and its officers.

The chief complaint of the relator upon the hearing was that complaint against him was not made to the commander of the castle as required by the general laws of the order; that on the contrary it was made to the castle itself in open session. He further complains that the complaint did not specify of what offense he had been guilty. And that at the trial upon the charges the evidence was not spread at length upon the minutes of the order, that the order allowed all manner of evidence to be heard against him, evidence of facts that occurred long after the charges had been preferred against him and of which he had no knowledge. Further that he was not notified in accordance with the general laws of the order by a special committee to which had been referred the complaint, that they had found evidence sustaining the charges against him, the general laws providing that where a complaint is made against a member, it shall be referred by the commander of the order to a special committee of three. They shall sit and hear evidence touching the complaint and if they find evidence sufficient in their opinion to warrant them in reporting charges to the castle, the law of the order provides that before they do so they must notify the member against whom the complaint is made that he may appear before this committee and bring witnesses if he can to disprove the evidence on which they have felt authorized to report charges. This he complains they did not give him an opportunity of doing. For this and other reasons he complains the proceedings were wholly irregular and void and that he should be restored to his rights of membership, being a member thereof and having paid his dues and that in case of death, his family would be entitled to receive from the order \$2,000, but being expelled from the order he is cut off from this right and privilege.

The castle in their answer set out a copy of the complaint that was served upon him which they claim was sufficiently specific to give him notice of the cause of complaint, and it alleges that he had a full and fair trial, and that he was present when the trial took place, he subpoenaed members of other orders in the neighborhood, and after being present for a short time at the trial, he retired to an ante-chamber or possibly from the room altogether and the proceedings went forward, the charges were sustained against him and then they proceeded to fix a penalty and by a large vote the penalty was fixed at expulsion, of which he received

notice on the 15th of November, 1882. The castle further answering says that on the next day, in accordance with the general laws of the castle, notice of an appeal from the decision of the castle to the grand commander was given. The castle says that appeal is still pending and that within the 30 days granted him to take an appeal and before their expiration, he invoked this court for a writ of mandamus compelling the castle to restore him to membership.

There may have been slight irregularities, but if there were any irregularities, they were not prejudicial to him, but rather in his interest. He had been notified of the complaint and of the time and place it would be heard preliminary to preferring charges against him, and instead of the committee proceeding without giving him notice to hear evidence to determine whether there was any ground for the charges, and then reporting the facts to him if they found grounds, they in the first instance gave him the privilege to come right in upon the committee meeting with his witnesses and there battle against the finding of any charges at all. The irregularity was not one to his prejudice.

Section 2 of chapter 14 provides as follows: Any member guilty of immorality or who shall be a disturbing element in the society, shall be suspended or expelled.

It was also charged that he had violated certain portions of his obligations, which he assumed when he became a member. The committee reported that he had violated section 2 of chapter 14 of the general laws; that among other things he was a disturbing element in the order, also that he had violated sections 5, 6 and 9 of his obligations.

It is the policy of the law to sustain organizations of this character benevolent societies, it being considered by the courts that they are promotive of good, and for the well-being of the citizen. Ordinarily they have a constitution and by-laws for their government, and the courts have held it to be a contract on the part of the member when initiated, that he will submit himself to the rules and regulations and general laws of the order and where they provide the means whereby a member may seek a redress of his grievances for anything done against him in the order, it has been held by the courts that he assents when he becomes a member and contracts that he will abide by the decision of the order. In reviewing their proceedings courts will not judge them nicely where the objection is that there was some irregularity in the mode of procedure where perhaps the society has not strictly observed the rules of evidence that obtain in civil courts. Nor will the civil courts look into the cause of the complaint on which the member is tried, if it appears that the member was arraigned for a complaint recognized by the constitution and laws, feeling that it is for the best interests of society and of the party concerned that he should abide by the decision of the order. It has been likewise decided by the courts that in voluntary organizations of this kind until the member who complains has exhausted all the judicatories of the order for redress, the civil courts will not take cognizance of his case. He has, by voluntarily becoming a member of the order, chosen his forum for the redress of his grievances and unless there has been some palpable violation of the constitution or laws of the order whereby he has been deprived of valuable rights by the order, the civil courts will not interfere, treating the decision of the order itself as final. It appears, that after this relator had been expelled on November 15, 1882, whether regularly or irregularly, he had his right of appeal. He was aware of that fact, and immediately took steps to perfect this appeal

and did so to the grand commander. Feeling some delicacy in the matter he refused to hear the appeal referring him to the supreme commander. But our recollection is, he testified that he should, if insisted upon, have entertained the appeal. Be that as it may, if this defendant is amenable to the writ of mandamus his remedy is not against the order, but against the officer therein, holding this trust or station, to compel him to entertain the appeal.

It is a well settled principle of law that where an officer of a corporation has a discretion to do or not to do a thing, that mandamus may not be resorted to to compel him to exercise that discretion; but, where exercising a trust or station, he has a discretion as to the mode or manner of performing some duty and refuses to exercise the discretion at all, he may be compelled by mandamus to do so.

The general laws of the order, section 19, chapter 15, provide in plain terms that any member of the castle who has been aggrieved at the decision of the castle where he has been expelled or suspended, may appeal to the grand commander, and the grand commander must entertain the appeal. It does not provide in terms how soon he must hear it. It does provide within thirty days there must be a transcript forwarded to him. The member taking the appeal must certify to the grand commander that he has notified the castle of the appeal.

Where there is no grand commander, all appeals shall be made to the supreme commandery or supreme commander, in accordance with the preceding sections.

It is perhaps not an unfair interpretation of the constitution and laws of the order to hold that in a case like this where an appeal was made to the grand commander who was a member of the castle that voted to expel the appellant, that the redress of a member would not be limited to the decision of the grand commander, but that he might take an appeal from his decision to the supreme commander.

It certainly would be an equitable view to take of such a case. Be that as it may, it is our opinion that until Mr. Pope has exhausted his right of appeal and obtained a decision upon it by the grand commander that he has no right to invoke the aid of the civil courts. It was his fault to have gone into an organization where it might be that his case would be finally disposed of by a brother member who had voted to expel him; perhaps no more unreasonable however than that a litigant should be put to a motion for a new trial before a judge who had decided the case against him. That he must do, however, to get his case before a higher court for review.

The grand commander having refused to exercise his judgment, Mr. Pope's remedy was against him by mandamus to compel him to do so, *non constat*, but that upon a full hearing before him even though he may have voted against him, he might have become convinced that the charges against him were not sufficient and have dismissed the complaint and restored him to membership or that the grand commander having entertained jurisdiction and having decided against him, upon appeal to the supreme commandery or supreme commander, that body might have found that the proceedings against him were not proper, that the proceedings should have been dismissed upon hearing and thereby the member become restored to all his rights as a member in the order.

In *Mattoon et al., trustees, etc., v. Wentworth, Admr*, 7 Ohio Dec. R., 639, this principle of law is recognized and also in 13 Md., 91; 2 Whart., 809; 4 Pa. St., 519. Where a person goes into a voluntary asso-

ciation of this kind and there is a provision for a trial of the grievance of members, he hereby assents and contracts that he will have his rights disposed of in that way and abide by its decision, and it is only in a case where there has been a flagrant disregard of the constitution and general laws of the order, where the member has been deprived of the right of a trial according to the laws of the order that a civil court will intervene. Such a case is not presented here. This member must be remitted to the society. He must prosecute his appeal before the grand commander and if a writ of mandamus will lie against this defendant in any case, we think it will lie against the grand commander of the order and compel him to discharge the trusts devolved upon him by the order.

Petition dismissed at the costs of the relator.

Jones & Pope, for relator.

Goldsmith, for respondent.

4

TERM OF COURT.

[Hamilton Common Pleas.]

ASA WATERS v. COMMISSIONERS OF HAMILTON COUNTY.

Where the rules of the court of common pleas, as in Hamilton county, provide that at the end of each term a joint session shall be held, and it has been the custom at such session to formally declare the preceding term adjourned, an adjournment by one of the judges of his separate session does not end the term.

MOTION to strike bill of exceptions from the files.

JOHNSTON, J.

This cause was tried upon submission at the May term, 1882, of this court, resulting in a judgment for the plaintiff. A bill of exceptions was allowed and signed December 5, 1882, and ordered to be filed and entered of record as of November 4, 1882, which was done. Upon review in the district court a motion to strike it from the files or that it should be disregarded, was made, for the reason that it was not allowed and signed within thirty days after the trial term, but that was overruled. The court taking judicial notice that the May term did not end until the opening of the November term, November 6, 1882, intimating, however, that when the May term did end was a question of fact.

The cause having been remanded to this court, the motion is renewed. By the constitution, section 12, article XI., it is provided: "That Hamilton county shall constitute the first district, and that the judges therein may hold separate courts, or separate sittings of the same court, at the same time." To carry out this provision, the legislature in 1852 enacted a law fixing the terms of court (3), and providing section 464, Revised Statutes, that the judges in this district might at the beginning of each term, and at all times thereafter, classify and distribute the business pending in the court, as might seem most convenient to the public interest; that they might adopt such rules of practice, etc., as were necessary for the advancement of justice and prevention of delay not inconsistent with laws of the state, causing the same to be entered on their journals. Under this law it appears by the records of this court

that in 1853, the district having three judges, certain rules of practice were adopted by said judges, sitting together in joint session, (volume 6, page 6, minutes October term, 1853,) section 1 reading as follows: "A joint session of the judges of this court shall be held on the first day of each term, and so long, and as often thereafter, as the judges shall deem expedient. At each joint session, the business pending in the court shall be distributed among the judges for trial and determination; and thereupon the judges shall hold separate sessions of the court, until otherwise ordered, in which separate sessions each judge shall do such business as has been assigned to him by said distribution." In section 2 of these rules occurs this language: "The minutes of proceedings of the joint session shall be kept in sheets provided for that purpose by the clerk, and shall be authenticated by the signature of the presiding judge. The minutes of proceedings of the separate sessions shall be kept in like manner, in sheets provided for that purpose by the clerk, and shall be authenticated by the signature of the judge before whom the proceedings shall be had. At the end of each term there shall be a joint session of the judges; at the termination whereof, or as soon thereafter as may be, the sheets of the minutes of both joint and separate sessions, shall be bound together in one book."

For nearly thirty years the judges of this judicial district have observed this rule, and while not formally spread upon the journal, yet during all this lapse of time, at a joint session of all the judges, at the opening or beginning of a new term, the term next preceding is by proclamation in due form made, adjourned without day. By this rule the session is recognized as having been held at the end of the term, for it provides that a joint session shall be held at the end of each term. Now while evidence has been produced that there was an adjournment of the separate division or session of this court where this case was tried, without day on November 4, 1882, the court cannot disregard the fact, that upon the 6th of November, 1882, all the judges of the district, the trial judge in this case included in observance of this rule met, adjourned the May term without day and opened the November term. The meeting upon the first day of the new term, and then and there adjourning the last term and opening the new term, has been for so many years without an exception observed, has become a usage or custom so well settled as to have all the force and effect of well established law. In accordance therewith, the time within which to take appeals and for perfecting bills of exceptions, so far as my experience has extended, commences to run from that date.

While this court in this district has seven judges, and each may hold a separate session at the same time, the court is nevertheless under the statute a unit. It is, in the language of the constitution, a court having several judges who are holding "separate sittings of the same court at the same time." A judge may adjourn the separate session of the court presided over by him without day, but that does not in my judgment adjourn or cut off the further continuance of the term. To so hold here, would lead to inextricable confusion. If for sickness, absence or otherwise the different judges should adjourn each at different times before the regular ending of the term, it would be next to impossible to properly perfect appeals and bills of exceptions. This judicial district differs from all the other districts in the state, excepting in Cuyahoga county. The legislature has enacted that there shall be three terms of court in this district: January, May and November terms, and the com-

mencement of each term is fixed. In all other districts in the state the judges by law fix the terms both as to the number and commencement, and any judge is authorized to appoint a special term. The other districts are made up of many counties, with comparatively few judges, and the county seats far removed. A necessity may exist there for short terms with power to finally adjourn the same at any time to enable the judges to reach other parts of the district in season. Here the different judges are under the same roof, and the practice has been such since 1853 as virtually to recognize one term as existing until the new or succeeding term is opened upon the day fixed by the statute. In the law creating the superior courts of this city and of Montgomery county the legislature fixed definitely the terms and the end of each term, and considered it necessary, it would seem to specially provide that the judge might adjourn the court "on any day previous to the expiration of the term for which it is held," sections 490 and 510, Revised Statutes.

There is no such provision in relation to the common pleas court of this district. The terms are fixed by statute beyond the power of the judges to change them. In 2 Green, (Iowa) 559, where the question before the court was whether two courts could be in session at the same time, in different counties of the same district, where the terms had been fixed as in the case at bar, by statute (not by the judges) the court say, page 566: "The general law appointing the time and term for holding the court in Clinton county fixes the time for the commencement of the term, on the second Monday after the fourth Monday in April and first Monday after the fourth Monday in September, and the term is thereby ended on the Wednesday succeeding those Mondays in each year; on the Thursdays immediately following, the court commences in Scott county." Upon page 568, they further say: "The term in Clinton county, having expired on Wednesday evening, and that in Scott having commenced on Thursday, by operation of law, the judge could not on Friday following legalize the proceedings by a *nunc pro tunc* order of adjournment." As in the case at bar, so in the Iowa case, the general statute fixes simply the commencement of the terms, not the days upon which they terminate. (Iowa Laws, 1848-9, page 21.) Thus it would seem that one term did not end until the other commenced, that is to say, in the case at bar, the May term did not end in law until the 5th day of November. There is nothing in our statute specially fixing the end of the term. In the superior court act it is different. The last day of the term is definitely fixed, section 489, Revised Statutes. While therefore as matter of fact the judge at separate session did according to the minutes formally adjourn his separate session without day, on November 4, 1882, yet as matter of fact and of law the term was not ended until the morning of the 6th of November, 1882, the first day of the November term, and hence the bill of exceptions having been allowed and signed on December 5, 1882, that was within thirty days after the trial term.

Motion overruled.

N. Longworth and C. Bates, for the motion.

O. J. Cosgrave, *contra*.

BIGAMY.

16

[Cuyahoga Common Pleas, 1883.]

STATE OF OHIO V. JOHN STANK.

1. An indictment for bigamy need not aver that the defendant at the time of his second marriage knew his first wife was alive, or that he knew she was not divorced.
2. It is competent for a defendant on trial to give evidence tending to show that at the time of the second marriage he in good faith believed and after exercising due diligence, had reasonable ground for believing that his first wife was either dead or divorced, and if he satisfies the jury of either of these things he is entitled to an acquittal.

John Stank was indicted for bigamy at the September term, in 1882, and at the same term he was tried and convicted. A motion for the new trial was filed and argued. The facts are in brief as follows: Stank married in 1879, but only lived with his wife about three weeks, she leaving him without any apparent cause. Some time in September last, he, desiring to be divorced from a woman who would not live with him, came to this city to consult a lawyer. On his way he fell in with a person whom he knew, directed him to Ambush, who, after hearing his case, pronounced it a clear one, and said he would at once relieve him of his marital obligations. Thereupon Ambush took Stank, who was a poor, ignorant German, unable to read or write either German or English, to the office of Justice Fuller and wrote upon paper and handed the same to Stank, saying, "Now you are divorced and free."

Ambush went to the probate court and procured a license for Stank, and told him he could marry again. Stank went away believing he was legally divorced, and shortly after married another woman. Whereupon his first wife, whose whereabouts he did not know and had not known since she had left him, put in an appearance and caused his arrest. Ambush was recently sent to the penitentiary, and the case against Stank was disposed of yesterday, the same being nollied. On the trial the defendant's attorney sought to show the facts as they existed and to prove that Stank acted in good faith and did not intend to commit any crime. They also wished to show that he believed, and had every reason to believe he had been divorced from his former wife. This evidence the court refused to admit, holding that if the fact was that Stank had two wives, and was not divorced from the first, he was guilty of bigamy, and evidence could not be introduced to show want of guilty intent. This holding was in accordance with a former ruling in a similar case in the same court.

Stone & Hadden, for the state.

George A. Groot, for defendant.

JONES, J.

On motion for a new trial, a question and a serious one is involved in the case. On the trial of the defendant, John Stank, evidence was offered tending to prove that the defendant believed, and had a right to believe from all the circumstances that came to his knowledge, that his wife had been lawfully divorced from him previous to the time of his second marriage, and evidence tending to prove that he had exercised such reasonable diligence as the nature of the case required, and commensu-

rate with the importance of the issues involved; and this evidence was rejected upon the trial of the case on the weight of several authorities which were produced upon the trial. The question came up suddenly and unexpectedly to the defense and several authorities were produced by state on the question, among them a case reported 7 Met., (Mass.) 472, which held that an honest belief on the part of the wife that the husband was dead when she had made many inquiries after him, and when he had been gone several years, was no defense whatever to the charge of bigamy. This case admits the general doctrine, that where there is no criminal intent there can be no guilt; but it proceeds to nullify this doctrine by saying that where a statute has made it criminal to do any act under any particular circumstances, the party voluntarily doing this act is chargeable with the criminal act of doing it. This is the leading case on this subject in this country. There was no authority cited in support of this doctrine; and in this case the defendant, though convicted, never was sent to the penitentiary, but was pardoned by the governor before the sentence was carried into effect. This case proceeds upon the doctrine that if any person violates the statute; it is of no consequence what excuses he has; it is of no consequence under what false impressions he labored. If he has been guilty of violating the law he must pay the penalty. In harmony with the same idea a case came up in the Eighth Massachusetts. It was tried by Bigelow, J. In 1867, where the defendant was charged with permitting a minor to visit a billiard room without the consent of his parents; the very same identical doctrine was maintained. The court held that it did not make any difference that the minor was over twenty years of age; it did not make any difference that he represented himself to be of age; it did not make any difference that the defendant honestly supposed and believed that he was of full age, but it said the law imposed a penalty on anybody that permitted a minor to visit a billiard room without the consent of his parents, and the penalty of the statute was absolute. The court held also that an indictment need not aver that the defendant knew the minor to be a minor, and they would not let him prove that he had every reason to believe that the alleged minor was of age. That case is in perfect harmony with the bigamy case in 7 Met., but how little in harmony it is with the views of our Supreme Court we will see hereafter.

In *Davis v. Commonwealth*, 13 Ky., 319, the statute having fixed the exception, to-wit, a divorce, or absence so many years, the court holds that the courts cannot extend to persons who in good faith believe that they have been lawfully divorced. This doctrine, and this case quotes the 7 Met., that I have been just discussing, and that case only in support of this doctrine. An incomplete record of a divorce proceeding in this case was rejected by the court, either to prove that there was a divorce, or that the defendant believed that there was a divorce. Now, I have this to say about this case, that an incomplete record is not any evidence at all, and that if the record had been introduced, it might possibly be said that it was merely a mistake of law and ~~not a mistake of fact~~ at all, and the 25 Mich., 224, has also been quoted in support of the doctrine. But this case chiefly decides that where a defendant residing in Michigan fraudulently procured an Indiana court, which had no jurisdiction whatever over the subject of his divorce, to give him a divorce from his first wife, that it cannot avail him in a defense to an indictment for bigamy, and the case does not decide, and does not attempt to decide, the question under consideration, to-wit: whether an honest, but innocent belief on the part of the

defendant that his wife is either dead or divorced is a good defense, if that belief is founded on diligence, and is on the whole reasonable. The 56 Ind., 263, was also quoted. Hood v. State, is an indictment for fornication. Defendant had married one Maggie Horton in 1869, and one Jane Chaney in 1876. The defendant offered a Utah divorce from Maggie Horton, neither party having been a resident of Utah. The court held that the Utah court had no jurisdiction, and its decree was invalid and insufficient. No decision of the question involved in the case at bar was made, and no allusion whatever was made to the case which I shall hereafter allude to, reported in the 46 Ind., upon the very point at issue in this case.

Another case was cited for the state, 65 Me., 30, and this case holds that where the act is unlawful, the law implies a criminal intent; second, that a female defendant, having a lawful husband living cannot set up as a defense to an indictment for adultery, that such former husband having left her she married again, supposed it was lawful for her to intermarry with her co-defendant, and that she was so advised by a magistrate, the very magistrate who had married her, and that she did so relying upon the opinion in good faith.

It will be observed in this case that the female defendant had married her co-defendant in the same year that her husband had left her; that she knew he was not dead, and that she did not pretend that she was informed of any divorce, but she merely claimed an honest mistake of law. The court said the defendant is conclusively presumed to know the law, that it was well settled and free from all obscurity and all doubt. "Ignorance of the law," said the court, "excuses no one." But this court in that very case goes on to say that "there is no doubt that a person might commit an unlawful act through a mistake or accident, and with an innocent intention; where there was no negligence or fault, and be legally excused for it; but this case was far from being one of that kind; it was criminal heedlessness on his part and on the part of both, to do what was done by them."

These are all the adjudged cases that I have been able to find in this country that are claimed to be in opposition to the doctrine that innocent mistake, good faith, reasonable diligence, and honest belief are available to the defendant in an indictment against him for bigamy. Neither are there more than a very few cases reported where in criminal trials for bigamy this question has ever been made. The general doctrine undoubtedly is that there can be no crime without a criminal purpose and an intent, and no one would claim that if a lunatic were to be guilty of a violation of any criminal statute strictly within its terms, that he could be convicted of the prohibited offense; knowledge and criminal intent would be both alike wanting. And in the state of Ohio the decisions of the court are utterly at variance in principle with this leading case in the state of Massachusetts. As early as 1837 James G. Birney, who, in 1840 was the Abolition candidate for the presidency, was indicted for harboring fugitive slaves under a statute which omitted the *scienter*; which simply declared that any person who shall harbor fugitive slaves, etc., shall be punished. The indictment in this case, at least one of the counts did not charge that he knowingly harbored such slaves. He was tried and convicted, and the Supreme Court set aside the conviction on the ground that it was necessary to aver knowledge and prove it before any offense could be established. Judge Wood said in this case:

"We know of no case where positive action is held criminal, unless the intention accompanies the act, either expressly or necessarily inferred from the act itself. *Ignorantia facti* doth excuse, for such an ignorance, many times, makes the act itself morally involuntary." In *Miller v. State*, 3 O. S., 475, our Supreme Court held on a statute prohibiting the sale of liquor to minors, or to a person in the habit of getting intoxicated, that it is necessary to aver and prove that the seller knew the minor was a minor, and in the habit of getting intoxicated. The very thing that the Massachusetts Supreme Court declares is of no sort of consequence, is in Ohio made the very vital and essential element of the crime.

In *Crabtree v. State*, 30 O. S., 382, the defendant was placed on trial in the court below, charged with selling liquor to a minor, and to a person who he knew was in the habit of getting intoxicated. On the trial he offered to prove in his own behalf that before doing this he had duly inquired in good faith of various persons, and been informed that the defendant was a person not in the habit of getting intoxicated. The Supreme Court held that the court below erred in excluding this; that it was competent evidence; and the language of the court in all these Ohio cases is directly, and as I have said, completely at variance with the Massachusetts cases in regard to this matter as it is possible to be. Where the seller using due care is deceived, and acting in good faith really believes that the person to whom he sells is of full age, if the fact is otherwise, does not violate the statute; he may show in his justification that the person to whom he sold looked like an adult, and was spoken of and treated by his acquaintances as of full age. Our own Supreme Court also quotes approvingly Bishop on Statutory Crimes as follows: "And where this good faith and due care does exist, and there is no fault or carelessness of any kind * * * honest error of fact says the court is as universally an excuse for what would otherwise be a criminal act, as is insanity itself."

The same general doctrine was approved in *Farrell v. State*, 32 O. S., 456, where the court below had refused to allow proof that the liquor sold by the defendant was sold to him for another article, and that he did not know that the liquor that he was charged with having sold was intoxicating at all. The court above reversed the conviction which had taken place in this case and said, "we think the testimony would have tended to show good faith and want of guilty intention." In *Squier v. State*, 46 Ind., 459, will be found reported a bigamy case. The court below in that case was asked to charge the jury, that if the jury believe from all the evidence that the defendant married a second time, in the honest belief that his former wife had been divorced from him, they should find him not guilty. This charge the court refused. The court above, in reversing this decision, for other reasons hold, that there was no error in this charge simply and solely because the charge was based on the belief of the defendant merely, without any reference whatever to his diligence in finding out, or to the honest belief and good faith in the matter, leaving out the question entirely whether he acted on reasonable grounds. They hold distinctly as follows: "In a prosecution for bigamy it is proper to charge the jury that if they believed from the evidence which had been offered that his wife had been divorced and that he had exercised due care, and made due inquiry to ascertain the truth and, considering all the circumstances of the case, had reason to believe and did believe at the time of his second marriage that his former wife had then been divorced, that they should find a verdict for the defendant.

In a case reported in *Gordon v. State*, 52 Ala., 308, the same doctrine was held, where a minor was charged with illegally voting, the court said: "Diligent inquiry, and honest belief in the fact of his being of full age, founded upon reasonable grounds, would be held to excuse him although he voted in clear violation of the statute."

In 53 Ga., 229, the defendant was indicted for permitting a minor to play at billiards without the consent of his parents, and the same general doctrine was maintained. The court in this case said: "It is clear to us that if the defendant, after exercising due diligence, thought honestly that the young man was not a minor, he is not guilty if he did so think after proper inquiry, the element of intent does not exist; the act was done through a mistake of fact, and in such case there is no guilt and no crime."

This is the true and sound doctrine of all the books, and is common sense and common justice.

In *Dotson v. State*, 62 Ala., 141, was also a bigamy case, in which the court had been asked to charge as follows:

"That if the jury believe from the evidence that at the time defendant was married he believed his wife was dead, the defendant must be acquitted." The court below refused this and the court above refused to reverse, but laid down the doctrine as follows: "Where a criminal intent is dependent upon knowledge of fact, ignorance or mistake as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal liability," and criticises the charge because it withdrew from the jury the honesty of the defendant's belief, and the diligence that he had used in ascertaining the truth of the facts necessary for his defense.

Bishop on Statutory Crimes, sections 356 and 1021, discusses this question pretty fully, and quite sharply reviews the doctrine which has been laid down in the Massachusetts court on this question of bigamy, as well as other questions where the criminal knowledge and intent are concerned, and declares that the doctrine of the Massachusetts court in regard to those questions is a wide departure from the universally accepted doctrines upon this subject in regard to other cases. And it has been long ago settled in our own state, that if a person on trial for murder can show that at the time he struck the fatal blow he believed, and had good reason to believe that he was in imminent danger himself at the hands of the deceased in respect either to his life or limbs, or of other great bodily harm, and that he inflicted the blow under an honest if wholly erroneous belief that it was necessary, in order to save his life, that he must be acquitted in such a case.

"But it is claimed in some quarters that bigamy, being of such a peculiar character, involving not only a violation of positive law, but also involving such a serious disturbance to the whole social fabric, the peace and good order of society, the legitimacy of children, and the succession of estates, that because of these and other things the humane general principles of the law are not to be applied, as in other cases, and some support is to be found in some of the authorities for this idea. I confess that I am utterly unable to perceive that there is any just ground for making any such distinction, nor in favor of holding a person to be guilty of bigamy who is absolutely free from any guilty intent, and is acting merely as any other honest and reputable citizen might act. For an illustration: supposing a man goes to sea; the vessel is lost, and all on board are supposed to have perished, and three years elapse. The wife

marries again, believing in common with the general community that her husband is dead. Is she to be sent to the penitentiary because she believed a story that everybody else believed? The case might be even worse than that; the husband might intentionally throw around her such a state of facts as to involve her in the commission of the crime of bigamy for the very purpose of sending her to the penitentiary, obtaining a divorce of her on that ground and then cheating her out of her dower in his estate. This is all possible, and indeed, probable, if such a condition of things as we are here talking about is not a lawful and complete defense. The principle that I have discussed here has been recognized and applied, as I have already shown, in cases of harboring fugitive slaves; in selling liquor to minors, selling liquor to persons in the habit of becoming intoxicated; in selling liquor by mistake for any purpose, in larceny, burglary, counterfeiting, and even murder itself; and I hold that there is and can be no sound reason for not applying it in a case of bigamy. The court on the trial of this cause excluded evidence tending to prove this issue. I do not undertake to say that the evidence that was excluded upon that trial would have satisfied me at all that the defendant, John Stank, was not guilty; but evidence was excluded which the jury had a right to consider, and which they might have found to be satisfactory. That error is a fatal error against the defendant, and for that reason I set aside the verdict of guilty, and grant the defendant a new trial.

28

TELEGRAPH DISPATCHES.

[Superior Court of Cincinnati.]

WM. ELDEN V. W. U. TELEGRAPH CO.

A broker cannot recover damages from a telegraph company for a loss of commission, alleged to have been occasioned by the incorrect transmission of a dispatch containing an offer to buy, where it does not appear from the dispatch, or otherwise, that the company had notice of the broker's interest in the transaction to which the dispatch related.

PECK, J.

The plaintiff, a broker, alleges that he delivered and paid for the following dispatch, to be transmitted by defendant to the parties addressed:

"Cincinnati, June 28, 1882.

"Portsmouth Iron and Steel Co., Portsmouth, Ohio. Reiter and Conley offer three sixty cash for one hundred sixty tons tank, delivered Pittsburg, shipments commencing July, shall I accept. Answer.

Wm. Elden, Agent."

That said message was incorrectly transmitted by reason of the negligence of defendant's agents so that the words "three sixty" had been changed and read "three fifty" when delivered to the Portsmouth Iron and Steel Co., which company sent in reply a dispatch declining to sell. That if the dispatch had been correctly transmitted the offer at "three sixty" would have been accepted, and one hundred and sixty tons of tank

iron would have been sold by the Iron and Steel Company to Reiter and Conley and plaintiff would have earned and received a commission of \$278.40 for making the sale. To the petition setting forth the foregoing facts the defendant demurs on the ground that they do not constitute a cause of action.

The question presented is whether the injury complained of is the immediate or the remote result of defendant's error. The claim is that if the message had been correctly transmitted a sale would have been made, and if a sale had been made, plaintiff would have been entitled to a commission by reason of an agreement to that effect express or implied between himself and the iron and steel company.

The statement of the claim shows that it was not the matter directly to be affected by the telegram, but a collateral and contingent matter to the making of a sale which was the only apparent purpose of the dispatch. One of the rules relating to damages, is that they must be such as the parties could have been presumed to know would follow from a breach of the engagement. It can hardly be claimed that this message was such as on its face to notify the company that if incorrectly transmitted there would not only be direct damage to the proposed buyer or seller, but also indirect damage to plaintiff by reason of his loss of commission. This latter loss was not such as would necessarily flow from a breach of the defendant's implied contract to correctly transmit the message, but arose from the failure of a collateral arrangement of which the telegraph company had no notice. Such being the case, it falls within the class of injuries for which damages cannot be recovered.

Lendsberger v. Magnetic Telegraph Co., 32 Barb., 530; *Baldwin v. Telegraph Co.*, 45 N. Y., 744; *Lane v. Montreal Telegraph Co.*, 7 U. C. C. P. R., 23; *Hibbard v. W. U. Telegraph Co.*, 33 Wis., 558.

Hadley v. Baxendale, 9 Exch., 341; *Barnesville Bank v. Telegraph Co.*, 30 O. S., 555; *Hord v. Telegraph Co.*, 5 Ohio Dec. R., 555. Plaintiff relies upon *Telegraph Co. v. Griswold*, 37 O. S., 301, but after a careful reading I can find nothing in that case to support this action.

The demurrer is sustained.

J. R. Challen, for plaintiff.

Wm. M. Ramsey, for defendant.

[Hamilton District Court, July 3, 1883.]

33

E. CUMMINGS v. BELA C. KENT.

For opinion in this case, see 6 Dec. R., 1178; (a. c. 12 Am. Law Rec., 163.) The judgment in this case was affirmed by the Supreme Court. See opinion 44, O. S., 92. The latter case is cited in 44 O. S., 441, 449; 45 O. S., 333, 339, and 46 O. S., 265, 267, 269.

42

CONTRACTS.

[Hamilton District Court, July 17, 1883]

†CONSOLIDATED COAL AND MINING CO. v. CINCINNATI, SANDUSKY AND CLEVELAND R. R.

1. Where in a written agreement by a coal company to deliver coal for the use of a railroad, the parties were described as the coal company upon one part and Charles Howard, superintendent of the railroad company, upon the other, and the agreement was signed, "Charles Howard, superintendent, for the railroad company," but the road was then and had been for some time in the hands of a receiver, and Charles Howard who had been the superintendent for the company was continuing to discharge under the same name like duties for the receiver, and the agreement was entered into by him by order of the receiver to whom the proposals to furnish the coal had been made, and was signed as directed by the receiver in the form that had been uniformly adopted during the receivership: *Held*, that evidence of the manifest intention to contract with the receiver was not excluded by the written words, but was admissible to identify the parties and apply language of description to its proper object.
2. An agreement with the receiver of a railroad to supply coal for the use of the road for a certain time, is not binding in favor of the railroad company, upon discharge of the receiver, and surrender of the road to the company during the time.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

The action in the superior court of Cincinnati was brought by the railroad company, for damages for failure to deliver coal under the following written agreement:

"This agreement made this 15th day of May, 1879, by and between Charles Howard, Superintendent of the Cincinnati, Sandusky and Cleveland Railroad Company of the first part, and the Consolidated Coal and Mining Company of Ohio of the second part. Witnesseth:

"That the party of the second part hereby agrees to furnish and supply the party of the first part all the coal that may be required for the use of said Railroad Company for one year from May 20, 1879, to May 20, 1880, for seventy-one cents (71c) per ton free on board of cars on the track of the Columbus and Hocking Valley Railroad at Straitsville, Ohio. Said coal to be of the first quality Lower Vein Straitsville Lump, and to be delivered in lots of from three to ten car loads of twelve tons each daily, as the party of the first part may, from time to time, order and direct, and the party of the first part hereby agrees to pay for the same, as above, monthly on or before the twelfth day of each month, for all the coal so delivered and received during the previous month.

"Chas Howard, Superintendent,

For the Cincinnati, Sandusky and Cleveland R. R. Co.

{ Consolidated Coal & Mining }
 { Co., Cincinnati, O. }

Alex. McDonald, President, Consolidated Coal and Mining Co."

The failure to deliver was from and after January 14, 1880. At the time the contract was made, the road was in the hands of a receiver, appointed by the circuit court of the United States, for the northern

†For decision of the superior court see 8 Ohio Dec. R., 365. The judgment of the district court was affirmed by the Supreme Court, February 1, 1887, but the case is not reported.

district of Ohio in 1877, and continued to be until January 1, 1880, when the receivership was dissolved. The receiver was the president of the railroad company.

Charles Howard had been superintendent of the road for the company, and under the receiver performed the same duties. The contract was made by him, by order of the receiver, and was signed by him under like directions, "Charles Howard, Superintendent, for the Cincinnati, Sandusky and Cleveland Railroad Co.;" that being the form of signature designated by the receiver, and always used in making contracts.

The defense was, that the contract was made with the receiver, and not with the company. The court deemed the language conclusive, that it was made with the company, and rendered judgment.

The evidence was abundant, that the dealing contemplated was with the receiver. The coal was furnished for the road, in his charge, as receiver. The bids, to furnish it, were made to him. The payments, for it, were receipted to him. It did not concern his office, as president of the company; the road had been taken by the receivership from the management of the officers of the company. As an officer, he was without power to bind the company, for supplies to a road not under its management.

With no road under management of the company, it is inconceivable, that the agreement could have been intended to furnish coal, for the company.

The written words were, that the agreement was "by and between Charles Howard, Superintendent of the Cincinnati, Sandusky & Cleveland R.R.Co.," etc.; and it was signed; "Charles Howard, Superintendent, for the Cincinnati, Sandusky & Cleveland R. R. Co." But the question is, who those words were intended to describe.

If, under the circumstances, they might either be applied to a person employed by the company or to the same person in the employ of the receiver, it was open, we think, to inquire who was intended.

The words in the body of the agreement, "Superintendent of the Cincinnati, Sandusky and Cleveland Railroad Co.," and in the signature, "Superintendent for the Cincinnati, Sandusky and Cleveland R. R. Co.," were mere words of description. The railroad company was not named as party to the agreement, as was the coal company. The description was an official designation, but to take it as conclusively designating an officer of the company, would be begging the very question. The designation had been adopted in all contracts, and transactions, by the superintendent for the receiver; the evidence tended to show, he was so known, in that capacity. The case did not differ, in principle, from that of two persons with the same name, one the superintendent for the company, the other, known by the same designation, but in the employ of the receiver.

When a description, in a writing is equally applicable to two or more objects, evidence of the surrounding circumstances may be admitted to explain. Wharton Contracts, section 659. It is the common case of written words, certain enough in themselves, but rendered uncertain, by extrinsic evidence of the existence of two or more persons, who may be described by the words. "To ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer or which identifies any person or thing mentioned in it." *Stephens Digest Evidence*, article 91, section 4.

There is no difference, in the admissibility of evidence to determine as between two persons, and its admissibility to determine, as between two capacities, in which, the words being equally applicable, a written agreement may have been undertaken with the same person. It is not, that the designation, superintendent of the railroad company, or, for the railroad company, would have been equally applicable to the capacity in which the person was employed by the receiver, but for the evidence, that, in all the transactions of such employment, he was known by that designation. It is by extrinsic evidence in every case, that the applicability of the words of a writing to two or more objects, is developed. This leaves the question to depend upon intention.

Manifestly the intention was, not to make the agreement with the railroad company.

As an agreement with the receiver, its obligations were not, upon his discharge, binding in favor of the company.

Contracts by a receiver, operating a railroad under orders of court, are not made by him as agent of the company. His appointment is not for the company, but against it. There is nothing resembling the relation of principal and agent between them. *Meach's Adm'r v. Holbrook*, 20 O. S., 137, 146; *Farmers Life & Trust Co. v. Central R. R.*, 2 McCrary, 181, 183.

Execution upon judgment against a receiver will run only against property in his hands. *Barton v. Barbour*, 104 U. S., 126, 128; see Revised Statutes, 3417. He has no power to bind the trust by his contracts, without order of the court. *Lehigh Coal Co. v. R. R.*, 35 N. J. Eq., 426. If he is agent at all, it is of the court. *Turner v. R. R.*, 8 Biss., 530, 532; *Barton v. Barbour*, 104 U. S., 136.

The company may be sued, although its road should be in the hands of a receiver, but if for acts of agents of the receiver, it is a complete defense. *Hyatt v. R. R.*, 10 Ill. App., 289.

The receiver as the agent of the court which has appointed him, and under its supervising authority and control, displaces the general officers of the corporation.

The agents in carrying out its business, thereupon become his agents, and stand in like relation to him, as they formerly stood to the managing officers of the corporation. *Phelan v. Ganabin*, 5 Col., 14, 16.

What remedy there may be for so much of an executory contract with a receiver as still remains to be performed when he is discharged, and the road surrendered to the company, or whether from the very nature of his authority it is not implied, in making the contract, that it shall be at an end, are questions unnecessary to discuss. It is enough, that there could be no right against the company, and since obligations and rights in the contract must be correlative and mutual, there can be no rights under it, in favor of the company.

Judgment for the company, therefore, was improperly rendered and must be reversed.

S. A. Bowman, and Halsey & Evans, for defendant in error.

Stallo & Kittredge and Joseph Wilby, for plaintiff in error.

tax list by the auditor among the taxable property for the year 1870, and the auditor proceeded to and did charge it with the same rate of taxes as other property, and continued to do so until 1881, when his attention was called to the alleged error. Now, if this property was, under the statute, exempt upon the ground that it was attached to a house used exclusively for public worship, then the charging of it with taxes by the auditor was an error, if indeed it was not a clerical error in bringing it upon the tax list, the fair weight of the testimony showing that, it was designated on the margins of the assessor's return as not taxable but exempt as being connected with a building used exclusively for religious uses—and not the purposes of gain in any manner. Section 2752 reads that the following property shall be exempt from taxation: "All * * * houses used exclusive for public worship, * * * and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same and not leased, or otherwise used with a view to profit." This but carries out section 2, of article 12, of the constitution. It might be sufficient for the purposes of this case to say, that the property was exempt on account of its being attached to the cathedral (church) building, having been so declared and decided by the auditor of state in 1864, and by that officer ordered to be dropped from the list of taxable property whose instruction as well as construction of statutes are to be obeyed by the county auditor. Section 199, Revised Statutes. The evidence shows that it remained off that list until 1870, and that from 1864 to 1881, or when it was sold by adversary proceedings to pay debts, it had not been used for any purposes of profit whatever remaining enclosed within a high brick wall that encloses the cathedral as well. But the testimony shows that it is used necessarily in connection with the cathedral building in various ways. Among others, that persons pass to and fro through a part of it in attending worship in the cathedral building, that the fuel therefor, and debris therefrom are hauled through it from necessity, and that it is used on occasions of large church gatherings at times. In the case of *Gerke v. Purcell*, 25 O. S., 229.

The court say, page 248: "The plaintiff in error claims, in effect, that only so much ground can be exempt as is essential to support the church edifice and to afford facilities for light and air, and ingress and egress to and from the building."

"We do not think the constitution requires a construction so rigid; nor, when fairly construed, do we see in the provision of the statute an unwarranted assumption of power.

"The express authority given in the constitution to exempt buildings of the description named, carries with it, impliedly, authority to exempt such grounds as may be reasonably necessary for their use. The ground in such case becomes annexed to the building as an incident and must subserve the same exclusive use to which the building is required to be devoted.

"It is not required that the ground should be indispensable to the use of the building as a place of worship. If the ground is no more than is reasonably appropriate to the purpose, and is used for no other, it comes fairly within the limits prescribed by the constitution and the statute."

Thus it will be observed it is not necessary that any part of the ground connected with the edifice itself should be indispensable to its use. What is reasonably necessary must in a great measure depend

upon the circumstances of each particular case. The size of the building erected, the ability financially, and the tastes of the congregation worshipping therein, the numerical strength of the congregation, the location, the character of the religious uses to which it is to be put, the value and surroundings of the entire lot when purchased, these are some of the circumstances to be considered in determining what amount of ground is reasonably necessary to the proper enjoyment of the building itself. The evidence shows that the cathedral is in the Catholic church, the central church of the diocese and it is there the provincial councils and synods are held and deputations from different cities in different and distant states assemble for religious purposes and the building as well as the contiguous grounds are necessarily expected to be more extensive than in the case of an ordinary parish church. If only what is indispensably necessary for light and air and ingress and egress is to be exempt, and the assessor or auditor is to be the judge, the frontage on Plum street and on Eighth street on either side of the entrances might be laid off into lots upon which commodious shops or even residences might be built, and that portion listed for taxes. In the language of the Supreme Court, "we do not think the constitution requires a construction so rigid." There is no evidence that this lot nor any part of it, which I think should be regarded as an entirety, a unit, although almost bisected by the parsonage, which is taxable, was bought for or held for any other than religious purposes. There is no evidence that it was bought either in whole or in part as an investment for prospective profit or ever so used. Upon the question what is reasonably necessary for the convenient use of a public institution or place of worship, the following cases may be referred to. 101 Mass., 319; 99 Mass., 599; 13 N. Y., (80) 105, (6 Hun.) Cincinnati v. Cameron, 6 Dec. R., 227 (s. c. 7 Am. Law Rec., 592); Cincinnati v. Frost, 8 Dec. R., 107 (s. c. 5 Bull., 684).

The fact that this property was recently sold for other than religious purposes can have no bearing upon the case at bar. It was sold under adversary judicial proceedings for debt. A church building may be brought to judicial sale for a debt legally incurred. That does not affect the exclusive religious use to which it was put before and during the existence of the debt, and place it on the list of taxable property. From the evidence in this case for the years during which taxes asked to be refunded were paid, the property in controversy was attached to the cathedral—formed a part of it and as absolutely, as does the glebe in England attach to and form part of the parish church. The idea of a church edifice necessarily carries with it the use of ground ample for its use and protection against noises, disturbances, and intrusions from without during worship.

In my judgment under the statute and the decisions of the Supreme Court it was exempt from taxation and the auditor erred in charging the taxes claimed upon it.

Judgment accordingly.

[Hamilton District Court, July 17, 1883.]

67

*CITY OF CINCINNATI FOR USE OF KIRCHNER V. ANCHOR WHITE LEAD
CO. ET AL.

SAME V. JOSEPH WEWELL ET AL.

SAME V. EGGLESTON, WILSON & CO.

*For opinion in this case see 6 Dec. R., 1188; (a. c. 12 Am. Law Rec., 235.) The judgment in this case was reversed by the Supreme Court. See opinion, 44 O. S., 243. For decision of Superior Court see 8 Ohio Dec. R., 678.

STREET OBSTRUCTION.

69

[Hamilton District Court.]

†CINCINNATI HOTEL CO. V. JOHN BRANAHAN ET AL.

The use of the side of a public street as a hackney coach stand, under a city ordinance, in such manner and so constantly as to interfere with the use and enjoyment of fronting store rooms is without authority of law.

MOORE, J.

The Cincinnati Hotel Co. ask that the defendants be restrained from using the west side of Central avenue opposite the ground occupied by the Grand Hotel building, as a stand for hackney coaches.

The petition alleges that the Cincinnati Hotel Co. are the owners of a perpetual leasehold estate situated at the southwest corner of 4th street and Central avenue, about 178 feet on the south side of 4th street, and about 200 feet on the west side of Central avenue on which is located a very large and costly building, all of which with the exception of certain store rooms on Central avenue and the west front is in use and known as the Grand Hotel; that one of the main entrances to the hotel with seven store rooms on the ground floor are upon the Central avenue front; that the windows of the store rooms on the corner of 4th street and Central avenue open upon the same street; that Central avenue is a public street of the width of 60 feet; that each of said defendants are the owners and drivers of hackney coaches and horses, that each of them are daily and nightly engaged in the business of soliciting passengers and for that purpose have appropriated and occupy as a stand for their coaches and horses, the west portion of said Central avenue between 3d and 4th streets by keeping a line of coaches and horses along the entire front of said hotel during each day and most of each night, so as to obstruct the sidewalk and the access to and from the hotel and the store rooms; that the coaches and horses are made to stand at an angle from the line of the curb, by turning the horses toward the center of street so that a considerable portion of the street is appropriated and almost per-

†For common pleas opinion see 8 Ohio Dec. R., 305. The Supreme Court sustained the district court by refusing to allow a petition in error. See opinion, 39 O. S., 333.

manently obstructed, that the store rooms on the Central avenue front and the one on the southwest corner of 4th and Central avenue is under the management and control of the hotel company, the remaining portion used as a hotel is controlled by Gilmour and Son, lessees. The petition alleges that the presence of horses occasions great annoyance and discomfort to the occupants and guests of the hotel building proper, growing out of the stamping of the horses feet, the offensive smells arising from the standing place, and the congregation and loud talking of the drivers on the sidewalk.

The plaintiffs allege that one of the effects of said occupancy of said street is to injure the rental value of the store rooms on Central avenue and the corner for business purposes, for the reason that it is now impossible to furnish the store rooms with ingress to and egress from the same, and they pray that each and all of said defendants be restrained as stated.

The defendants deny that they are so using the street as to create a nuisance and as to the manner of occupancy of the street; assert, that by an ordinance of the common council of the city passed on September 22, 1879, "designating stands for hackney coaches, furniture cars and express wagons within the corporate limits of the city of Cincinnati," the "west side of Central avenue extending from 4th to 3d street, reserving 20 feet in front of side entrance of the Grand Hotel, is set apart for hackney coaches." The testimony heard, shows conclusively that besides being a nuisance to the occupants of the hotel building the presence of the coaches and horses along the line of the curb is an interference to the access to the Central avenue stores from the street; that some of the present tenants use vehicles and horses in their business and need an uninterrupted space opposite their respective front almost daily to load and unload merchandise used in their traffic.

It is the interest and rights of the Hotel Co. we propose to consider—their rights in the store rooms remaining under their control in respect to access to and from the street.

The right of an abutting lot owner in a public street is clearly defined and need not be the subject of present comment. Central avenue is admitted to be a public street, regularly dedicated, and by section 2640, of the Revised Statutes, under the care, control and supervision of the city council. In the case of *Crawford v. Delaware*, 7 O. S., 459, the court says: "Distinct from the right of the public to use a street, is the right and interest of the owners of lots adjacent; the latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement appendant to the lots unlike any right of one lot owner in the lot of another, is as much property as the lot itself. Also 7 O., 218.

In *Harman v. Abbey*; *Bingham v. Doane*, 9 O., 165, 167, in relation to a highway, the court says: "Its existence generally contributes to the enjoyment of the adjacent lot and confers additional value upon it, and any act of another which impairs that value or interferes with that enjoyment may be the subject of a suit."

The question in the case at bar is whether the ordinance of Septem-

ber 22, 1879, gives the defendants the right to obstruct the street in the manner established by the testimony.

Section 2640, Revised Statutes, not only vests the care, control and supervision of the highways, streets, etc., within the corporation in the city council, but it also imposes the duty of keeping the same open and in repair and free from nuisance. So that in exercising control over the street and in regulating the operations of hackney coaches, the obligation remains to protect the rights of the adjoining proprietor and although it cannot be presumed that the city contemplated a complete obstruction of the curb line on the street in front of plaintiff's property, yet in fact the manner of its use by the defendants under that ordinance is an encroachment upon the property rights of the plaintiffs.

There is a distinction to be observed between a partial or temporary obstruction of a highway and an obstruction of the character indicated and as described in *Clark v. Fry*, 8 O. S., 358, where it is said that the right to transit may be temporarily interrupted by the repairs of houses, construction of sewers and drains, etc. "But this temporary occupation must not be unnecessary or unreasonable, uninterrupted or prolonged."

In *Street Ry. v. Cummins*, 14 O. S., 523, 549, in discussing the rights of the public in the street, the court says: It (the public) "may regulate and modify the manner of using the street by the public at large and may undoubtedly devote its own interest to the maintenance of new structures, placed in the hands of other agencies, and calculated to enlarge the general purposes for which the highway was originally constructed. But when these new structures and new modes of travel devolve additional burdens upon the land and materially impair the incidental rights of the owner in the highway, they require more than the public has or can grant, and the deficiency can only be supplied by appropriating the private right upon the terms of the constitution," approved in *Railway v. Lawrence*, 38 O. S., 41.

The primary object of a street is for the free passage of the public, and it is a fair and reasonable use of the same to locate hackney coach stands as one of the public conveniences, but to locate a stand in one of the narrow streets of a closely built city reflects somewhat upon the reasonableness of the exercise of the power in authorizing the same. The right to temporarily obstruct the highway, springs from reasonable necessity and is limited by it as in case of temporary use of street by loading and unloading cars. *Mathews v. Kelsey*, 58 Me., 66; *Davis v. Windom*, 51 Me., 297.

But there cannot be an absolute necessity for the prolonged obstruction of a highway and yet retain it as a highway. "A congregation of carts in the public streets for the reception of slop from a distillery is deemed an unreasonable obstruction, *People v. Cunningham*, 1 Denio, 524. So in respect to keeping coaches at a stand waiting for passengers. *Rex v. Cross*, 3 Compt., 226.

It is claimed that the common council has legalized this stand and therefore it is not unlawfully occupied by the defendants. That claim under the circumstances shown is made to extend too far. Under that authority the defendants may occupy the streets, but they must occupy them at their peril not directly or indirectly to injure private rights.

In *L. & O. R. R. v. Applegate*, 8 Dana, 289, the Chief Justice says: "Neither the government of the city nor the state can license a private nuisance or take or encroach on private property without the owner's consent or payment of his damages. See *Caro v. Met. El. R.*

R. Co., Superior Court, N. Y., 1880, 19 Am. L. Reg., 376; Fritz v. Hobson, 14 C. D., 542, 34 N. J., 201. In Wallack v. Certain Ticket Sellers, N. Y. Sup. Ct., 1882, the court uses the following words:

"In this case the plaintiff claims that the defendant and others obstruct the way to the theater and interfere with the proper right to which he is entitled as the occupant of the premises on which the theater is. The defendants do **not** deny the selling of tickets on the sidewalk in front of the theater, but content themselves with the denial of doing so in the vestibule or the entrance or in front of it, or in any part except as the license provides. It is substantially admitted that the defendants do claim the right to sell tickets for his theatre on the sidewalk in front thereof and the first ground taken by them is that they have a license so to do from the mayor.

"The answer to this is simply to refer to the opinion of Mr. Justice Van Vorst in *Ely v. Campbell*, 59 How. Pr., 333, in which this question is considered, and to state the conclusion arrived at, that the city has no right by license to appropriate any man's sidewalk or street, for any obstruction to him or the public. The authorities referred to in the case cited clearly demonstrate that the city has no power to license any business on the sidewalk or in front of any man's premises without his consent. An ordinance of this character with its opportunities for trespass upon private rights "must be construed with some degree of strictness." *Hickok v. Hine*, 23 O. S., 530. The plaintiffs allege that they are informed and believe that each of said defendants is insolvent and unable to pay any judgment for damages that might be recovered against them. The testimony establishes that as a fact.

We are of the opinion that the plaintiffs are entitled to the relief prayed for.

Paxton & Warrington and M. F. Wilson, for plaintiffs.

Campbell & Bates, for defendants.

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STREET RAILWAYS.

[Cuyahoga Common Pleas.]

†BROADWAY & NEWBURGH ST. RY. CO. V. BROOKLYN ST. RY. CO.

1. A municipal corporation may grant a street railway company the right to extend its line, although the extension would necessitate the use of a track already built by another company.
2. When such extension does not contemplate the construction of a new track for the whole distance, the consent of the abutting property owners on the part already built is not required as a condition precedent to granting the right to extend.
3. When a street railway company accepts a renewal of its charter with the condition attached that the city may grant the right to use the track to any other company on such terms as the city council shall deem equitable, and the city has granted such right and prescribed the terms, the court will not interfere with them if they are reasonable.
4. And the company, the use of whose tracks has been granted, cannot object because a part of their business will be taken away.

BARBER, J.

The petition prays the court to enjoin the defendant from occupying the tracks of what the plaintiff avers is its railroad, between the east end of the viaduct and the market, for the purposes of operating a street railway. The defendant, the Brooklyn St. R. R. Co., was originally organized to construct a street railway from Brooklyn to Lorain street on the west side, partly within and partly without the city. Previous to the matters complained of the Brooklyn St. R. R. Co. made application to the city, under the provisions of the statute, asking permission from the city to extend its railway toward the central part of the city, and over the tracks of the West Side Street Ry. Co. Proceedings were had under that application, by which the Brooklyn St. R. R. Co. obtained permission under the statute to extend its railway to the east end of the viaduct. In making that extension it became necessary to pass over the tracks of the West Side St. Ry. Co. Indeed, it was made a condition by the city that no other track should be constructed in the streets over which they passed. An injunction was obtained by one of the stockholders of the Brooklyn St. R. R. Co. restraining the city from granting the permission that was asked, on the ground that the Brooklyn company, having been chartered and organized for the purpose of building a street railway only from Brooklyn to Lorain street, had no corporate power to go beyond that point; that the city could not grant corporate power. That injunction was made perpetual in the common pleas court, and I think in the district court, but on hearing in the Supreme Court was reversed, the Supreme Court expressly holding that the city might, under the provisions of the statute, grant permission to the Brooklyn St. R. R. Co. to extend its track; that it was not the granting of corporate power, but was simply a permission to the Brooklyn St. Ry. Co. to exercise its corporate franchises as a street railway in the streets of the city. *Sims v. Street R. R. Co.*, 37 O. St., 556.

An application was also made on the part of the West Side St. Ry. Co. to restrain the Brooklyn St. R. R. Co. from occupying its tracks through the streets over which it sought to pass; and a temporary injunction was granted in that case. It was granted on the theory that while the city had power to give the Brooklyn company authority to occupy the street, and while the West Side Co. had no exclusive rights in the streets, still having laid down its track, it was its personal property, and under the constitution it could not be taken from it without either an agreement with the owner or appropriation proceedings as provided by law. That injunction was never disturbed; accepted, I suppose, by the parties to the proceedings as being the law of the case. Subsequently, however, the Brooklyn St. Ry. Co. obtained a lease from the West Side Co. for ten years, permitting them, for a consideration, to use its track. It also obtained from the city the right to use the track across the viaduct; and previous to the first of January of this year it was exercising that right and running its cars over the West Side Co's. track to the east end of the viaduct. The Brooklyn St. R. R. Co. then made application to the city for permission to extend its railroad still further. An application was also made for the grant of the right to pass over the tracks already laid in Superior street, around the square, and up Ontario street to the central market. The city council passed an ordinance on the 12th of March, 1883, granting these rights as prayed for; and it is to restrain it from exercising them, that this petition is filed by the Broadway and Newburgh Co.

The Woodland avenue St. Ry. Co. has since become a party defendant and adopted in its answer and cross-petition all the averments of the petition and prays for the same relief as the Broadway and Newburgh Co.

To the right of the city to grant this privilege and to the right of the Brooklyn St. R. R. Co. to exercise it, it is objected, that the city had no right to make such a grant, for the reason that this is not an extension of the road; that it is not an extension of its franchises or of its right to construct a road, because it is said, that there is a large space between the point from which it desires to extend and any point where it has a road; to-wit, from Lorain street to the east end of the market, a space of a mile or more, that it is not an extension, and therefore the city had not the power to grant the privilege.

By section 2505, Rev. Stat. and sections 3437, 3438 and 3439, express authority is given to the city to authorize a street railway company which runs or has the right to construct a street railway to extend its track over any streets of the city where, in the opinion of the city, the public interest would be subserved. If in its original application the Brooklyn company had asked permission to extend its track over the whole route over which it now seeks to extend it, there would be no doubt but what the city might have granted that permission so far as it had any power to act in the matter. That question has been conclusively determined in *Sims v. The Brooklyn St. R. R. Co.*, *supra*. Every objection was urged in that case that can be urged in this case. The city granted it the right to extend its road to the end of the viaduct, and was sustained by the Supreme Court. That grant did not exhaust its power to grant another or further extension. I am unable to discover any reason whatever why the city, as to anything it has the right to give, cannot as well make that extension now as it could have made it if the application had been made originally. But in that case, I think they practically decide this: That it is only a grant to the Brooklyn company of the right to exercise its corporate powers as a street railroad company in the streets of the city. The city is made the guardian of the streets for the purpose of the public use, and it may give any street railway company possessing the requisite qualifications permission to extend its railroad; but it can give it no power, so far as any legislative authority is given to the city, to do anything more than to exercise its corporate functions as a railroad company in the streets; anything beyond that must be acquired by virtue of some authority given by the statute, or by right obtained under contract or by waiver. The fact that the city gave to the Brooklyn St. R. R. Co. the right to extend its track to the east end of the viaduct did not give that company any right or authority to use the West Side St. Ry. Co.'s tracks; it had to acquire that in some other way. I find no authority given by statute by which the city can take the exclusive property of one company lying in a public street or anywhere else and give it to another company. That difficulty the Brooklyn company met with in seeking to pass over the West Side St. Co.'s tracks, and it was restrained and compelled to secure the track in some other way.

It is objected that because it holds this right to pass over the West Side Co.'s tracks by the payment of a rent and the right to pass over the viaduct by the payment of rent to the city, which is liable to terminate by a failure to pay rent—that it is not a permanent right, and therefore it does not constitute it the owner of a railway track which can be extended. In my judgment, the city has nothing to do with that ques-

tion. The reason why the statute gives it authority to permit a street railway company to extend its track is for the accommodation of the public, so that people from Brooklyn, for instance, who have rode over it to Lorain street can get down to the centre of the city, or to any other part of the city to which they may want to go, by the payment of one fare. The statute makes it an express condition that a street railway company whose track is extended cannot by reason of the extension increase the price for which passengers shall be carried. No matter to what extent the grant is extended, the fare cannot be increased. So that the purposes of the statute are fully accomplished when the city gives the company the right to extend its road; and it gets the right to run its cars over a track already constructed. In my judgment, it makes no difference whether it does it by obtaining a lease, by buying a track, for by constructing a track of its own under permission of the city council. The objection that this is not an extension is not well taken.

In order to get through the central part of the city it is necessary to use the tracks of railroads already constructed. The city refuses to permit any additional track to be laid, and has under taken to grant to this Brooklyn company the right to use those tracks. And it has prescribed the terms on which it shall do it. The ordinance prescribes that for the use of the tracks already constructed the Brooklyn company shall pay to the company entitled to receive it, one-fourth of the cost of the tracks as they are laid, and that hereafter as long as its charter extends, it shall pay one-fourth of the expense of keeping them in repair; and the ordinance provides that if the company pays that or tenders it to the company entitled to receive it, it may then have the right to use the tracks.

It is claimed that the city could not make this grant; that it is wholly without an authority. And several reasons are assigned. It is not claimed, as I understand counsel, but what the city, under the decisions that have already been made, may grant the right to extend its railroad over the streets of the city to a company that is entitled to make an extension. But they say that the Brooklyn company has not obtained permission from the lot owners along the streets over which this extended track passes. Section 3438, Rev. Stat. provides that no ordinance giving a company the right to extend its track shall be passed until there shall have been presented to the city the permission of the owners or more than one-half of the feet front along the streets, where it is proposed to construct a railroad or to construct an extension thereof. The claim here is that no such permission or consent was presented to the council before this ordinance was adopted. I understand the meaning of that statute to be: That wherever it is necessary to construct a track in the streets of the city that consent must first be presented; but where there is no intent and no permission granted to build a new track that is not a precedent requirement. I do not well see that any other construction could be put upon it. So that as to any part of this route over which a new track is not intended to be constructed no such consent is required. Beyond the point where they occupy these tracks and over all of the streets through which a new track is to be constructed, the consent has been obtained from the owners of a majority of the feet front. So that objection is not well taken.

The next point is that the city has undertaken to fix the price that is to be paid for the use of the tracks. I have already said that by statute the city has no authority whatever to take the tracks which are the private property of one company and grant their use to another. The

legislature, in my judgment could not give to the city that power. But it is claimed that the city obtained it by contract between the owners of these roads and the city when the right to put their tracks in the streets was originally granted.

All the tracks proposed to be used by the Brooklyn company were originally constructed by the Kinsman St. R. R. Co. under a grant from the city to which was attached: "the condition that it should be subject to the terms and conditions already fixed by ordinance, and such future terms and conditions as the city might see fit to impose." In addition to that the ordinance contained an express stipulation that the East Cleveland St. Ry. Co. should have the right to run its cars over the track of the Kinsman St. Co. from Ontario street on the south side of the public square to the west end of its track as far as it might construct it, and that the city might fix the terms and conditions under which that should be done.

In 1874, the Broadway & Newburgh Co., which is the petitioning company in this case, desired to occupy the track of the Kinsman St. Ry. Co. from the Central market to the west end of the track, and it applied to the city for permission to do it—for permission to extend its track in precisely the same manner that the Brooklyn company has now applied to extend its track. The city granted its permission to extend its track, which it had built as far as the Central market, to Bank street, and prescribed the amount which should be paid if the Broadway & Newburgh Co. failed to agree with the Kinsman St. Co. Application was made to the courts for an injunction to restrain the Broadway & Newburgh Co. from taking possession after they had tendered the payment of the amount which had been prescribed, on the ground that the city had no authority to grant this permission; and the Supreme Court, in the case of *Kinsman St. Ry. Co. v. Broadway & Newburgh St. Ry. Co.*, 36 O. S., 239, expressly held that the provisions of that ordinance which permitted the city to fix the terms and prescribe any future terms and conditions under which the Kinsman St. Ry. Co. should exercise its franchises in the city gave it the right to fix the price which should be paid by another company that should seek to occupy its tracks; and I take it from an examination of that decision that during the life of the charter of the Kinsman St. R. R. Co. it might have granted that right over the entire extent of that road. In express terms, the condition had been made for the East Cleveland road to come in at Ontario street and go to the west end; but the Supreme Court considered that a construction of the contract that was then made and held that the city had the right to give that permission as far as Central market, and I do not see why it could not have done it over the entire length of the road as well.

In 1879 the charter of the Kinsman St. Ry. Co. expired. It applied to the city for a renewal of its charter. The charter was renewed, and in the renewal occurs this condition or stipulation: "That the renewal is granted upon the express condition that the city reserves the right to grant to any other company the right to use the track between the Central market and the west end of the track on such terms and conditions as the city council shall deem equitable." That is the language used. Now, I take it that so far as the Kinsman St. R. R. is concerned, that reservation is as ample and as broad as the reservation in the original grant of its charter.

Subsequently, and before the questions had arisen which are now under consideration, the Kinsman St. R. R. Cos'. property was sold on

foreclosure of a mortgage, and was brought by Mr. C. C. Baldwin. A new company, the Woodland Avenue Co., which is one of the defendants here, was organized, and purchased of C. C. Baldwin the property and rights of the Kinsman St. Co. In my judgment, the conveyance by the court to Baldwin and by Baldwin to the Woodland Avenue Co. was a conveyance not only of the property, but of whatever right the Kinsman St. Co. had to maintain its tracks in the streets of the city, and it accepted it under all the terms and conditions, restrictions and liabilities, which attached to the Kinsman St. Co. and that, so far as this question is concerned, the Woodland Avenue Co. stands in the condition in which the Kinsman St. Co. would stand. That being the case, whatever right the city reserved to prescribe terms and conditions, is binding upon the Woodland Avenue Co. as it would have been upon the Kinsman St. Co.; and when the city has fixed those terms and conditions, if they are reasonable, the court will not interfere with them.

There has been some proof that the price fixed under which the Brooklyn company shall occupy these tracks is not large enough. Some affidavits have been filed, and no counter affidavits. I find, by a careful consideration of the testimony, that there is no objection made to the estimate made by the city for the value of the tracks that are already laid. But it is said that that is not all the damage that would be done to these companies that now own and occupy the tracks: They will be incommoded, a part of their custom will be taken from them. In other words the complaint is, not that they are not paid for their tracks or for the improvements that they have made in the streets, or that a reasonable account of the expenses is not fixed to be paid in the future, but that they are not paid for the franchises that they are granted in the streets. In my judgment, no street railway company can acquire in a street an exclusive right to its track, the law does not give to the city any power to grant it. The right to lay its track in a public street is given subject to the right of the city to allow any other company to lay its track in the same street whenever the public interest requires it, and it acquires no exclusive franchise whatever. The only thing of the value that the prior company has in the street is the property that it puts there. So that, while there is testimony tending to show that this company would be put to inconvenience and suffer loss of fares, I am of the opinion that the law does not give any such property right to the company.

Now, it is said that under another provision of the statute, section 2302, the city cannot grant the right to extend over the upper part of this route between the Central market and Woodland cemetery without a competition bid and without notice shall have been given, that other companies may have an opportunity to come in and bid as who will carry passengers for the least fare. That question is practically disposed of in the questions I have already passed upon. It is an extended track, and in my judgment it is entirely immaterial whether there intervenes a space between the place where the company actually has constructed a track itself and the place where it proposes to construct a track. The purpose and object of that statute was to protect the interests of the public living along the streets, that there need not be an unnecessary large fare charged them. But that is regulated by the requirement of the statute that only one fare shall be charged over the entire route, and that the city has no power to permit any change in that respect.

In this connection there is this observation to be made: In the view I take, however, it is not necessary to decide it for the purposes of this

case. The Broadway & Newburgh Co. which is the original plaintiff as I construe the right, that it has obtained, has no ownership of any track between the Central market and Bank street; it has obtained from the city only the right to use the tracks already laid. If it had arrived at an agreement with the Kinsman St. Co. by which it had bought from it an undivided interest in its track, then the question would be different. A street railway track is real estate—as much so, perhaps, as any real estate that we have, and the granting of a right to use it is not a conveyance of the title to. So that the Broadway & Newburgh Co. from Central market to the west end of the Kinsman St. Ry. track has only the right to use the track. They make the point in this case that when the rights which they did obtain were obtained no restrictions were made upon their right, and that is on the theory that they owned the track—that they had purchased and obtained the track, the same as though they had obtained the right to build the track, without any contract. My construction of the ordinance is that they simply obtained the right to use the Kinsman St. Cos' track to the west end of it under the same terms and conditions as the Kinsman St. Co. had it.

If the case rested upon the petition of the Broadway & Newburgh Co. I should have been compelled to refuse the injunction for the reason that it has no standing whatever in court. But in the view that I take of the case, and the questions all being made by the Woodland avenue company, I find no difficulty in disposing of it without deciding that question.

Entertaining these views, the only disposition of the case that we can make is to refuse the injunction asked in the petition.

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REFUNDING TAX—ALE HOUSES.

[Clinton Common Pleas.]

IRWIN V. MARTINSVILLE (VILLAGE).

1. A municipal corporation may, under sec. 9, Act of April 17, 1883, (80. O. L., 164) prohibit ale, beer and porter houses. And in such cases there shall be a refunding of a ratable proportion of the tax paid.
2. A municipal corporation may also prohibit places of habitual resort for tippling and intemperance, but in such cases one part of the tax is to be refunded.
3. To constitute a resort for tippling and intemperance, not only many persons must resort to it, but each must drink often so that he feels the effects of it in order to constitute tippling *and* intemperance.

DOAN, J.

The plaintiff in error was convicted before the mayor for "keeping a place for habitual resort for tippling and intemperance" under an ordinance recently passed by the village council, prohibiting the keeping of such place and for the punishment of the keeper.

The authority for passing such an ordinance is found in the ninth section of the late legislative enactment, called the "Scott Law," which authority is substantially the same as that given by paragraph 5, section 199, of the Municipal Corporation Act of 1869, (66 O. L., 149,) which remained in force till April 18, 1875 (72 O. L., 107).

That the "Scott Law" is valid and constitutional is settled by the recent decision of the Supreme Court in the case of *State v. Frame, Auditor, etc.*, 39 O. S., 399.

That such an ordinance (substantially the *McConnelsville* ordinance, passed under the authority of act of 1869) may be passed and enforced is beyond question.

The important matter in the case is to arrive at a correct construction of the statute empowering the municipal corporations to prohibit.

By the law, ale houses may be prohibited and a ratable proportion of the \$100 tax paid shall be refunded.

The place for habitual resort for tippling and intemperance may be prohibited, but there is no provision for a refund of any part of the \$200 tax paid if it is prohibited. This omission to refund is significant. It is quite apparent that in such omission there was deliberate legislative intent.

It is evident the intention was to give the power to suppress the ale house, and as there could be no sales of ale, etc., after the house was suppressed, there should be, in all good conscience, a refund; but this is not the case when the place for tippling, etc., is prohibited the business of selling liquor to be drunk where sold may be legally continued.

Let us see—by section 6941, Rev. Stat., the selling of intoxicating liquors, to be drank where sold, was punishable. This provision of the statute is repealed by section 11 of the Scott Law. After such repeal it is no longer unlawful to so sell, except the sale be to minors, persons intoxicated or in the habit of getting intoxicated. Upon this legal traffic a tax of \$200 is levied and paid in advance. This business so taxed is under the protection of the law—the place of such business may not be prohibited or suppressed by a municipal corporation. Men in numbers, few or many, may resort to the place so taxed and drink with impunity to the keeper. A dram-shop, so called, is not necessarily a place for tippling and intemperance.

But if the business is abused—if the place becomes disorderly—then the place is one for tippling and intemperance.

It is not sufficient that many persons resort to the place, but each of several must go there frequently in order, to make it a place of habitual resort. One, two, or three times a day for each is not sufficient. It is not enough that each should drink often; he must drink so that he sensibly feels the effects of the liquor. The law has it tippling and intemperance.

[Hamilton District Court, April Term, 1883.]

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MOHR & MOHR DISTILLING CO. v. FIREMENS' INS. CO.

For opinion in this case, see 6 Ohio Dec. R., 1180; (a. c. 12 *Am. Law Rec.* 168.) For Superior Court opinion, see 8 Ohio Dec. R., 421.

APPROPRIATION OF PROPERTY.

[Hamilton District Court, Tuesday, July 19, 1883.]

†TRUSTEES OF THE CINCINNATI SOUTHERN RY. CO. V. JACOB HAAS.

In a proceeding to appropriate private property under the provisions relating to municipal corporations, sec. 2260, Rev. Stat., failure to pay the compensation fixed within six months, as therein provided, is to be regarded as final upon the question of the necessity for the taking, as between the parties, in the absence at least of any showing that the failure was by mistake, or otherwise unintentional.

ERROR to the Court of Common Pleas.

AVERY, J.

The proceeding, in the court of common pleas, was to condemn the land of defendant in error for terminal facilities and rights of way of the Cincinnati Southern Railway.

The answer was, that a little over six months before, in a proceeding between the same parties to condemn the same land for the same purpose, there had been an entry of judgment upon verdict assessing the compensation, to be paid to the owners, which stood unreversed. Demurrer to this was overruled, and the plaintiffs declining to plead further, the proceeding was dismissed.

The power to appropriate land for the purposes of the Southern Railway is derived from sec. 7, of the original act, 66 O. L., 80.

Whether in respect to terminal facilities and rights of way, it is qualified by subsequent legislation is a question not raised and need not be discussed.

The supplemental act, 70 O. L., 139, sec. 2, provides: "Proceedings for appropriation may be commenced either in the name of the city or in the name of the trustees, and said proceedings may be commenced and conducted either in the court of common pleas or probate court as in other cases of appropriation for the use of municipal corporations."

In the chapter upon appropriations by municipal corporations, it is provided, sec. 2260, Rev. Stat.: "When a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made, as heretofore provided, the right of the corporation to make such appropriation on the terms of the assessment so made, shall cease and determine; and any land so appropriated shall be relieved from all incumbrance on account of the proceeding in such case, or the resolution of the council making the appropriation; and the judgment of the court, directing such assessment to be paid, shall cease to be of any effect, except as to the costs adjudged against the corporation."

The contention is that this leaves the corporation, not having paid the compensation within the six months, to proceed anew.

The argument is based upon the words, "and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect except as to the costs adjudged against the corporation. It is said that the judgment ceasing to be of effect, the land remains as before subject to the exercise of eminent domain.

All property is subject to eminent domain but the right remains dormant in the state until legislative action is had, pointing out the occasions, mode, conditions and agencies for its exercise. Cooley's Constitutional Limitations, 528. The question is not as to the existence of the power in the state, but whether the intention of the legislature has been to delegate it to be exercised again and again through the same agency, over the same property.

The provisions of sec. 2260, have been construed by the Supreme Court to be intended for the benefit of the owner. *Ryan v. Hoffman*, 26 O. St., 109, 120. In the absence of any such provision, the corporation would not be bound, but would be left to determine, at its own option, whether to take the property. The object of the provision is to limit the period for such determination.

†This judgment affirmed the common pleas. 8 Ohio Dec. R., 642. But it was reversed by the Supreme Court. See opinion, 42 O. S., 239.

Appropriations made by a municipal corporation may be abandoned even after the assessment of compensation. *Dillon on Municipal Corporations*, sec. 473; *State v. Hug*, 14 Mo., 116. In the matter of the Commissioners of Jersey City, 31 N. J. Law, 72. But the conclusion is not warranted that thereupon the power exercised is restored, to be at once re-exercised.

The reason for permitting the corporation to abandon is one of public policy. "It is reasonable, that after having ascertained the expense of the project, the corporation should have a discretion to go on with it or not, as it sees fit." *Dillon on Municipal Corporation*, sec. 473. "The price is an essential element in determining whether it consists with the public good to take property." *Mahan v. Halstead*, 89 N. J. Law, 640, 644. But public policy cannot surely require that the same land be subjected again and again to the same proceeding, until a jury be found to fix a price to suit. That would be practically enabling the corporation to take the land at its own price.

The power granted by the statute is to appropriate land whenever in the construction of the line of railway it shall be necessary. The appropriation may not be complete to divest the owner until payment, but upon judgment for possession upon such payment, the exercise of the legislative power is complete. Grants of this nature, it is held, being in derogation of private right must be strictly construed, and if there be reasonable ground of doubt whether the legislature intended a continuing power, the doubt should be resolved against it. *Railway Co. v. Daniels*, 16 O. S., 390, 396.

The authority to determine the necessity of the taking is delegated, as is the general rule in this state. *Giesy v. R. R.*, 4 O. S., 308, 326. But this does not place the question beyond judicial control. Where the property is confessedly unnecessary for the purpose for which it is taken, it is held, there is no doubt courts may interfere. *Malone v. Toledo*, 34 O. S., 541, 546.

Why is not the refusal to take this property, at the former compensation fixed to be regarded between the parties as conclusively determining that it was not, necessary? We are of the opinion that it should be so held. A different construction would render the exercise of the power oppressive. The legal effect of authorizing the appropriation of land for public uses, is to compel the owner to offer it to the public at the ascertained price. The option of taking it or not is with the representatives of the public, for the reason that the necessity for public uses may be affected by the price. When declined it must, we think, be regarded as final between the parties. The owner is left with his land free from all incumbrance on account of the proceedings, and entitled to regard the power exercised as exhausted. *O'Neill v. Freeholders of Hudson*, 40 N. J. Law, 161, 173. And see 2 *Grant's Cas.*, 137; 9 *Ia.*, 438; 3 *Mo. App.*, 41.

Judgment affirmed.

W. T. Porter, for plaintiff in error.

A. B. Huston, and Long, Kramer & Kramer, for defendant in error.

JUDGMENT—SATISFACTION.

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[Hamilton District Court.]

MICHAEL CAVANAUGH V. WILLIAM F. JENKINS.

In a proceeding to vacate a satisfaction of judgment entered by one of two joint judgment creditors in consideration of part payment, the court found that no authority was to be implied from the fact of their being co-plaintiffs and set the satisfaction aside, but at the same time credited the amount paid, on the judgment. Upon petition in error, this was affirmed, so far as setting aside the satisfaction was concerned, upon the ground that there was evidence going to show notice of actual want of authority; but upon cross-petition in error, alleging that the payment should not have been credited, the entire entry was set aside: *Held*, that it was not a case for the entry of satisfaction by the reviewing court upon the findings of the trial court, but that a new trial must be ordered.

AVERY, J.

The petition in error to set aside an order of the superior court of Cincinnati, was heard at a former day of the term and the order affirmed. It was an order vacating the satisfaction of a judgment of the same court, in favor of the defendant in error and one Clark, jointly, against the plaintiff in error; which satisfaction had been entered by Clark. The finding was, that it had been entered without the knowledge or authority of Jenkins unless authority existed by reason that he and Clark were co-plaintiffs, and that authority did not exist by such reason. But, at the same time, the money paid was ordered to be credited on the judgment.

Exception was noted by the defendant in error, to the credit; and upon the other side a motion for new trial was filed; which being overruled, a bill of exceptions was taken setting out the evidence.

This court upon hearing the petition in error, was of opinion, that, from the joint character of the judgment, authority to enter satisfaction would be implied in the absence of notice to the contrary; but, finding upon the evidence set forth in the bill of exceptions that it was in conflict, whether there was not notice in fact that Clark had been paid the entire amount of his interest in the judgment by the co-plaintiffs, affirm the order vacating the satisfaction, being unable to say it was against the weight of the evidence.

Thereupon, the defendant in error asked to file a cross-petition in error, alleging error to his prejudice in entering the credit upon the judgment, and, plaintiff in error consenting, leave was given, the entry of affirmance that had been made was set aside, and by a new entry finding that, in the proceedings and order of the superior court of Cincinnati there was no error to the prejudice of the plaintiff in error, but upon the cross-petition of the defendant in error, that was error to the prejudice of the defendant in error, the entire order of the superior court was reversed and the cause remanded by new trial. At the same time upon request of counsel for the defendant in error as provided, section 6726, Rev. Stat., the court specified in writing, as the grounds of such reversal, "that, upon the finding of the superior court of Cincinnati that the payment by plaintiff in error to Clark was without authority as against said Jenkins, the amount of such payment should not have been credited against him."

Counsel for defendant in error now appear with a motion for such judgment as the court below should have rendered, and it is insisted that the findings of the superior court of Cincinnati are special findings of fact, which entitle the defendant in error to the order of this court vacating the satisfaction and making the matter final here without remanding for a new trial.

The findings of the superior court do not purport to be special findings, and in determining upon the petition in error whether the judgment should be affirmed or reversed, were not so treated by this court. It is not that they do not purport to be made on request, (*Harner v. Batdorf*, 35 O. S., 118;) but, that, in form and substance, they are nothing more than the general findings common in equitable suits.

They were not regarded as the grounds of the conclusion that there was no error to the prejudice of the plaintiff in error, but such conclusion rested on the weight of the evidence. How, then, the order entered by the superior court being set aside, can they become any more efficacious than before. For a new order against plaintiff in error, vacating the satisfaction entered, there must be recourse to the evidence. But it is

settled that a court reversing a judgment cannot make up a new one from the evidence. *Emery's Sons v. Irving Bank*, 25 O. S., 360, 369.

The reversal upon the cross-petition in error, was on the ground that the finding, that Clark was without authority, was inconsistent with crediting upon the judgment the amount paid to him. But, it did not follow, that such finding of the want of authority thereupon became the foundation of a new order, vacating the satisfaction.

The finding, itself, that authority did not exist by reason of the two being co-plaintiffs, was not upon the petition in error approved; and the order vacating the satisfaction was affirmed, only upon a question of the weight of the evidence whether there was notice of the actual want of authority. This left the credit entered, without ground to stand upon as against the defendant in error; but the whole being reversed, upon his cross-petition in error, the question of notice was open and must be remanded for a new trial.

Motion overruled.

S. T. Crawford, for the motion.

Huston & Holmes, *contra*.

[Hamilton District Court, July 31, 1883.]

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HENRY HUELSMAN V. MILLS & KLINE.

For opinion in this case see 6 Ohio Dec., R., 1192 (s. c. 12 Am. Law Rec., 301.)

LEASE—ELECTION TO CONTINUE.

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[Hamilton District Court, June 19, 1883.]

JAMES POWELL V. LYDIA HARRISON.

Where a tenant rented premises for one year, with the privilege of renewing the rental after the expiration of said year, for one or two years, at his discretion, the holding over for one entire year and a portion of the second year, indicated by the payment of the rent according to the terms and conditions named in the original agreement, without objection on the part of the landlord and without notification by the tenant that he was not in for the term, constituted an election to continue for an entire year.

ERROR to the Court of Common Pleas.

The action was originally brought before a magistrate, for rent. It was appealed to the court of common pleas and there tried before a judge and jury. The trial was at the November term, 1882, and a verdict was rendered for the plaintiff. A motion for a new trial was made, for reasons set forth in said motion, and this motion was continued to the January term, 1883, when it was overruled in the month of March of the same year, and a bill of exceptions was taken, embodying all the evidence.

The remaining facts are stated in the opinion.

W. H. Baldwin, for plaintiff in error.

Cox & Cox, for defendant in error.

SMITH, J.

It is claimed by plaintiff in error, that certain errors occurred during the trial of the case in the common pleas, but we cannot consider those errors, because there is no bill of exceptions taken at the trial term.

The only error before us is whether the court erred in overruling a motion for a new trial on the ground that the verdict was against the law and evidence.

The action below was for rent. The plaintiff relied upon a certain written memorandum, in these words:

"Cincinnati, January 6, 1877.

"James Powell has this day rented of me, Mrs. Lydia Harrison, the west one of my two dwelling houses, situated on the south side of Vine street, east of Park avenue, Cincinnati, at a rent of \$35 per month, payable at the end of each month, for the term of one year, said term to commence as soon as the additional improvement now being made shall have been completed (say January 18, 1877), said Powell to have the privilege of renewing said rental of said premises after the expiration of said year for the further term of one or two years, as he may elect, at the same price, \$35 per month. Said Powell agrees to keep the said premises in good condition, ordinary wear and tear excepted, and to pay rent therefor as stipulated.

"(Signed)

James Powell.

"Witness: T. S. Harrison."

Defendant entered into the occupation of these premises under this written agreement, and continued there for the first year named in the agreement, paying rent at the rate of \$35 per month. At the end of the first year, he continued to occupy as before, upon the same terms, and paying the same rent in the same manner for fourteen (14) months thereafter, and the plaintiff claims that he thereby exercised his privilege of renewing said rental for the further term of two years named in said memorandum. The defendant denies that he made any such election, but did elect to continue thereafter as tenant from month to month, for fourteen months, and then quit and settled in full. This action is to recover for the residue of the term. On the trial of the case, the only testimony presented upon this issue was the fact that at the end of the first year, viz.: January, 1878, the defendant continued in possession for fourteen months, and paid rent at the rate of \$35 per month, which the plaintiff received, and the further fact that when the defendant proposed to quit, plaintiff notified him that she would hold him for the residue of the year. The defendant having abandoned the premises, plaintiff made efforts to rent the same, and at the end of two months did rent the same, at \$25 a month, but thus lost the rent for two months, during which the premises were vacant, and \$10 a month for eight months, making in all \$150, for which amount she recovered judgment. If, therefore, the plaintiff is entitled to recover at all, the verdict for \$150, is the amount she was entitled to.

Whether, or not, when a party has the privilege of a renewal of the rental after the expiration of the term, the mere fact of a continued occupation, according to the terms of the lease, no other fact appearing in the case, is such an election as to continue the term, is the question presented in this case.

In Taylor on Landlord and Tenant, section 332, it is said: "Sometimes, instead of a covenant for renewal, it is agreed the tenant shall have the privilege or option of a further term. In this case if notice is stipulated for, it must be given, but if not stipulated for, the tenant's mere continuance in possession and paying rent, though with no express notice of his desire for the further term, entitles and binds him thereto.

The present case does not require a notice. If, therefore, the terms of this agreement are such as to give a party the option of an extension of the term, then the mere continuance is sufficient evidence of that election. This author cites several cases:

Clarke v. Merrill, 51 N. H., 15; Kramer v. Cooke, 7 Gray, 550; Delashman v. Berry, 20 Mich., 292, which fully supports the doctrine of the text.

In Thieband v. First National Bank of Vevay, 42 Ind., 212, a lease was executed for five years with a privilege of three more, and the lease contained covenants of renewal. The court held that the mere continuance over the five years, nothing more being said, was not an evidence of a renewal for the three years, but it might be treated as a lease from year to year, or renewal from year to year. This case is criticised in Taylor on Landlord and Tenant, in the note to section 382, where it is said that the 'weight of authority sustains the text, and the reasoning in Delashman v. Berry, 20 Mich., 292, seems conclusive, namely, 'that the tenant's holding over must be referred to a rightful holding under the privilege, rather than to a wrongful one as tenant at sufferance.' ''

The case of Elevator Co. v. Brown, 36 O. S., 660, is not in conflict with this doctrine.

In that case the lease contained the agreement that if the lessors should purchase the title in fee simple to the premises the lessees would renew the lease for the further term of eight years, from September 1, 1879. On August 30, 1879 the lessors gave notice they had purchased the fee simple, and desired the lessees to renew. The lessees immediately declined to renew, and on the 2d day of September vacated the premises, and within two days returned the keys to the office of lessors—but left some coal in one of the bins for eighteen days thereafter.

It was claimed in that case, that by remaining in possession after September 1, 1879, the lessees had consented to the renewal. But the court held that the remaining in possession was to be taken in connection with all the other circumstances of the case, the refusal to renew, the return of the keys and vacating the premises. These circumstances negative the conclusion they intended to renew.

Neither is this decision in conflict with the case of Worthington v. The Globe Rolling Mill, 6 Dec. R., 1038; (s. c. 9 Am. Law Rec., 693.)

In this case there was a lease for a certain term, and the tenants continued to occupy after the term, though they had received notice from the landlord that if they remained thereafter it would be at an increased rent. The tenants gave notice they would not pay the increased rent. After remaining there some few months afterwards they abandoned the premises. It was claimed by the plaintiff that the mere continuance under these circumstances made it a lease from year to year, and, therefore, the tenants were bound for the rent during the year. But the court held that this continuance, after the notice and refusal were given, was to be considered in connection with all the circumstances, and, under those circumstances, that holding over should not be treated as a mere tenancy from year to year, but a tenancy at sufferance, and the tenants would have to be responsible for any damages created by holding over.

Many cases were cited by the court in giving the opinion as to what facts would make a holding over after the term a tenancy from year to year, and it was stated that there was a conflict of authorities in some states, viz., New York, Pennsylvania and Tennessee. Schuyler v. Smith, 51 N. Y., 309; Hemphill v. Flynn, 2 Pa. St., 144; Brinkley v. Walcott, 10 Heisk. 22. In these states the rule was laid down that a mere holding over for a term, no matter how long or short a period, was to be construed as a holding for a year, creating a tenancy from year to year, while

Meahear v. Pomeroy, 49 Ala., 146; *Hunt v. Bailey*, 39 Mo., 257, and *Skaggs v. Elkus*, 45 Cal., 154, the law was that a mere holding over did not create a tenancy from year to year, but whether it does, or does not, depends on the circumstances of the particular case.

The present case is not a mere holding over for a month, or a portion of a month, but for one year entirely, and for two months of the succeeding year.

But if it was an exercise of a privilege for holding over for one or two years, at his election, the holding over one entire year, and a portion of the second year, indicated by the payment of the rent, according to the terms and conditions named in the memorandum, without any objection to the receipt of the rent by the landlord, and without notifying the landlord that he was not in for the term, it seems to us the jury were warranted in finding an election to continue for an entire year, and that the court below did not err in overruling the motion for a new trial.

Judgment affirmed.

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BOARDS OF EQUALIZATION.

[Hamilton Common Pleas.]

STATE OF OHIO V. THEOPHILUS WILSON ET AL.

The county commissioners have no power to provide for the board of equalization "additional help," by way of clerical assistance, etc. under the existing statutes.

MAXWELL, J.

This action was brought by the prosecuting attorney against the board of control, the board of commissioners and the auditor of this county, to enjoin the payment of about \$2,000 to the employees of the annual city board of equalization; a temporary injunction was granted by one of the judges of the court, and now the case comes up on a motion by the defendants to dissolve the temporary injunction, and on the motion of the plaintiff to continue the injunction until the final hearing.

The facts are substantially as follows: The annual board of equalization for the city of Cincinnati having been elected by the common council, pursuant to section 2805, Rev. Stat., and having appointed the six clerks, as provided in said section, applied to the county commissioners for additional help, on the ground that the six clerks were not sufficient. The county commissioners, on June 20, 1883, adopted a resolution allowing the board of equalization twenty men, "as viewers, messengers, etc." This action on the part of the county commissioners was not at that time submitted to the board of control, not approved by them, not in any way acted upon by them, until July 10, 1883, at which time the bill for the payment of this additional help, having been submitted to the board of control, they approved it, but at the same time adopted a resolution notifying the county commissioners that they would not approve any bill for further services of the same character. The additional help was, however, continued by the board of equalization, and on August 29, 1883, a second bill, the one now in controversy, having been approved by the county commissioners, was presented to the board of control for their approval. The board of control thereupon, by a bare majority

vote, reconsidered the resolution of July 10, 1883, and were, as is alleged, about to approve this second bill, when this action was brought and the temporary injunction allowed.

It is claimed on the part of the plaintiff that the appointment by the county commissioners of the "additional help" was unauthorized and void, that the county commissioners have no power to make such appointment, and that, even if they had, their action should have been submitted to the board of control for their approval; on the other hand it is claimed by the defendants that the county commissioners have general authority, as a matter of public policy, to make such appointments, and that their action although not submitted to the board of control at the outset, was afterwards ratified by that board. Clearly, the action of the county commissioners in this matter should have been submitted to the board of control under sections 999, 1000-1-2-3, Rev. Stat.; but assuming that the subsequent action of the board of control was a ratification of the action of the county commissioners, let us see how the case then stands.

It is not claimed by the defendants that the board of equalization had any power to appoint this additional help, but it may assist in determining the question in controversy to examine the sections defining the powers and duties of the board of equalization. By section 2805 and the amendments thereto, the board of equalization is given the power to appoint all necessary clerks not exceeding six, which power the board has exercised. By section 2806 it is provided that the auditor shall lay before the board the returns of the assessors for the current year, and also the valuation of the real estate, as the same was entered on the duplicate of the preceding year, or as fixed by the state board of equalization, with such maps, returns, lists, abstracts and other papers as may be in the auditor's office pertinent to the duties of the board. It is also provided by section 2805 that the board shall meet at the office of the auditor. In short it will appear from reading sections 2804-5-6-7, Rev. Stat., that the board of equalization meets at the auditor's office, receives its working material, including, presumably, stationery, from him and there might be a question, not necessary to be decided here, whether the board has any power to do more than work up the material furnished by the auditor, and whether he is not the proper one to furnish additional help, if any be required, for which he might then be paid, under section 1343, Rev. Stat.

It is not easy, in the brief space of one opinion, to define the powers and duties of the county commissioners, but it may be said in general, that they have such express powers as are given them by statute, with such implied powers as may be found necessary to give proper effect to the express powers. The county commissioners have the oversight of the county real estate, the construction, conservation and repair of the various county buildings, the collection by suit or otherwise of such moneys as may become due to the county, and the estimates and assessments for the necessary revenue of the county. They are to furnish suitable offices for the various county officials, and keep the offices in proper order, they are to make suitable provision for the convenient administration of justice, they construct and provide the eleemosynary buildings of the county, and they make the estimates and pass the formal resolution, making the assessment for the county revenue.

But as to all these things, their powers are clearly defined by statute. The legislature, in providing for the county organization, has given to

each official, whether board or individual, separate duties, and in so doing has made ample provision for the transaction of all the business of the county, but has not vested in any board or officer the power to supplement and provide for the real or imaginary wants of any other board or official, where the statute is silent. The county has not, like the city, a body vested with legislative powers. The county officials must follow the beaten path worked out by the statute.

The legislature having provided for the election of a board of equalization, and having defined its powers and duties, including the number of clerks it may have, the county commissioners cannot do either directly or indirectly what the legislature has forbidden the board of equalization to do directly.

The motion to dissolve the temporary injunction will be overruled and the injunction continued until the final hearing. *Commissioners v. Mighels*, 7 O. S., 110, 125; *Treadwell v. Commissioners*, 11 O. S., 183, 190; *Commissioners v. Noyes*, 35 O. S., 201, 205; *DeLaney ex rel. v. Commissioners*, 21 O. S., 648, 650; *State ex rel. Gerke v. Commissioners*, 26 O. S., 364, 368; *Dalton v. Commissioners*, 8 Ohio Dec. R., 770.

J. H. Perkins and W. H. Pugh, for plaintiffs.

Campbell, Bates & Bettman and O. J. Cosgrave, for defendants.

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PARTITION.

[Hamilton District Court, July 31, 1883.]

CINCINNATI SAVINGS SOCIETY V. JOHN L. THOMPSON ET AL.

Where the undivided interest of a tenant in common in one of the parcels of the common property is incumbered by her with a mortgage duly recorded, and afterward by mutual deeds between her and her cotenant, for the purpose of partition but not reciting that fact, and also duly recorded, a specific part of the parcel by metes and bounds is quitclaimed to her and she in return quitclaims the remaining part of the parcel and all her interest in the rest of the property, and the specific part so quitclaimed to her is afterward mortgaged by her to a third party, who had no notice in fact of the partition or that she had quitclaimed her interest in the remaining part of the parcel, and the mortgage upon her undivided interest is then foreclosed and conveyance made to the purchaser, as of an undivided interest, and he brings proceedings for partition: *Held*, that partition should be so made as to set off such undivided interest out of the specific part quitclaimed to the mortgagor, notwithstanding the subsequent mortgage of that part, for the reason that upon the mortgage of her undivided interest in the whole and the quitclaim afterward made by her, the equity arising in favor of the grantee under the quitclaim was to marshal the lien of the mortgage upon the part she retained; and that of this, the subsequent mortgagee of that part had constructive notice from the record of the mortgage upon the whole and the quitclaim.

ERROR to the Court of Common Pleas.

By the last will and testament of Abraham Knicely his estate was devised, two-thirds to his widow, and one-third to his adopted daughter, Mrs. Thompson. Among the parcels of land was a lot 156 feet in front, and of uniform depth, known as lot "E."

The undivided one-third of Mrs. Thompson in this lot was mortgaged by her, and her husband, to the Schiller Lodge, Knights of Pythias,

which mortgage was duly recorded; and afterward by mutual deeds of quitclaim for the purposes of partition, the north eighty-eight feet of the lot, in value equal to one-third of the whole estate, was conveyed to her by the widow, and she and her husband in return conveyed to the widow the south sixty-eight feet, together with all her interest in the other parcels. These mutual deeds were likewise recorded, but were upon their face mere deeds of quitclaim for one dollar and other considerations, containing no recitals of the real object. Afterward, without notice in fact that her interest in the south sixty-eight feet had been so conveyed, the Cincinnati Savings Society took a mortgage from her and her husband, to secure an indebtedness of his, upon the north eighty-eight feet.

In subsequent proceedings by the Schiller Lodge, in the court of common pleas, to foreclose, there was a sale and conveyance to it of the undivided one-third covered by its mortgage, but by the decree of confirmation the matters in controversy upon the answer and cross-petition of the widow, who set up the partition, and upon the answer and cross-petition of the Cincinnati Savings Society setting up its mortgage, were continued for further adjudication. This action, in the court of common pleas, was then brought by the Schiller Lodge as owner of an undivided one-third by the purchase in foreclosure, for partition of the lot; and by agreement of the parties was heard together with the undisposed portion of the foreclosure case. The error alleged is, that the undivided one-third interest mortgaged to the lodge was allotted to the north eighty-eight feet, and by the order of partition was to be set apart out of that portion; while the title of the widow under the quitclaim to the remaining portion was quieted.

Storer & Harrison, for plaintiff in error.

J. F. Baldwin, for defendant, in error.

AVERY, J.

Upon partition among tenants in common it has been held that a lien upon the undivided interest of one will follow and attach to the share set apart to him. *Jackson v. Pierce*, 10 John., 418; *Crosby v. Allyn*, 5 Greenl., 453; *Williams College v. Mallett*, 12 Me., 398; *Thurston v. Menke*, 32 Md., 571; *Williard v. Williard*, 56 Penn. St., 571-4. The reason given is, that the right of partition is an incident to the estate, and whoever takes an incumbrance upon the undivided interest of one takes it subject to the right of the others to hold their shares in severalty. *Wright v. Vickers*, 81 Penn. St., 122, 138; *Hall v. Morris*, 13 Bush., 322; *Potter v. Wheeler*, 13 Mass., 503. The same rule has been applied to partitions by the voluntary act of the parties. *Webb v. Rowe*, 35 Mich., 58; *Wade v. Devay*, 50 Cal., 376; *Bavington v. Clarke*, 2 Penn., 115.

The applicability of the rule to voluntary partitions is denied, in *Emson v. Polhemus*, 28 N. J. Eq., 439. But that was where a voluntary partition among tenants in common was sought to be made the ground for enjoining proceedings in partition, by a purchaser under a prior lien of the undivided interest of one of them. The case presented in the court below was different, being itself a proceeding for partition by the purchaser under the lien; and the question being whether, he not objecting, the equities of the tenants in common as between themselves might be preserved.

The general principle of equity, in making partition, is to assign to each that part which, with reference to the respective situations of the

parties in relation to the property, will best accommodate him. Story's Equity, 6566; Adam's Equity, 281. Separate interests acquired under a partition void in itself for omitting a necessary party, will be protected so far as it can be done consistently with the preservation of the rights of such party. Dawson v. Lawrence, 13 O., 544. Even, Emson v. Polhemus, in the subsequent progress of the case, 30 N. J. Eq., 405; 32 N. J. Eq., 827, sustains the proposition, that the equities, under a voluntary partition although the partition itself be disregarded, will control in reassigning the shares of the cotenants or of third parties deriving from them.

The equity under the partition, as between the parties themselves, that the Schiller Lodge should resort to the north 88 feet of the lot is not questioned; but the Cincinnati Savings Society insists that its mortgage was taken without notice of such equity, and that as against it the undivided interest of the lodge in the whole should be apportioned.

The argument is, that constructive notice from the records in the county recorder's office, was confined to the chain of title, including only the quitclaim by which the north eighty-eight feet was vested in the mortgagor and not extending, there being nothing in the instrument itself to give notice of it, to the mutual quitclaim by which all interests in the remaining 68 feet was divested.

The marshaling of liens affecting the whole, upon successive portions in the inverse order of alienation, is a recognized rule in this state as in most of the other states. Commercial Bank v. Western Reserve Bank, 11 O., 445; Cary v. Folsom, 14 O., 365; Nellons v. Truax, 6 O. S., 97, 104. From this equity of successive purchasers, each is put upon inquiry. The conveyance of a part, the whole of which has been incumbered by the owner, constitutes in equity a primary charge on what remains for the satisfaction of the incumbrance; and the conveyance being recorded is notice of the equity.

In Brown v. Simons, 44 N. H., 475, 479, it is considered the same as a counter security given by the owner upon what remains, by way of indemnity to the purchaser against the incumbrance; and record of the conveyance was held to be constructive notice.

In Iglehart v. Crane, 42 Ills., 261, 269, it was held, that each purchaser from a mortgagor is bound, by the constructive notice furnished by registry of prior conveyances of any portion of the mortgaged premises.

In Manly v. Pettie, 88 Ills., 128, upon mutual conveyances between tenants in common one of the conveyances not being recorded, it was held, for this reason alone, that the interest of that tenant as an undivided interest in the entire property remained subject to levy.

In Chase v. Woodbury, 6 Cush., 143, upon the conveyance of an incumbered parcel by a father to his two sons in equal shares, and the question of contribution to the payment of the incumbrance, arising between one of the sons and a purchaser from the other, it was held, that it stood the same as if the father had given to each of the sons a mortgage upon the part conveyed to the other for security against the common incumbrance.

In Chapman v. West, 17 N. Y., 125, 128, upon the question, whether a suit pending for specific performance of an agreement to sell a part of an entire tract incumbered by a mortgage would be notice to subsequent purchasers of other parts of the tract, it is said, it would be as much the duty of a purchaser, in investigating the title of a parcel he was about

to purchase, to look for a notice of *lis pendens* affecting another parcel covered by the mortgage as to look for the record of a deed of the latter parcel.

In the note to *Aldrich v. Cooper*, by the American Editors of the *Leading Cases in Equity*, 4th ed., 298, 299, it is said, adopting the language of *Hunt v. Mansfield*, 31 Conn., 488: "It results from these decisions, that where the record discloses an incumbrance on property of which a party is taking a conveyance and also discloses the further fact, that the incumbrance rests on other property, and on an examination directed to such other property, it becomes apparent that a conveyance of the latter has been made which creates an equitable right to throw the burden of the incumbrance on the first property, the purchaser will be presumed to have made such examination and will be regarded as constructively notified of such equity."

No principle is better settled than that a purchaser must look to every part of the title essential to its validity. *Brush v. Ware*, 15 Pet., 93, 113; *Reeder v. Barr*, 4 O., 447, 458. The considerations suggested in *Brown v. Simons* apply with peculiar force: "In the examination of the title of the part which he proposes to buy, he is led directly to the original mortgage and finds that his is but part of an entire tract in which his grantor has only the right of redemption, and which was originally subject to the common burden but liable to be affected by a prior sale of another part of the entire tract. Under such circumstances, the different parcels of the tract mortgaged cannot, we think, be regarded as separate and distinct so as to relieve him of the duty of inquiring into the title of the other part; but we think in examining the title of the part he proposes to buy he is led directly to a deed that puts him on inquiry as to the remaining part of the land."

The common source of title of the parties was in Abraham Knicely. His last will and testament was in the chain of title. The undivided interest of Mrs. Thompson under the devise extended to every part of the lot, and her mortgage of such undivided interest was likewise in the chain of title. The Cincinnati Savings Society took with notice of this common incumbrance; and taking her interest in a specific parcel of the lot was put upon inquiry whether her interest in the other parcel had been conveyed. The records in the county recorders' office disclosed that upon the quitclaim which united the interest devised to the widow to the interest of the mortgagor in this specific parcel, she had by simultaneous deed quitclaimed to the widow her interest in the other parcel. The equity arising was to cast the burden of the incumbrance altogether upon the parcel left in the mortgagor. The conveyances themselves were notice of this equity, and the mortgage to the Savings Society was subject to it.

Affirmed.

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CONSTRUCTION OF DEED.

[Superior Court of Cincinnati.]

H. BELMER & CO. v. C. H. & D. R. R. Co.

RUTH A. BATES v. SAME.

A grant of a right of way eighty feet wide to a railroad which already has a right of way and tracks "which said eighty feet is to include the Mill Creek road on the west where said road is contiguous to said railroad" does not mean a grant measuring from the existing track as a center line and including so much of said road as lies within forty feet, but it means to measure eighty feet wide from the west side of the road eastwardly and thus include the whole road.

PECK, J.

In these cases I have read the pleadings, examined the affidavits, inspected the plats and viewed the photographs, and the question arises, it seems to me, upon the conveyance made by Bryant & Treavor, trustees, to the C., H. & D. R. R. Co. These trustees, by this conveyance, deed to the railroad company a right of way eighty feet wide, and the question is to locate that eighty feet.

It is claimed by the plaintiffs that the tracks which the company now propose to construct, and which are claimed by the company to be within the lines of the eighty feet, are not within those lines, but will be, if laid, on the property of the plaintiffs. As I have said, the deed is for a right-of-way eighty feet wide. It has this provision, however, "which said eighty feet first described, is to include the Millcreek road on the west where said road is contiguous to said railroad," and in another part of the instrument the same provision is substantially repeated, that the eighty feet shall include the road.

It is claimed by the company that they located their original track with reference to the centre line of the right-of-way, so as to leave room for other tracks, and that, fixing the eighty feet as they claim the right to, by reference to this original track, it gives them the ground on which they claim the right to lay these additional tracks.

On the other hand, it is claimed that the location of the old Millcreek road, referred to in the conveyance, is fixed by a stone wall which formed the western boundary of the road there at the time this conveyance was made, and which wall is there yet, and that measuring eighty feet eastwardly from that wall, will include the road, and will give the railroad the right-of-way to which the company is entitled under this conveyance. As a matter of fact, and taking all that I can see in the conveyance and in the affidavits that have been furnished, I think that claim is made out. It seems to me that the grantors in this conveyance intended that they should commence to measure from the west side of the road, and measure eighty feet eastwardly. They say that the eighty feet shall include (that is the language) the old Millcreek road, wherever that road is contiguous to the railroad; now, I cannot understand that to mean anything else than that it should include the whole road. The claim of the railroad company, as I understand it, is that it intended to include so much of the road as might be necessary to make up the eighty feet, measuring forty feet from a centre line which was fixed by the location of their original track, but that does not appear in the language

of the conveyance, which, with reference to itself and to the monuments that were then existing, means what it says, "to include the road."

Now it may be claimed that the trustees had nothing in the road to convey, that they had no rights in it, but it appears that their property abutted on both sides of the road, and it is very certain that the property holder has a reversionary right, in the street upon which his property abuts, and he has also other rights of property in a street which is in use, or part of which is in use as a public way. So it seems to me it was intended that this road should be included in the eighty feet, the right-of-way in which was conveyed, in so far as the grantors could convey it, to the railroad company, and such being the fact, if these tracks were located by the company as they are now proposed to be located they would be on the property of the plaintiffs, or upon a street which it is claimed runs along the east side of the railway in front of plaintiff's property, but the existence of which is disputed. If it be the private property of plaintiffs, defendant clearly has no right to enter upon it. If it be a dedicated street, the property of plaintiffs abuts upon it, and the access to their property will, as it sufficiently appears from the testimony, be seriously damaged by the construction of the proposed track within the line of such street. In either case, plaintiffs are entitled to restrain the defendant from the proposed occupancy until the company shall have appropriated the right-of-way under proceedings instituted for that purpose. *Railway Co. v. Cumminsville*, 14 O. S., 524; *Railway Co. v. Lawrence*, 38 O. S., 41.

The motion to dissolve the injunction will be overruled, except in this: There is a claim of a right-of-way across the railroad, which I do not find to be sustained, as there is nothing conveying any right-of-way, and it does not appear to come within the provision of this conveyance, that where streets are laid out in Fairmount, the company shall provide a right-of-way across the railroad. This is not a street that was laid out in Fairmount, it is simply a right-of-way that has been used by these property holders for access to their property, and it is marked on the plat as a private way. The original injunction will be modified in that respect; otherwise the motion to dissolve will be overruled.

Rankin D. Jones, for plaintiffs.

Ramsey & Matthews, for defendants.

[Clarke Probate Court.]

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JOHN SMITH ET AL. V. THOMAS MCKEE ET AL.

For opinion in this case, see 3 Dec. R., 578; (a. c., 4 Ohio Law Journal, 354.) See note to that case. See also 42 O. S., 463.

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FORECLOSURE—PLEADING.

[Cuyahoga Common Pleas.]

CONRAD KNIERIM V. JOHN ZAENGERLE ET AL.

Demurrer for want of defendant. Where the petition does not disclose that said party had no interest.

CADWELL, J.

In this case a demurrer is filed to the petition; first, on the ground that it does not state facts sufficient to constitute a cause of action, and secondly, because one Somer is not made a party defendant. The petition shows that Casper Zaengerle and wife, some years ago, made to Somer a mortgage for \$1,000 on land owned by Zaengerle and wife jointly.

Casper Zaengerle died, and Somer undertook to foreclose the mortgage. Zaengerle made a will devising half of the property to the defendants, and when Somer undertook to foreclose his mortgage he made only the administrator of Casper Zaengerle a party. He did not make the devisees parties. On the sale Somer bought in the land, and sold it to Unterzueller. Unterzueller sold it to Franke, and Franke to the plaintiff, who is still the owner of the premises. Of course, by the sale Somer acquired only the wife's half, the three devisees and heirs of Casper Zaengerle not being made parties. The plaintiff says he is the owner of the note and mortgage, and asks to have the mortgage foreclosed against the defendants, the devisees, who have the equity of redemption of Casper's half. He says that, it being sold, one-half ought to be applied on the \$1,000 mortgage and the other half belongs to him by reason of the sale by Somer to Unterzueller, by him to Franke, and by Franke to the plaintiff. He says that by virtue of the sale of the premises he has become the owner of the mortgage. It does not follow that he is the owner of the note and mortgage simply because he has received the conveyance from Franke of certain land covered by the mortgage. He does not show that he even has the right to be subrogated to the rights of Somer simply because he purchased the land, to half of which he concedes he has no title. He does not state the form or the conditions of his purchase from Franke, or of Franke's purchase from Unterzueller, or of Unterzueller's purchase from Somer. He does not show that Somer had parted with his interest in the mortgage. There is no showing that the plaintiff purchased this part of the property and paid full value for it, or that he supposed when he purchased that he was buying the whole. There is no showing that his grantor paid a full and fair value for the whole of it, supposing that he was getting title to the whole. It is not shown that Somer has no interest. It is stated that Somer sold to Unterzueller, but the terms of the conveyance are not stated. Somer may have sold subject to the mortgage which he attempted, but failed to foreclose. He may still have an interest, for aught that appears. So that he ought to be made a party unless the petition is made to show that he has no interest.

The demurrer is sustained on both grounds.

PLEADING—AVERMENTS.

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[Cuyahoga Common Pleas.]

FREDERICK VOSS v. JOHN YOUNG.

It is *not necessary* to aver, in a petition in an action for personal injuries, that the plaintiff's injury was sustained without fault on his part.

The plaintiff alleged in his petition that on March 26, 1883, he was driving in a carriage along one of the streets of Cleveland; that the defendant was in charge of a team of horses, one of which he was riding, on the same street, and so improperly and carelessly drove and managed his team that a part of the harness of his horses caught in the hind wheels of plaintiff's carriage, upsetting the same, throwing plaintiff violently to the ground and breaking his leg. To this petition the defendant filed a general demurrer, claiming that to give the plaintiff a cause of action the petition must contain an averment that the injury was sustained without fault on the part of the plaintiff, but solely by reason of the negligence of defendant.

CADWELL, J.

I am not aware of the question raised here, purely as one of pleading, being settled in this state. It has been usual to make the averment, and Bates says it is safer. But the Supreme Court in *Railroad Co. v. Whitacre*, 35 O. S., 627, held that when the plaintiff in his proof showed the accident to have been the result of carelessness on the part of defendant, he had made out his case, and no further proof was necessary, unless the plaintiff in his evidence had raised the presumption of negligence on his part. Then he must offer proof to overcome that presumption, or be defeated. It hardly seems necessary to aver what it is not necessary to prove.

Demurrer overruled.

Geo. B. Solders, for plaintiff.

Foran & Dawley, for defendant.

UNPROTECTED EXCAVATION.

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[Hamilton District Court, October 23, 1883.]

HENRY VEIGEL v. F. LUKEHREIMER.

Where the excavation for a cellar, including an area two and one-half feet out into the sidewalk in front, had been let by the owner to one contractor, and the masonry to another, each employing his own hands; and the two were at work at the same time and together in control of the premises, although the owner was there daily to see that the contracts were complied with; and by reason of there being no barriers, or insufficient ones at night, a person passing upon the sidewalk fell into the excavation and was injured: *Held*, the owner was not liable, if not appearing he had any notice of the unprotected condition of the excavation.

ERROR to the Court of Common Pleas.

AVERY, J.

The plaintiff in error, who was plaintiff in the court of common pleas, while passing at night on the sidewalk in front of defendant's premises, upon Eighth street in this city, fell into an excavation and was injured.

The excavation had been made in digging a cellar upon the premises, which was not completed and had been intended to be carried out upon the sidewalk two and a half feet for the purposes of an area; but the caving of the earth had taken it somewhat farther. Along the line of the excavation upon the sidewalk, planks were laid up, about two feet high, for a barrier; but at the point where the plaintiff fell in, whether because the planks were down or because the earth had caved away outside, there was no protection.

Two policemen testified that "along about that time the place was kept in bad condition so far as guards around the excavation were concerned."

The cellar digger had been employed to do the work of excavation complete for \$250. There had been a similar contract with the stone mason, to wall up the cellar, for \$1,650. They employed their own men. The two were at work at the same time; as the mason testified, "working into one another's hands." His testimony was that they were in control of the premises. The duty of attending to the barriers which had been first undertaken by the digger had been transferred by him to the mason.

The defendant testified that he was there nearly every day and overlooked the work to see that it was done according to the specifications and contract; that he did all the superintending there was done, so far as to see that the work complied with the specifications which was all he wanted.

Upon this testimony the court directed the jury to find a verdict for the defendant on the ground that not he but the contractors were liable.

The question presented is a perplexed one. The cases agree that responsibility for negligence is only for the negligence of one's self or one's servants. But at the same time for the negligent disregard of duties to the public in the use of property, there are cases which trace the responsibility back to where the authority to apply the property to the use begins. *Storrs v. City of Utica*, 17 N.Y., 108, 109, Comstock, J.; *Creed v. Hartman*, 29 N. Y., 596, Selden, J.; *Homan v. Stanley*, 66 Penn. St., 464; *Robbins v. Chicago*, 2 Black, 418, 4 Wall, 657; *Baxter v. Warner*, 6 Hun., 585; *Pickard v. Smith*, 10 C. B. N. S., 470.

The distinction, however, seems reasonable between lawful and unlawful uses; and where the use itself is not in disregard of any duty, but the mischief is in negligence, it is not easy to see why the responsibility should fall upon one who is only chargeable with giving authority for the use. "Where the mischief arises not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists." *Butler v. Hunter*, 7 H. & N., 833, Pollock, C. B.

The distinction between liability for the use, and liability for negligence, is marked and illustrated by the two cases of *Carman v. R. R. Co.*, 4 O. S., 399 and *Clark v. Fry*, 8 O. S., 358. In the former case, the construction of part of a railroad was let out by a contract which provided that rock should be removed by blasting, and it was held that for an injury resulting not from any carelessness in the work, but as an unavoida-

ble result of blasting in that locality the railroad company was liable. In the latter case, the contractor for completing a house had left an excavation made for an area unguarded and a person passing by fell in; it was held that the owner was not responsible for the negligence of the contractor, unless the relation of master and servant existed between them. The rule announced was, that the temporary impediment of the highway was not a nuisance; and that although when anything to be done under a contract is in itself unlawful or necessarily injurious to a third person, the employer as well as the employee would be liable for any injury resulting therefrom, yet when this is not the case, and the employer has not the control or direction in the execution of the work, he is not responsible for any negligence or other wrongful act committed in the performance of it.

Whatever may be held elsewhere, the rule in this state at least would seem to be settled. Moreover, it appears to be supported by the prevailing weight of modern authority. *Scammon v. Chicago*, 25 Ill., 424; *Hale v. Johnson*, 80 Ill., 185; *Ryan v. Curran*, 64 Ind., 346; *McCafferty v. R. R.*, 61 N. Y., 178; *Hilliard v. Richardson*, 3 Gray, 349; *Conners v. Hennessey*, 112 Mass., 96; *Erie v. Calkins*, 85 Penn. St., 247; *Smith v. Simmons*, 16 Reporter, 282; *Addison on Torts*, 579; *Wood on Master and Servant*, section 314.

The only distinction to be suggested between this case, and *Clark v. Fry*, *supra*, is that there the contract was for the entire building. But the test of responsibility is the power of control, *Shindelbeck v. Moon*, 32 O. S., 264, 274, and a part may be no less without the control of the owner under a contract for that part, than under a contract for the whole. For the time at least, the conditions with respect to the question of control would be the same as if the entire building were contracted for. *McCafferty v. R. R.*, 61 N. Y., 178, 181; *Potter v. Seymour*, 4 Bosw., 140, 148; *Allen v. Willard*, 57 Penn. St., 374, 382; *Knight v. Fox*, 6 Exch., 721; *Rapson v. Cubitt*, 9 M. & W., 710; *Richmond v. Russell*, 22 Scotch Jur., 394; *Shearman & Redfield on Negligence*, section 80.

The mason was at work with the cellar digger and had undertaken to attend to putting up the barriers; but the digging had not yet been completed and the job turned over to the owner. The arrangement, for all that appeared, was made between themselves for their own convenience; the owner was not consulted. The only testimony was that the two were in control of the premises at the time. Had the digging been completed the reason would have been the same. The mason would not have been relieved from providing temporary safeguards because of not having himself made the excavation; so long as for the purpose of walling it up his contract gave him control. *Clapp v. Kemp*, 122 Mass., 481. For that reason, the owner would not have been chargeable with his negligence.

The defendant superintended the work so far as to see that it was according to the contract. But it is held that the rule of liability is not changed even though by express stipulation the owner may have reserved such privilege of superintendence. *Joliet v. Harwood*, 86 Ill., 110, 114; *Pfau v. Williamson*, 63 Ill., 16; *Erie v. Caulkins*, 85 Penn. St., 247; *Chambers, Admr., v. Ohio Life and Trust Co.*, 1 Disney, 827, 332, 333. The reason is that it is his right to see that he obtains what he has contracted for, without being responsible for the means

and instruments which are left to the selection and under the control of the contractor. Thompson on Negligence, 913.

In the course of the trial a city ordinance, regulating the granting of permits for excavations in public streets and prescribing that openings or areas should not project more than four feet, was offered and excluded. The ordinances, however, that such excavations should be unlawful without permits, and that they should be lighted at night, were admitted. But it has been held that while a city council may, by ordinance, regulate the manner in which excavations shall be made, and punish violations of the ordinance by fine, it cannot, by any such ordinance, create a civil liability in a case where none exists by law. Chambers, Adm'r, v. Ohio Life and Trust Co., 1 Disney 327, 336; Clark v. Fry, *supra*. The ordinance excluded was therefore immaterial; it did not affect the liability of the defendant, and the court could not have erred in excluding it.

The testimony of the night policemen, that "along about that time the place was kept in a bad condition so far as guards around the excavation were concerned," did not show notice to the owner. The owner of property may become liable by permitting a nuisance to continue upon his premises, though originating under an independent contractor. Clark v. Fry, *supra*; Thompson on Negligence, 903. But a liability of this sort depends upon notice. Coshocton Road v. R. R., 51 N. Y., 573. The language in Clark v. Fry, *supra*, is if the owner should wilfully allow a nuisance to be created or continued." There was no evidence of any notice to the owner. He was there during the day, but the condition to which the policemen testified was at night.

Judgment affirmed.

Tilden, Hardacre & McMillen, for plaintiff in error.

Campbell, Bates & Bettmann, for defendant in error.

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ATTORNEY AND CLIENT—EXCEPTIONS.

[Hamilton District Court, October 23, 1883.]

EDWARD CARLTON V. E. P. DUSTIN.

1. Where the relation of attorney and client exists, the law will not permit an extortionate contract for compensation for services to be made.
2. If the court has no power to sign a bill of exceptions as presented, it has none to sign an appendix which is a part of the same bill of exceptions.

ERROR to the Court of Common Pleas.

SMITH, J.

The action below was brought upon a promissory note given by the defendant to the plaintiff, for the sum of \$500, payable in ten days after date. The answer of the defendant was first, a denial of liability on the note; second, that at the time the note was given, he was in jail, having been committed by the mayor of Lockland for some offense, and the plaintiff came to him in jail to be employed as his attorney; that the plaintiff made representations to him that his defence required great skill

and labor on the part of the attorney to defend him, and promised to procure bail and only to charge a reasonable fee for his services; that at the time the note was given the plaintiff was in fact the attorney of the defendant, and the note was without consideration. To these various defenses a reply was filed and the case submitted to the court and jury. The jury rendered a verdict for the full amount of the note. A motion for a new trial was made and overruled, and a bill of exceptions was taken embodying all the evidence, and a petition in error filed in this court to review the judgment of the court below.

A preliminary question is raised by the defendant in error, that the bill of exceptions was signed more than thirty days after the end of the trial term. The statute requires that a party taking an exception to the action of the court during the trial, and desiring a bill of exceptions, must have it allowed and signed within thirty days after the end of the trial term, and the entry allowing it must be on the journal of that term.

By an inspection of the transcript it appears that this bill of exceptions was signed and entered as of the trial term; and the endorsement on the back of the bill of exceptions corresponds with the entry on the journal. But the defendant excepted to the signing of the bill of exceptions as therein stated, on the ground that at that time more than thirty days had expired after the end of the term, and the court could not make a *nunc pro tunc* entry of the time of signing, or sign it after that time.

There is appended to the bill of exceptions the statement of the plaintiff's objections, which is also signed by the trial judge as a second bill of exceptions, but the two bills are together and there is only one filing. If the court had no power to sign the bill of exceptions as presented, it certainly had none to sign the appendix, for it was part of the same bill. But there is another answer. What is appended to the bill of exceptions is not the finding of any facts by the court, but simply the statement of counsel of the reason why the bill of exceptions ought not to be signed. There is no evidence either by affidavit or otherwise showing that more than thirty days had elapsed; there is no finding of the court that such was the fact, and being simply the statement of the objections by counsel, it ought not to overcome the recital in the record which states that the bill of exceptions was duly signed, etc., as of the trial term. Therefore we think that objection not well taken.

On the trial of the case, the plaintiff offered the note in evidence and rested. It was a note given by the defendant to the plaintiff for the payment of \$500 in ten days after date.

The defendant then offered himself as a witness and testified that he had been arrested and committed to the jail of Hamilton county, and was advised by parties to employ counsel; that Mr. Dustin was then present in jail, and was recommended to him. Mr. Dustin came and conversed with him, counseled with him, learned the nature of the offense charged against him, and promised to take steps to procure bail to have him released. On the next day he says Mr. Dustin came to him with this note prepared for him to sign for the payment of \$500. Dustin said it was for security merely; that his wife, at whose instance he had been arrested, might not prosecute, and then he (Dustin) would have nothing to show for his fees; that he should charge only a reasonable compensation for his services, and would secure or procure some one to become his bail to release him from jail. Upon these representations of Mr. Dustin he signed the note; but the next day Mr. Dustin failed to obtain bail. The man he applied to was out of town, and for the next three or four

days he failed to procure bail to release him, so that defendant was compelled to employ another attorney, who procured bail for him, and he paid the other attorney \$25 for his services, and gave a mortgage to indemnify the bail thus procured. As soon as he was released, at the instance of the wife, the prosecuting attorney of the county refused to take any steps to prosecute the defendant; he was not prosecuted nor indicted; a divorce suit which had been brought, was discontinued and nothing else was done in the case.

On the trial of this case the defendant called, as a witness, a member of this bar, Mr. Cornell, who had been present and listened to the testimony, who testified he had been a member of the bar for many years, was familiar with the practice in these courts and with the usual charges for professional services. He was asked to state the value of the plaintiff's services for the defendant. To that testimony the plaintiff objected, and the court sustained the objection. To the ruling of the court, excluding that testimony, exception was taken and the case was brought into this court for review.

It is claimed by the plaintiff that there was an express contract evidenced by the note for the payment of \$500 for his services in this matter.

It is claimed, by the defendant, that when the note was given the employment had already commenced; the relation of attorney and client then existed, and the law will not permit an extortionate contract for compensation to be made between the attorney and client when such relation exists.

The rule of law is, that where the relations of attorney and client do not exist, where there has been no such employment, where the parties deal at arms' length and neither requires the protection of the court, they may make such contract as they see fit.

A man may put his own estimate upon the value of his services. He may say he will not be employed as an attorney or in any other capacity, except upon the terms he sees fit. But we think the law is also settled that where the employment has already commenced, and the relation of attorney and client exists, the law will interpose and protect the client against an unreasonable or extortionate contract made with the attorney. Weeks on Attorneys-at Law, section 276; Wharton on Agency, section 577; Downing v. Mayor, 2 Dana, 228; Phillips v. Overton, 4 Hayward, Tenn., 291; Rose v. Mynett, 7 Yerger, 30; Planters' Bank v. Hornberger, 4 Caldwell, 551.

In the last named case the court came to the following result, viz.:

"We, therefore, declare that, in all cases where the relation of attorney and client exists, and it is desired to make further professional engagements:

"First—That it is the duty of the attorney to have the contract (if there be one) clearly and definitely stated and understood, not only in its language, but also in its spirit, legal consequences, and practical results.

"Second—That the means used to obtain the contract be free, not only of fraud, actual or constructive, but also, of any other inequitable consideration.

"Third—That every material circumstance, or fact connected with the execution of the contract, and calculated to inform the client of his rights and responsibilities, be declared to him without reservation.

"Fourth—That the attorney inform himself of all such facts and circumstances which would reasonably come within the knowledge, and which would likely prevent the execution of the contract by the client.

"Fifth—That he does not contract for a greater benefit than his services are reasonably worth with reference to the trouble and difficulties of the particular case, amount involved, either of pecuniary character or reputation personally, etc.

"Sixth—That the *onus* shall devolve upon the attorney to show that the contract was free from all fraud, undue influence, and exorbitancy of demand."

It is obvious that if this note was given at the origin of the employment as part of the original contract, and before the relation of counsel and client existed, then the parties had the right to make whatever contract they pleased; and if there was any valuable consideration for the note, and it was free from fraud and misrepresentations, then the court would not interfere; but if the employment had already commenced and the relation of attorney and client already existed so that the attorney was in a fiduciary relation to the client, then it is material to ascertain whether the contract for compensation for the services was reasonable.

We think there was evidence tending to show that the employment had already commenced, and that the note was given at the time when the relation of counsel and client existed, and if that was so, it was the duty of the court below to receive testimony tending to show the value of the services claimed.

A witness was called for that purpose, and it appears that counsel offered to prove by the witness that the services for which said note was given were not of greater value than \$50.00. That testimony was excluded by the court. We think it should have been received, and it was error to exclude it. We think it should have been received, and under a proper charge submitted to the jury.

It was a question for the jury to determine whether the relation of attorney and client then existed, and if the jury found from the evidence that the employment had already commenced and the relation of attorney and client existed when defendant signed the note, then all the plaintiff was entitled to receive, on account thereof, was a reasonable compensation for said services, and the testimony excluded was important and competent to aid the jury to determine what was a fair and reasonable compensation for such services.

Judgment reversed.

S. T. Crawford, for plaintiff in error.

Dustin, Diehl & McCarthy, for defendant in error.

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INNKEEPER AND GUEST.

[Hamilton District Court, July 17, 1883.]

†ARCADE HOTEL CO. V. E. WIATT.

A person residing in the city came to a hotel at 2 o'clock in the morning and called for a room, which the night clerk promised to give him. He then deposited with the clerk a package containing money, for which he took a receipt, and, without registering his name, left the hotel, returning at 4 o'clock in the morning, when he found the money and clerk had disappeared: *Held*, in an action to recover the money, that he was a guest, and the hotel keeper was liable for the loss.

ERROR to the Superior Court of Cincinnati.

This action was brought by Wiatt, the plaintiff below, against the Arcade Hotel Co., to recover a sum of money claimed to have been deposited by him, while a guest of the hotel company, with its clerk.

The answer denied that he was a guest, or had deposited the money with the hotel company, as claimed.

The case was submitted to the court below, a jury being waived; a large amount of evidence was taken, and the court found for the plaintiff, and assessed the damages for the amount claimed.

A motion for a new trial was made and overruled, a bill of exceptions taken, embodying all the evidence, and a petition in error to reverse said judgment was filed in this court.

The question presented is, whether the judgment below is sustained by the law and the evidence?

The plaintiff's statement is substantially this: He says his business at that time was keeping or managing a gambling house; that on the 14th of October, 1882, about 2 o'clock in the morning, he came to the Arcade hotel for the purpose of passing the night. He went to the night clerk of the house and this conversation took place (I quote from his testimony):

"I said to him, as night clerk, 'How are you fixed for accommodations, to-night?' He says, 'Very good; we have not been doing much since the Exposition.' I says, 'I want a room.' At the time he was busy at the side desk, looking over some books. He says, 'I am engaged now, just making up my night report;' says he, 'I will take your name, and reserve you a good room.' I says, 'Very well.' I then produced a package of money, and said, 'I would like to leave this with you.'"

He further testifies that, having had this conversation with the clerk for a room and for passing the night, he said to the clerk, he had just been eating, and did not wish to go to bed at once, but would go out and take a short walk, and then drew out a package of money, said to contain \$2,100, and handed it to the clerk for safe-keeping, took his receipt for it, and then went out with his friend. He said he did not return until between 4 and 5 o'clock in the morning. When he returned there seemed to be a quarrel between one of the messenger boys and the porter, and there was some confusion. This night clerk had disappeared. Wiatt asked for him, but he could not be found. He made inquiries, but no one seemed to know where he was. Word was sent to the day clerk, who came down stairs into the office. Wiatt made known that he had deposited this money with the night clerk, and drawers were searched to see if it could be found, but it was not there. Plaintiff became very anxious, and Mr. Briggs, the manager, was called, and came down soon afterwards. It was then evident that the night clerk had disappeared for good, and the money also gone. Police officers were immediately sent for and efforts were made to find him by the manager of the house, and by Thomas Emery's Sons, who were large stockholders in the hotel company. He was never found.

The plaintiff immediately made claim against the hotel company for this money. Attorneys were employed, and a correspondence opened with the Emerys, but they refused to pay. Hence this suit was brought. The remaining facts are stated in the opinion.

Perry & Jenney, for plaintiff in error.

Campbell & Bates, for defendant in error.

*For opinion of superior court, see 8 Ohio Dec. R., 570.

For a subsequent decision by the circuit court, see 1 Ohio Circ. Dec., 34. The judgment of the district court, above, was reversed by the Supreme Court. See opinion, 44 O. S., 32.

SMITH, J.

The question in the case, it seems to us, is this: Was this man a guest at the time when this money was left with the clerk? It is a question of fact. It is claimed by the defendant that he was not a guest—that he did not at the time intend to be a guest, as defined in the law books—but came there for the purpose of depositing his money.

There are many suspicious circumstances. He did not register his name. His answer is that the clerk was busy with the register in making up his night account. Again, no particular room was assigned him, but the clerk told him he had a room, and would give him one; that the house was comparatively empty, as it was just after the Exposition. Another circumstance is that though plaintiff says he came there to lodge that night, after leaving the money with the clerk, he went away and did not return until about 5 o'clock in the morning. One answer is that his business was night business, and his time to sleep was by day.

Another circumstance, very much relied upon, is, that he was not a traveler, and at common law, to entitle one to the rights of a guest at a hotel, he must be a traveler or wayfaring man; and many decisions are cited. There is also testimony tending to show that it is a custom among hotels for all persons to register before they are considered guests. But that is not a uniform rule. There is much conflict in the testimony. The statements of Mr. Wiatt are contradicted by Mr. Briggs, the manager, also by Mr. Emery and his clerks, in many matters.

The large amount of testimony in the case is full of contradictions and uncertainties. But there is testimony tending to prove the main fact that the relation of being a guest of the hotel at that time had been established. The court below having found, upon all the evidence, that he was a guest, we think we ought not to disturb that finding. It is one of those cases where the witnesses were subjected to the inspection of the trial judge. All appeared upon the witness stand. The judge had an opportunity of seeing their means of observation, their apparent candor, truthfulness, honesty, intelligence, and could sift the evidence by the appearance of the witnesses themselves.

The question arises then, what is a guest at an inn? Story on Bailments, in giving a definition of an inn-keeper, says, section 475: "The keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation."

In an early case, it was said, the true definition is, "a house where a traveler is furnished with everything he has occasion for while on his way." *Thompson v. Lacy*, 3 B. & Ald., 283.

But in a later case it is said to be "a public house of entertainment for all who choose to visit it." *Wintermute v. Clarke*, 5 Land. (N. Y.), 247.

What constitutes a guest has been determined in numerous cases. The definition found in *Walling v. Potter*, 35 Conn., 183; 9 Am. L. Reg. N. S., 618, is "a person receiving transient accommodation at an inn for which he is charged by the inn-keeper is a guest, and is entitled to the rights of a guest though he be not actually a traveler." And the court in the opinion says, distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country;" and the case of *Wintermute v. Clarke*, 5 Land., 257, is to the same effect.

But in the case of *The Queen v. Rymer*, 2 Q. B. Div., 136, where the defendant was indicted for not receiving a person as guest, the defense that he was not a traveler was held good.

Redfield, J., in commenting on the case of *Walling v. Potter*, in 9 Am. L. Reg., 618, says this distinction exists, that where a person seeking accommodations resides in the same town with the inn-keeper the latter cannot be compelled to receive him, but the rule is very different when the inn-keeper receives a party without objection or without question as to his place of residence. It appears that the plaintiff in this case resided, and had resided for some weeks or months at No. 100 George street, with his wife, and the reason assigned for going to the hotel that night was that his wife was away from home looking after a sick parent.

In *McDonald v. Edgerton*, 5 Barb., 560, the plaintiff handed his overcoat to the bar-keeper and treated some friends at the bar. The overcoat being lost, it was held, under the circumstances of that case, that he was a guest.

In *Hall v. Pike*, 100 Mass., 495, the defendant kept boarders and also transient guests. Plaintiff stopped for several days at the house and set at the table where the regular boarders sat. It was claimed, as a matter of law, that he was not a guest, but a boarder. But the court, Colt, J., giving the opinion, said that whether or not a person was a guest depended upon all the circumstances, and not upon any one fact, and held that the court below rightly decided that he was a guest and not a boarder.

In *Lusk*, 3 Belote, 22 Minn., 468, the plaintiff and his family were stopping at a hotel. Plaintiff's family were regular boarders. He himself came there to visit them, and when there would stay a week or so at a time. While there his room was broken into and his watch and his wife's jewelry stolen at the same time. The question arose, was he a guest or a boarder. The Supreme Court of Minnesota held that he was a boarder as to his family and the property of his wife, but a guest as to his watch. He was allowed to recover for his watch, but not for his wife's jewelry.

In *Berkshire Woolen v. Proctor*, 7 Cush., 417, the plaintiff, who lived in Berkshire county, Massachusetts, went to Boston to attend a trial in the circuit court of the United States. He brought with him his witnesses and stayed at a hotel in that city, and as the trial lasted several days, he made an arrangement with the hotel proprietors to board by the week for himself and witnesses. Whilst there his money was stolen from his trunk. The question arose whether he was a guest or a boarder. In the opinion given by Fletcher, J., it was held that the jury being properly instructed, and having found that he was a guest, that finding should not be disturbed.

I cite these various cases for the purpose of showing that whether or not the party is a guest, and is entitled to the privileges of a guest, does not depend upon any one fact, as to his residence, how long he may stay, or whether the price of board is previously agreed upon, but all the facts and circumstances are to be considered in each case.

In *Schouler on Bailments*, 256, it is said: "To lay it down on the whole who should be deemed a guest in the common law sense is not easy; and here the facts in any case must guide the decision. Commonly, such a party is the temporary sojourner who puts up at the inn to receive in due course its customary lodging and entertainment; and so long as one keeps this transient character, he may well be so presumed. And yet the decisions show us that neither the length of one's stay, nor his place of permanent abode, nor the distance he may have traveled, nor his final destination nor any special modification of the inn rates, nor the method of payment can alone conclude the question. But all such circumstances enter as material into the proof."

As it is a question of fact, whether or not the relations of guest and inn-keeper was established at the time and the superior court has so found this fact for the plaintiff, that finding is not so much against the evidence that we would be justified in disturbing it.

There is another consideration, we think, ought not to be overlooked in this case in determining whether defendants are liable. It appears from the testimony of Mr. Briggs, the manager, that Sexton, the night clerk, had been there but some four or five days, and was employed to fill this responsible position as night clerk of the house with very little information or inquiry as to his character. He says that Sexton was a stranger to him, that he employed him upon the recommendation of his bar-keeper at the Palace Hotel (Mr. Briggs was manager of both hotels), and all this bar-keeper knew of him was that he had kept a saloon in Columbus. Upon this information, apparently, Mr. Sexton was appointed as the agent of the Arcade Hotel Co., to receive guests during the night, say from 12 to 6 o'clock, to assign rooms and receive whatever they wished to deposit, according to the custom of hotels.

It does seem to us that there was not the highest degree of diligence, or care, or caution, exercised in the employment of this night clerk. He soon made known his true character by getting hold of the money and leaving.

The point also is made that this money, which was claimed to have been left, was money which had either been received or was used in a way contrary to the regulation of the statute. That may be true, but the character or business of the plaintiff is not in question here. It may affect his credit as a witness, but that has all been passed on by the court below. Whatever may have been his occupation, if he came there as a guest, and did in fact deposit this money with the defendants as a guest, and it was stolen by the defendant's clerk, we see no alternative but to hold them responsible, for the night clerk was the agent of the defendant in receiving the money.

Another question was raised in the brief of counsel, that the court erred in admitting a question in Holloway's testimony.

The answer to that is, it does not distinctly appear from the bill of exceptions which was the question objected and excepted to. It seems that a certain question was put, and again put in a different form, and the objection was made to that, and the court apparently sustained the objection to the question as last put; then, the record says, the question was repeated. Whether it refers to the first or second

question does not appear by the bill of exceptions. The first question is not objectionable, and the answer is not objected to.

It seems to us, therefore, after a very careful reading of the testimony in the case, and examining the authorities and briefs, that notwithstanding the suspicious circumstances which appear in the case, there is not sufficient reason to justify us in reversing the judgment.

Judgment affirmed.

CONTRACTS.

320

[Hamilton District Court, October 23, 1883.]

CINCINNATI COAL AND COKE CO. V. THOS. J. STEPHENS ET AL.

Where a written contract was entered into to furnish defendants with a yearly supply of coal from August 2, 1880, and at the expiration of that time only 17,000 bushels were delivered, an oral agreement to extend the time of delivery, unsupported by a consideration other than that mentioned in the written contract, will not support an action for the delivery of the remainder.

ERROR to the Court of Common Pleas of Hamilton county.

MOORE, J.

The petition filed in the court below, alleges that on the — day of July, 1881, Stephens & Bro. entered into a verbal contract with the Cincinnati Coal & Coke Co., whereby the company agreed to deliver 2,900 bushels of coal, in such quantities and at such times as the said Stephens & Bro. required, at any time prior to October 1, 1881, for the sum of nine cents per bushel; that prior to September 2, 1881, the coal excepting 1,600 bushels was delivered and paid for; that the company then refused to deliver the remainder unless they were paid sixteen cents per bushel; that Stephens & Bro., between September 2d and October 1, 1881, were compelled to pay in open market, sixteen cents per bushel for 1,600 bushels, and asks a judgment for the difference, the sum of seven cents per bushel, amounting to \$112. The Coal & Coke Co. filed a general denial, and on the trial of the cause the plaintiffs, to maintain issues on their part, introduced in evidence the following written agreement:

"Cincinnati, August 2, 1880.

"We agree to furnish Messrs. Stephens & Brother, the manufacturers of Camp Washington, Hamilton Co., Ohio, Cincinnati, their yearly supply of coal, not to exceed (20,000) twenty thousand bushels of second (2) pool Youghioghny lump coal, seventy-two (72) pounds to the bushel, at nine (9) cents per bushel, or whatever portion of above 20,000 bushels they may wish in Youghioghny nut coal at eight (8) cents per bushel (72 pounds to a bushel). To be delivered at our elevator at the foot of Freeman street, Cincinnati, O. Terms, cash on the first of each month for what coal has been delivered in the preceding month. Contract to commence from this date.

"Cincinnati, Coal & Coke Co.

"F. G. Hengehold, Supt.

"Stephens & Bro."

Further testimony was introduced to show that a few days prior to the date of the expiration of the year named in the contract, Thomas J. Stephens, one of the firm of Stephens & Bro., called at the office of the Coal & Coke Co. and stated there were some three or four thousand bushels of coal coming to him under his contract, and that he would agree that the time for delivery of the same be extended until the first of October following.

This appeared to be an act which tended to accommodate the Coal & Coke Co. and they accepted. At that time no other conversation was had or arrangement made between the parties.

During the month of August, the company delivered about 1,700 bushels of coal and then refused to deliver any more, giving as a reason that they had discovered that the written contract of August 2, 1880, which expired on the 2nd day of August, 1881, provided for the delivery of the annual supply of coal to Stephens & Bro. from the date of the contract, not to exceed 20,000 bushels and not for the delivery of 20,000 bushels whether needed as an annual supply or not, and that the year had expired. The evidence shows that the contract was not before the parties at the time of the agreement to extend the time for the delivery of the coal, nor was any reference as to its construction made thereto by either party.

The court in substance instructed the jury that if the parties made a mistake as to the construction of the contract and not as to the material fact; if both parties agreed to the construction of it, for example, that there were 3,000 bushels due, they were bound to carry out that construction, although one of the parties became satisfied and was in fact right in being of opinion that they were not bound to furnish the 3,000 bushels under the contract. To the charge of the court as indicated, the defendant excepted, and the jury having rendered a verdict for the full amount claimed, the defendant filed his petition in error in this court asking a reversal of the judgment.

The court construed the contract to be a contract for the delivery of a year's supply not to exceed 20,000 bushels, and charged the jury that if the party made a verbal agreement shortly before the expiration of the written contract to extend the time for delivery although they may have been mistaken in the construction of the written contract, they are bound by it.

We fail to discover a consideration for the promise or obligation upon which suit is brought. The record does not show that there was either an abandonment, dispute or compromise as to the terms of the contract, or that the new agreement was based upon a valuable consideration. The testimony develops the fact that the real contract between the parties is the contract of August 2, 1880, and that no other contract based upon a consideration was ever entered into between the parties. The transaction set out by the plaintiffs in their petition is a matter growing out of an extension of time under the written contract. If at the time of making it the parties had the written agreement before them, and to settle a dispute or questionable construction of its terms they then made a verbal contract, plaintiffs might sustain an action. The defendants have a right to rely upon a strict construction of their written contract, unless changed or modified by agreement.

Judgment reversed.

Baker & Goodhue, for plaintiffs in error.

O'Conner & Glidden, for defendants in error.

LUNATIC—GUARDIAN.**321**

[Pickaway District Court, May Term, 1883.]

Bingham, Louden and Evans, JJ.

WILLIAM DAVISON V. T. C. TIPTON, GUARDIAN, ETC.

1. Notice to a lunatic of an application to the probate court to appoint a guardian is not required.
2. The court may try an application to declare one a lunatic, in part by inspection, and having so tried the case, it being impossible to put such evidence on the bill of exceptions, and the judge below having certified that it was impossible to report the lunatic's answers to questions, the reviewing court will not attempt to examine the weight of the evidence, for it is evident that all the evidence is not in the bill.

Dr. T. C. Tipton was appointed guardian of William Davison, a lunatic, by the probate court of Pickaway county, Ohio, and had accepted said appointment, and had qualified as such guardian.

Thereupon Davison took an appeal to the court of common pleas, where the case was tried before Judge Lincoln. A large number of witnesses were examined, and Davison himself was called before the court and questions were put to him by the judge and the counsel for each side, and he answered, but not under oath.

After considerable deliberation the court found that Davison was a lunatic, and required the appointment of a guardian, and confirmed the appointment of Dr. Tipton.

Thereupon the counsel for Davison took a bill of exceptions, setting out all the testimony and reciting the fact that Davison was examined in person before the court, and further reciting that he made answer to the various questions put to him, but it was impossible to reduce the same to writing.

It should also be stated that at the time of the appointment of the guardian in the probate court, no notice was given to Davison.

Smith & Morris, for Davison.

Page, Abernethy & Folsom, for Dr. Tipton.

BY THE COURT:

We think the statutes of Ohio do not require notice to be given to the lunatic at the time of the appointment of the guardian. This point, we think, is settled by the case of *King v. Bell*, 36 O. S., 460, and *Shroyer v. Richmond*, 16 O. S., 455.

We are of the opinion that we cannot consider the bill of exceptions, because it is apparent from the statement in it that all of the testimony which was before the court of common pleas is not before this court. It appears from the bill that the court of common pleas proceeded to try this case in part by inspection. This is a mode of trial recognized at common law. Section 6, Dane's Abridgement, chapter 182, article 5.

At common law in cases of infancy, lunacy, and certain other cases, the court might proceed to try the case by inspection, and also by the testimony of witnesses. Trial by inspection has been recognized by the Supreme Court of this state, *Gray v. State*, 4 O., 353, where a colored man was inspected by the court, and he was determined to be "of a shade of color between the mulatto and white." Now, the court

in this case personally examined Davison, and heard his answers to questions. It is certified by the judge of the court of common pleas, that it was impossible to report his answers, as we suppose from their incoherence or absurdity. Now, the appearance of Davison, his conduct in presence of the court, and his answers, were strong facts and may have determined the decision of the judge. They might be more convincing than the testimony of a large number of illiterate witnesses. Perhaps the court decided this case altogether upon the appearance and conduct of Davison in their presence, and which they had a right to do.

All this portion of the case is not in the bill of exceptions. It would be doing injustice to the court below to reverse his judgment on a portion of the testimony only.

Judgment of common pleas affirmed.

321

INDICTMENT—BURGLARY.

[Pickaway Common Pleas, 1883.]

STATE OF OHIO V. WAT WILMORE.

1. Under an indictment for breaking into a warehouse with intent to steal, proof that defendant entered simply to destroy a kit of gambling tools in revenge for having been cheated in gambling, does not sustain the indictment.
2. There can be no larceny of implements made and kept solely for gambling, for there is no property in them, although the material of which they are made might have a value.

The defendant was indicted in the court of common pleas of said county for burglary, several years ago, and as a somewhat novel question arose on the trial of the case, it is perhaps worth reporting.

The indictment charged that the defendant "in the night season willfully, maliciously, forcibly and burglariously, broke and entered into a certain storehouse of one Robert Wright, with intent feloniously and burglariously to steal, take and carry away the goods and chattels of said Robert Wright."

The testimony showed that the defendant broke and entered a gambling house for the purpose of breaking up and destroying a valuable "kit of gambling tools" worth about \$300, and that the purpose in doing this was revenge for having been cheated in gambling, and not to steal.

Henry F. Page, counsel for the defendant, made the points:

First. That if the defendant entered the building for the purpose of destroying property, and not to steal, the indictment was not sustained.

Second.—That there could be no property in a "kit of gambling tools" made and kept exclusively for the purpose of gambling. That there could be no property in a burglar's tools. That no action could be maintained for such tools or implements. That the law did not recognize property in such things. The suggestion that the materials of which such tools are composed were valuable was not entitled to weight, as the burglar or gambler would not be permitted to describe the tools

as so much wood, iron, steel, or other material, and leave out of sight the fact in regard to the purpose for which they were made and used. To do so would be like the suggestion of Sergeant Circuit, when he directed his clerk to file a bill in the name of Kit Crape v. Will Vizard for an equal partition of plunder between two highwaymen. Said he: "The charge must be made for partnership profit, by bargaining lead and gunpowder against rings, watches, jewels and money, in Epping Forest, Hainslow Heath, and other parts of the Kingdom." See Foote's farce of the "Lame Lover."

The judge charged the jury: That if the defendant broke and entered the said storehouse for the purpose of destroying property and not to steal the same he could not be convicted under this indictment, and, further, if the things taken or destroyed were a "kit of gambling tools," or other implements made and kept solely for the purpose of gambling, there could be no larceny of such things, and the defendant must be acquitted.

The jury found the defendant not guilty.

JOINDER OF CAUSES—RENT—ATTORNEY.

339

[Hamilton District Court, October 30, 1883.]

JOSEPH O. COUNTER v. JAMES S. ARMSTRONG.

1. The joinder of causes of action for rent under a lease, and for recovery of possession as upon forfeiture of the lease, is a misjoinder.
2. The condition of forfeiture being, that if any installment of rent remained unpaid by the space of thirty days after due the lease should be void, the day for making the demand was the last or thirtieth day; if that fell upon Sunday, the following Monday was the proper day. The demand being by agent, it was not essential that his authority should have been in writing.
3. The authority of an attorney-at-law, in the conduct of a suit, does not extend to remitting a part of the claim.
4. Rents collected by a receiver in an ejectment suit are not, as such, the money of the plaintiff.

AVERY, J.:

The proceedings and judgment, and the quantity of exceptions taken in the court of common pleas, are somewhat unusual.

The petition was for the recovery of real estate upon the forfeiture of a lease, with damages and mesne profits; for recovery of rent under the lease; for an injunction against waste, and for a receiver. There was a demurrer for misjoinder of causes of action; but two days before the demurrer was passed upon, the record shows the answer to have been filed. The court then overruled the demurrer, allowing ten days to answer; but without other answer or entry in relation thereto the defendant went to trial on the existing answer.

Among the causes of action that may be joined under the code, are claims to recover real property, with or without damages for the detention thereof, and the rents and profits of the same. Section 5019, Rev. Stat. But rents and profits in this connection are held to refer merely

to the time possession is wrongfully withheld; the action being the code substitute for trespass for mesne profits. *McKinney v. McKinney*, 8 O. S., 423, 429; *Livingston v. Tanner*, 12 Barb., 481, 486; *Larned v. Hudson*, 57 N. Y., 151, 153; *Woodhull v. Rosenthal*, 61 N. Y., 382, 394; *Lord v. Dearing*, 24 Minn., 110, 113; *Dobbins v. Baker*, 80 Ind., 52, 55; *Harrall v. Gray*, 12 Neb., 543, 544. Causes of action arising out of the same transaction, or transactions connected with the subject of the action, may also be joined; but for rent under the lease the cause of action was upon the lease, while for the possession it was upon the forfeiture of the lease. The effect of filing the answer, however, was to withdraw the demurrer. Whether it was overruled for that reason, the reason at all events is sufficient of record.

The lease was from one Lawrence to Clark, of a lot 50 feet in front on the west side of Sycamore street, in Cincinnati, between Third and Fourth, running through to Hammond street, for ninety-nine years renewable forever, executed in 1839; the fee being afterward conveyed to the plaintiff, and the leasehold having been assigned by deed to one Brooks in 1868, and by Brooks to the defendant for one dollar on the 20th of December, 1880. It was admitted that he had been in possession ever since and had paid no rent.

The rent reserved was in semi-annual installments of \$375, payable on the first of January and July, with a condition that if any installment or part thereof remained unpaid "by the space of 30 days" after it was due, the lease should be void, and the lessee or his heirs and assigns might re-enter.

Exception is taken that this was a condition limited to non-payment of rent by the lessee, and that it only entitled the lessor to re-enter so long as the possession was in the lessee—counsel call it a personal condition. At common law the grantee of the reversion could not enter for a condition broken, since to prevent maintenance the common law did not allow the assignment of a title of entry or re-entry. *Co. Litt.* 214a. But this was a reason founded upon a state of society which does not exist in this country. 4 Kent., 447; and see *Hall v. Ashby*, 9 O., 96; *Borland v. Marshall*, 2 O. S., 308, 314, *Thurman, J.* And it was never held that the condition was extinguished by assignment of the lease. Being annexed to the term it must necessarily attend upon the term.

The non-payment for which the forfeiture was claimed was of the rent payable July 1, 1881. The demand made was by authority of the brother of the plaintiff, who held a power of attorney from him. Exception is taken that it did not confer power to make the demand. But it was "to rent any and all real estate to collect the rents past due or to become due, and to do everything necessary for the proper administration of said property." It would be unreasonable, we think, to construe this as not including power to demand the rent—the condition of forfeiture was a means of securing payment. Exception again is taken that the demand was not made by the brother of the plaintiff. But it was under authority from him. Express power was given in the instrument itself to substitute an attorney or agent; and for the purpose of a demand, the tenant not requesting production of the authority, we see no reason why a writing or a seal should have been required. An agent making demand is not bound to show his authority unless required to do so. *Roe v. Davis*, 7 East, 368. The only authority needed was to receive the rent. Actual entry into the land was not necessary. *Sperry v. Pond*, 5 O., 388, 390; *Austin v. Cambridgeport*, 21 Pick., 215; *Co.*

Litt. 202a, Hasgrave's note (8). There is a further exception that the power of attorney to the brother was not proved. But the signature of the plaintiff was testified to; and the testimony being that the subscribing witnesses were persons in Paris, France, proof by them was dispensed with. 1 Greenl. Evidence, section 572.

Exception is taken to the amount of the demand. It was for \$375, the rent to July 1, 1881; whereas, two days prior to the demand, suit for the same rent had been begun before a Justice of the Peace, and was pending, and to bring it within the jurisdiction, \$75 of the amount had been remitted: There is no question of the rule that the demand under a condition of forfeiture must be of the precise rent due; and that a penny more or less will be ill. But the suit brought before the Justice was afterward discontinued. The attorney-at-law who brought it had only the authority of his general employment. This was insufficient, to reduce the amount due by remitting part. *Card v. Walbridge*, 18 O., 411, 417; *Wilson v. Jennings*, 3 O. S., 528, 539; *Shores v. Caswell*, 13 Met., 413; *Kellogg v. Gilbert*, 10 Johns., 220; *Lambert v. Sandford*, 2 Blackf., 137.

Exception is taken to the day of the demand that it was Sunday. The rule being that the demand must be on the precise day when the rent is due and payable by the lease to save the forfeiture, as where, under a condition that "if the rent be unpaid by the space of 30 or any other number of days after the days of payment the lessor may re-enter," a demand must be made on the 30th, or other last day (Co. Litt. 202a); the exception here is that the 30th day was not the 31st of July, which was Sunday, but was the following Monday. We think that as the tenant had until the last day, the demand was required to be on Monday. *Barrett v. Allen*, 10 O., 426. But, the agent undertaking to make the demand, while he made it on Sunday, also made it on the following Monday; and indeed, too, took the precaution to make it, each time with the same formality, upon the preceding Saturday. The exception to the charge of the court submitting to the jury whether due demand was made on the 31st of July, was not excepted to at the time—no attention seems to have been paid at the trial to the point now insisted on. The answer of the jury to the interrogatory propounded whether it was made on the 31st of July, was not a finding that it was not made as well on the other days.

Exception is taken to the place of the demand. The house, upon the premises, fronting on Sycamore street, was a double house rented out in rooms to sub-tenants. An open hallway, with a staircase closed in by a door to the upper stories, divided it in the middle, on each side of which fronting the street was a store. Upon Hammond street, in the rear, was a livery stable. The agent making the demand entered the hallway from Sycamore street, and finding no one there to make a demand of, turned to the right and made it of the tenants of the ground-floor on the north side of the hallway, and then in a similar manner made demand of the tenants of the ground floor on the south side of the hallway; and then, perhaps, with a view to cover the ground entirely, went around the block to the stable on Hammond street and made demand there. But no demand was made at the door that closed in the foot of the staircase, or at the entrance to the hallway; and in making the demand, that he did, of the ground floor tenants, the agent went inside their doors. This constitutes the exception taken. The rules of the common law are ancient and curious upon the subject of demand. I'

must ever be made at the most notorious place on the land. "Therefore, if there be a dwelling house upon the land, the demand must be at the front or fore door, though it is not necessary to enter the house, notwithstanding the door be open." 1 Williams' Saunders, Ed. of 1871, p. 435. But the door of a dwelling house is that which is closed against strangers; and neither the open hallway nor the door that was common to every one using the staircase answered this description. At the same time, as only one demand was required, it could not have been necessary to make it at the room doors of the several sub-tenants. As made, it was at the most notorious place upon the premises, being at the stores; and as to being inside the door, the rule that it is "not necessary to enter notwithstanding the door be open," does not prohibit entering.

Exception is taken to the moment of the demand. But it was about fifteen minutes before sunset, and after making it the agent waited at the premises in readiness to receive the money until the sun had set. This was a compliance with the exigence of the rule that the tenant has until the last moment to pay, and that the demand must be deferred until only time enough is left before sunset for conveniently counting, paying and receiving the money. *Smith v. Whitbeck*, 13 O. S., 471, 482; *Startup v. McDonald*, 6 M. & Gr., 624; 626, Parke B.

There were a number of exceptions to the charge, involving the same points that are made upon the evidence; and exception was taken to refusing to adopt the language of special charges asked by counsel. *Bond v. State*, 23 O. S., 349, 356. There was a refusal to charge that the demand must have been with the intent and for the purpose of taking possession. Such intent and purpose could have been necessary only upon actual entry. *Doe v. Williams*, 5 B. & Ad., 783; *Doe v. Woodrolfe*, 10 M. & W., 608.

The verdict was for the installment of rent demanded with interest, and for \$1,000 mesne profits; the jury at the same time finding the facts specially upon the question of the forfeiture. Judgment was entered for the rent, and in default of payment, for the possession; but the receiver who had been put in possession, against the defendant's objection at the beginning of the suit, having in his hands, of collections from the sub-tenants, \$392 after expenditures for taxes, repairs, etc., the court entered a remittitur of the \$1,000 mesne profits, and ordered the amount, in the hands of the receiver, paid to the plaintiff, overruling the claim of the defendant to select it as exempt under the homestead laws. *Rev. Stat.*, 5441. The correctness of this ruling depends upon the question for whom the receiver held the money. If for the defendant, although in the hands of an officer of the court, the right of exemption extended to it. *McConville v. Lee*, 81 O. S., 447.

The contention for the plaintiff is, that the judgment for possession was conclusive of the right of possession from the time of forfeiture; and that the right to the rents followed the right of possession. But it was not in the nature of a lien upon the rents. Before judgment, the plaintiff was not entitled to possession in fact; and although a receiver had been appointed, meanwhile, it could not have been for transferring the possession by anticipation. The defendant had the right to the verdict of a jury upon that question. *Emerson's Appeal*, 95 Penn. St., 258, 262; and see *Thompson v. Sherrard*, 35 Barb., 591, 595; *Guernsey v. Powers*, 9 Hun., 78; *Burdell v. Burdell*, 54 How., 91. Possession in fact, as against the plaintiff, left the defendant still liable, but not

or the specific rents. The liability was as in trespass for damages, or as for use and occupation waiving the trespass. The ground of liability was inconsistent except with leaving the defendant in possession. This was illustrated by the verdict for \$1,000 as mesne profits. The defendant was freed from this liability by the remittitur; but the cause of action was not changed. The plaintiff did not thereupon become entitled to the money held by the receiver. The only claim he could have upon the rents received was in the nature of damages; and remitting the verdict relinquished even that. In any point of view the rents, as such, were not money of the plaintiff.

Order for payment of the money in the hands of receiver to plaintiff reversed and payment to the defendant ordered.

Judgment otherwise affirmed.

S. M. Johnson and Wm. Disney, for plaintiff in error.

Hoadly, Johnson & Colston, for defendant in error.

NUISANCE—INJUNCTION.

342

[Hamilton Common Pleas.]

GEORGE BARKAU V. JACOB KNECHT ET AL.

1. A trade or business though in itself lawful, may be enjoined if in conducting it, a nuisance is created thereby, injurious to the health and comfort of an adjoining owner.
2. An action at law for damages not a prerequisite.
3. An adjoining proprietor residing upon his property with his family thus injured sustains a damage different in kind from the public at large, and may maintain an action to enjoin in his individual right.

JOHNSTON, J.

The case of George Barkau against Jacob Knecht and others was submitted to the court on a motion to dissolve a temporary restraining order. The plaintiff alleges in his petition that he is the owner of three acres of land out on West Fork, near Cummins ville, and resides upon it with his family, and has lived there for several years; that in August last, defendants erected upon a lot of ground adjoining plaintiff's, a building in which since the first of August they have been conducting the trade or business of rendering the bodies of dead animals, tripe and offal and other matter for the purpose of manufacturing an article known as fertilizer. He alleges that in carrying on this business noisome odors and stenches arise from this establishment so offensive in character as to render the occupancy of his property by himself and family inconvenient, annoying and unhealthy, and greatly to the injury of his property. He prayed for a restraining order, and that upon the final trial a perpetual injunction might be entered. This is not a disposition of the case upon its merits, but simply as to whether or not the temporary restraining order should be dissolved. An answer in the case has not as yet been filed.

There was much oral evidence introduced. Perhaps fifty witnesses in all testified upon the question whether or not the business as conducted by these defendants alongside the property of the plaintiff was

offensive and unwholesome. I think the clear weight of the evidence is that the business that has been conducted up to the time of the granting of this temporary restraining order, has been of a character to constitute, in law, a nuisance to the plaintiff and his family and an injury to his property.

But other questions are to be considered before passing finally upon this motion. It is claimed on the part of the defendants that there has been acquiescence on the part of the plaintiff to such an extent that he is estopped or has no right to complain. It is further claimed that while it may be true that these odors are annoying to the neighborhood, that he cannot maintain this action for the reason that he is but one of the public, that he has shown no special injury to himself, and therefore cannot maintain an action in his individual interest. It is further claimed also that he is not entitled to the extraordinary remedy of injunction for the reason that there is an adequate remedy in the due course of the law, and further that a court of equity will not listen to his complaint until he has established his legal rights in an action at law for damages.

Commencing with the last proposition first—that a party cannot maintain an action of injunction until he has established his legal right in an action at law. I think it well settled in the case of *Goodall v. Crofton*, 33 O. S., 271, that where the nature of the injury to property is of such a character that it may be fairly estimated in money an injunction will not be granted. The injury in that case was a diminution in the rental value of the property. Where health is affected the law is different, for on page 275, the court say: "We think the plaintiff below upon the showing made in his petition and by his proofs, has an adequate remedy at law. There is no complaint that the alleged nuisance in any degree interferes with his health or that of his family, that it works a personal inconvenience or discomfort."

Now in this case the evidence shows that the injury complained of is one that affects the occupancy of the property by the plaintiff and his family, that the stenches arising at times are of so offensive a character that he is compelled to close the windows and doors in warm weather; that it at times sickens the stomach; that it is at times impossible for them to eat their meals with any degree of comfort.

The evidence clearly shows that the injury goes farther than the question of property, that it affects the comfort and the health and the convenience of the plaintiff and his family in the occupancy of his property; and wherever these facts appear, courts of equity have universally held that the party is not obliged first to bring his action at law for the purpose of establishing his legal rights, but may proceed at once in a court of equity. It is hard to tell, it is impossible to measure or estimate what the damages are that a husband, a wife or a child may suffer from being subjected to a blighting nuisance of this kind; it is impossible to tell whether it will shorten their lives one day or one year, and for that reason a court of equity will in the first instance grant relief.

Now it is claimed if the odor arising from this establishment be a nuisance, that he does not suffer anything more than his neighbors or other persons squares away; that even if odors do arise from the conducting of this business, that the plaintiff only endures the same kind of a disagreeable smell that his neighbors and the public generally are called upon to endure, that perhaps he may have to endure more of it than persons who are farther away, but the difference is only in degree and that there is no difference in kind. It is the law that where a nuisance

exists from any cause if an individual undertakes to abate it by a suit in equity, he must show that he sustains some injury from its effects, not common to the public at large, for otherwise it becomes the duty of the public prosecutor to take charge of the case and abate it as a public nuisance; where a property holder or a taxpayer or citizen simply is put to the same inconvenience and annoyance that the public generally is, he cannot maintain an action in his own interest to abate or enjoin the nuisance.

Now the question arises in this case upon the evidence whether or not this plaintiff does sustain an injury that is not shared in by the public, whether this nuisance, these offensive smells, are simply greater in degree and produce injuries only of the same kind as that endured by the public generally. I apprehend that the community simply that live about this establishment do not, in contemplation of law, constitute the public at large. I can very well see why if there be a public street along in front of this establishment, and perhaps there is, that a person traveling from College Hill by there every day to and from his business, when he gets opposite the establishment, or within the radius of the odors that go out from it, that he may suffer inconvenience; it may be unpleasant for him to pass by it, it may sicken him, yet living at College Hill he sustains no injury in his property, his property rights have not been invaded in the least; his health while residing upon his property and using it in an ordinary way is in no wise affected by those odors. That person might well be said to be a member of the public at large and when he comes within a sufficient distance of this establishment to detect these unwholesome smells, he is simply enduring the same inconvenience that all the other members of the public at large in passing by in that neighborhood endure, and would not be heard in a court of equity.

This, however, is the case of an individual who bought property and improved it years before the establishment of the defendants was constructed. He is not simply affected by these offensive odors as he passes from the city of Cincinnati out to some point beyond, but he is subjected to the inconvenience arising from these odors, day after day; he is obliged to endure these odors while he is seeking the ordinary enjoyment of his property, and that is an inconvenience that is an annoyance to him and his family that does not attach to a member of the general public at all. I think this principle was recognized in our Supreme Court in the case of *Hatch v. Indiana Ry.*, 18 O. S., 92, 123. In that case Hatch claimed that by the abandonment of the Whitewater Canal and the construction in lieu thereof of The Cincinnati and Ind. Ry., that access to his farm which lay upon both sides of the canal and afterwards upon both sides of the railway was injured thereby. It was sought to be claimed as against Hatch that the inconvenience he was put to in crossing over a bridge that had theretofore spanned the canal and afterwards spanned the railway, that in going from one part of his farm upon one side of the railway to his farm or property on the other side, and then being obliged to cross over this bridge, that he suffered thereby and was put to no inconvenience different from that sustained by the public at large, and therefore he ought not to be heard. The court below so found, and the Supreme Court say this: "In this holding we cannot but think that it erred. As a matter of fact is the convenience one which the plaintiff suffered in common with the public at large? Let it be remembered that the plaintiff was at first the owner of an entire tract of land and that it was, first by the canal, and then by the railroad, cut

asunder. His tract being thus cut into two parts, his means of access from one to the other were by a turnpike and county road, the former running through and the latter alongside of his original tract, and the fact assumed is, that these means of access from the one part of the tract to the other were made inconvenient and dangerous by reason of the cuts and embankments, one or both, made by the railroad. It seems to us this case differs from that of a member of the public at large in this, that the latter is only inconvenienced in a matter of ordinary travel, as in the case of *Jackson v. Jackson*, 16 O. S., 163, while the plaintiff in addition to this is subjected to inconvenience and danger in the ordinary use of his property, which involves the necessity of constant and necessary passage by him from one part of it to the other."

Now I can well see how that applies to this case. He is not a member simply of the public at large who is obliged to pass by this place perhaps twice or three times a day to points beyond where these smells may not be detected, but he is situated, this establishment is located so near his property, that in its ordinary use as a dwelling he is obliged to endure these odors and these annoying smells continually, and thus the inconvenience suffered by him is different in kind from the inconvenience sustained by the public at large. It invades his property rights. Now although this might amount to a public nuisance, yet there is very high authority for holding that an individual who sustains an injury like this may maintain an action against its continuance upon the ground that it is a private nuisance as to him. That principle was laid down in the case of the *State of Pennsylvania v. Wheeling and Belmont Bridge Co. et al.*, 13 Howard. The state of Pennsylvania in that case did not commence the action for the purpose of protecting any of her sovereign rights as a state in the Union or for the purpose of indicating the rights of her citizens on account of any sovereign rights that belonged to them as citizens of that commonwealth, but the action proceeded purely upon a question of private interest as a state, in this, that large improvements had been made by the state by the way of roads, canals and railways which terminated upon the Ohio river and its tributaries, and that in the construction of this bridge across the Ohio at Wheeling she sustained pecuniary injury, and it was to abate this nuisance and prevent the construction of the bridge that the action was instituted. The defense there among others was that the injury that the state sustained, was simply an injury in common with the people who navigated the waters of the Ohio river from its source to its mouth, and therefore the state of Pennsylvania no more than an individual could maintain the action. I read a few paragraphs of the syllabus: "An indictment against a bridge as a nuisance by the United States could not be sustained, but a proceeding against it on the ground of a private and irreparable injury may be sustained at the instance of an individual or a corporation, either in the federal or the state courts."

"In case of nuisance, if the obstruction be unlawful and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery."

Again, "where there is a private injury from a public nuisance a court of equity will interfere by injunction."

Turning to the text on page 566. Justice McLain, in announcing the opinion, says: "But a public nuisance is also a private nuisance where a special and an irremediate mischief is done to an individual. In the case of the *City of Georgetown v. Alexandria*, 12 Peters, 98, the court

say: "The court of equity also pursuing the analogy of the law, that a party may maintain a private action for special damages even in case of a public nuisance, will now take jurisdiction in case of a public nuisance at the instance of a private person where he is in imminent danger of suffering a special injury for which, under the circumstances of the case the law would not afford an adequate remedy. Where no special damage is alleged an individual could not prosecute in his own name for a public nuisance." This doctrine was laid down in *Cunning v. Lowerre*, 6 Johns. Ch., 439. In that case an injunction was granted and the chancellor said "that here was a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance but worked a special injury to the plaintiffs." In *Sampson v. Smith*, 8 Simmons, 272, it was held "that injury to the plaintiff's trade was sufficient to give jurisdiction against a public nuisance, and that it was not necessary to use in such a prosecution the name of the attorney-general, and this was on a bill for the discontinuance of works already erected. Indictment is not the remedy at law that the property owner must invoke. He cannot commence or control that action. That is the remedy of the public—the people, not of the individual. In *Tiffin v. McCormack*, 34 O. S., 638, the principle is recognized that where in the conducting of a business a nuisance is created that affects the property of an adjoining proprietor, that it would be no defense to show that the business is conducted with ordinary care, the adjoining proprietor will still be entitled to protection even to the extent of compelling the party who thus causes the injury to abandon his trade altogether, at least abandon the conducting of it in that manner which is offensive to the adjoining proprietors, which perhaps in a business like this might amount to the abandonment of the trade altogether. Neither will the fact that it is a lawful business protect a party. The only other question remaining is, whether or not the plaintiff has lost his right to maintain this action by acquiescence, that in a measure is a question of fact, a mixed question perhaps of fact and of law. The clear weight of the evidence is, that this business has not long been continued; that it was commenced about August 1, 1883. There was some evidence tending to show that plaintiff being hard by the property complained of, at different times conversed with some of the defendants. There is some evidence tending to show that at different times he said that he did not think the business would be objectionable to him or to the neighborhood, but there was evidence of a very decisive character that neither in those conversations at least or at other conversations had between them, where the question seems to have been mooted as to whether or not it would be a nuisance in the neighborhood, the evidence is quite clear that he was told that it would not be conducted in a manner to be objectionable. Now there is no evidence here to satisfy the court that the course of conduct of these defendants in putting up this establishment was influenced in any way by anything that plaintiff may have said. He at times perhaps told them to what extent they would have to dig the strikewater, or loaned them a wheelbarrow, or perhaps have taken with them a glass of beer, or something of that kind, but there is no pretence that anything Barkau may have said to any of these defendants or their agents influenced their conduct in the least in the putting up of this establishment or in conducting it.

To constitute acquiescence, in the law, a party must in the first place have been fully aware of all the facts and the circumstances; he must

have had an opportunity after being fully possessed of all the facts and circumstances, to exercise his judgment and to assent, and must have intended to do so. Now, as already intimated, there certainly has not been long delay nor has he permitted this work to go on for a long time without any objection. The building was commenced in the spring, the rendering commenced about the first of August, and this suit was commenced some two or three weeks ago; the complaints commenced sometime before the suit. There is no evidence here to satisfy the court that Barkau, after understanding all the facts and after having endured these obnoxious odors indicated to these defendants that they could continue their business there, that it did not injure his property, or that he at any time said anything, while they were constructing the building and before commencing the business of rendering, there is no evidence to satisfy the court that they were induced to go forward and expend their money upon the faith that Mr. Barkau would never object. Such being the findings of the court upon the evidence in this case, it is the duty of the court at least to overrule the motion to discharge the temporary restraining order and leave the case to be disposed of further upon its merits.

M. F. Wilson and John W. Herron, for plaintiff.
Joseph Cox and L. S. Cotton, for defendants.

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STREET RAILWAY.

[Cuyahoga Common Pleas.]

TOM L. JOHNSON v. WEST SIDE ST. R. R. Co.

Where, under proper requirements by city council, the city clerk had advertised for bids for laying down a street railroad track, and plaintiff was the lowest bidder, and defendant was also a bidder, and the council rejected both bids and authorized the defendant to lay the track as an extension of its existing road, plaintiff is not entitled to an injunction against the construction by the defendant and plaintiff not suing as a property holder cannot be heard to question the legality of the extension or to claim that its construction is a nuisance.

INGERSOLL, J.

This is an application for an injunction. Plaintiff bases himself on the ground that, having at a former time—some time, perhaps in 1879—been led by an advertisement that was put forth by the clerk of the city council, to make a bid for laying down a railroad track on a route in certain streets of the west side, beginning at the junction of Pearl street and Franklin avenue, passing along Franklin, around the Circle, through Fulton street to Lorain street, and embracing a certain portion of Lorain street. Having made a bid, as he claims, in accordance with that advertisement, and being really the lowest bidder, and having taken, as he claims, other necessary steps to entitle him to the bid, if it was to be given to any one, the city council saw fit to declare both the bids off, the other bidder having been the West Side St. R.R. Co., the defendant in this action. Although they had previously decided that it was important for the good of the public to have such a road made, and, as

I said, had directed the clerk to advertise for proposals to do the work, yet he says, they declared them both off, and after they had so declared them off they proceeded to pass an ordinance to give authority to the West Side St. R. R. Co. to extend its track over the route in question, under an authority that is given to them to extend street railroads.

The defendants come, and challenge entirely the right of the plaintiff to any standing in court.

Plaintiff does not plant himself in this proceeding upon the ground that he is an owner of land along the line of that road, and that this defendant, The West Side St. R. R. Co., has proceeded to put down a railroad track there which becomes an encroachment or a nuisance upon his premises, or upon his occupancy thereof, and ask for relief on any such ground as that, at all. He plants himself, so far as I understand the petition and the argument that is made here, upon this simple ground; that his rights have been violated in this; that there was an inchoate right upon his part to put a railroad track down there on this route in question, gained by virtue of his being the lowest bidder when the city put forth its proposals for bids and that if the city was going to let any one in there to put down the railroad track, it should not have let in the West Side St. R. R. Co., which was his competitor.

The plaintiff does not say that the city had not a right to reject both those bids. On the other hand, he admits that the city had the right to reject both the bids; and, even if it did it, not in good faith toward him, as he, perhaps, more than intimates in this petition, yet he cannot attack it here in this proceeding. He does not claim any right to do that here in this proceeding. He does not say, "Because of their bad faith, that has given me a right, or has perfected a right which would have accrued to me if they had gone on and decided that I was the lowest bidder. So that I now stand, because of their fraud which they have done, in the position that I would have been in if no fraud had been committed, and therefore I have a completed right." I do not understand that he puts himself on that ground at all. He admits openly in argument, and, I may say, probably, by the case that he has made—that is, he does not say the contrary in the case that he has made—that his right never was perfected to go and put down a railroad there himself.

Now, in that view of the matter, can he ask the court to interfere, and by an injunction prevent this railroad company from exercising its franchises over that road?

A very interesting question is raised here by these pleadings as to what is meant by an extension of a railroad, what is meant really by the building of a new route—a matter that, if I were going to decide, I should want to give more time to than I have had it in my power to give since this case was argued, for, in my view, it is a far-reaching question, that concerns the interests of this city as it is applied here, and of other cities as it is made the general law elsewhere whether a party can, under a pretense of extending his road, start off and branch out on any street it sees fit to—run its road at right angles as far as it has a mind to, and call that an extension of the road. In the view that I have taken, it is not necessary to decide that question.

I cannot see that this plaintiff has any right to stand here in court, because he is not complaining that any actual right of his has been infringed. It is not enough for a party to claim that he has not been dealt with fairly under the moral law for a man to come into court and

ask for relief. There may be some very gross violations of the plainest principles of the moral law that a man might show forth in court, and yet he could not have any equitable relief at all. He must show that some legal right of his has been in some way encroached upon, and in such a way that courts of equity are wont to give relief for it in order to permit him to have the relief that he asks.

Now, here the right never existed for him to put a track down at all; that is plain. He does not claim that he has a right to go there and put a track down himself; but he says, "Because I would have had a right if something more had been done; I am therefore wronged by the tolerating there of the defendant who has not any right to be there." Does that give him a standing in court to complain? I do not know of any equitable principles so widely extending or so recognized by a court of equity as will permit a bill in equity to be filed on any such ground as that—merely that a right would have accrued if the parties had treated him fairly; but they did not treat him fairly, and therefore he asks the court to stop the party in whose favor the city acted indiscreetly and illegally, as he claims, in giving the right to lay the track.

Mr. Russell: We claim that our right accrued under the statute, but that before we could exercise the right there was something more than the statute made mandatory upon the council as a legislative act.

The Court: I cannot in that view consider that a right accrued. What right accrued? No right to put your road down. You had a right, perhaps, in one sense, to go and demand of the council that they should keep good faith with you--the right to go there and complain of them *in foro conscientie*, if a council may be presumed to have any conscience at all that they had not fulfilled their conscientious relations to you. But that does not give you a right to come into a court of justice and ask the court to interpose by injunction. I think the application should be denied.

L. A. Russell, for plaintiff.

Rstep, Dickey & Squire, for defendant.

[Cuyahoga Common Pleas.]

FRANCIS BARTLETT V. CHAS. G. PATTERSON ET AL.

1. Where a person as contractor for the construction of a railroad mortgaged to the president of the railroad company a large amount of property in order to obtain funds to go on with the work, and the mortgagee brings suit to foreclose, sub-contractors who have not been paid and who claim that the contractor was in reality simply the agent of the road, and that the conveyance was only made to get the property out of the way of the creditors, they are not sub-contractors but are chief contractors and have a right to come into the suit to deny the *bona fides* of the mortgage. But they cannot, in this suit ask that the railroad company be made a party and that they have judgment against it as chief contractors. Such a claim requires an independent suit. The code cannot make a new party defendant and settle controversies between it and other defendants and charge it as equitable owner in favor of one whose claim is not in judgment.

2. A court cannot reform a mortgage by inserting two additional tracts of lands merely on evidence that the mortgagor had just previously expressed an intention to include all his lands and had a list of them before the scrivener, and that there is a repetition in the description of two other lots by inserting them twice.
3. Whether sec. 3207, Rev. Stat., and subsequent sections, giving liens on railroads to persons performing labor, etc., on the road means to give such lien to a subcontractor because he has obtained work and labor of others and furnished them upon a railroad, *quere?*

INGERSOLL, J.

This is an action brought by Bartlett to foreclose a mortgage, and also to reform it in some of its particulars, especially in its descriptions of property. Patterson, who had been doing a large amount of work as a contractor upon what is known as the Connotton Valley Ry., it appears from the evidence, wished to borrow some money of Bartlett about the time of the execution of this mortgage, and having in his name the title to certain lots in the county of Cuyahoga, which were remnants of property which he had bought for the purpose of securing his right of way for the Connotton Valley Ry. Co., gave a mortgage of the same to Bartlett for a loan of \$80,000; this loan having been furnished, not by the direct use of money, but by the advance of C., M. & St. P. R. R. bonds—securities that were at par in the market, and were the same as money, a sufficient valuable consideration to sustain the mortgage. Patterson had given in return bonds of this Connotton Valley R R. Co., admitted not to be of equal value, but one hundred thousand dollars of those bonds in return, which, however, he afterwards came around and wanted to be taken up and used, and they were given up, and a deed of those lots made. But after some little time, since the deed was one designed to be held as a mortgage, he put it into the shape of a mortgage, and that mortgage was made—made in the forepart of February, 1882, and a few days after the mortgage was sent on here for record.

In the making of this mortgage, I should say certain premises were improperly described. It is admitted on all hands, certain lots were described as lots in the allotment of A. & B. when in reality A. was not the original allotter, but had all his interest rather from C., the original allotment being C. & B., though it was now commonly known as the allotment of A. & B. So far as that correction is concerned, I think it should be made, and in fact I understand from the defendant that he coincides with that, he having an attachment lien thereafter referred to upon these other lots, and having followed the very same description, and there is nobody objecting to have that change made.

There were certain other lots referred to in this mortgage, and at least two pieces of property described, wherein a repetition was made of the description, and it is claimed to be desirable to amend this mortgage—to reform it in respect to the descriptions, and substitute two other pieces of property that it is said were designed to be put in by the mortgagor. It is not claimed that he undertook to define the property in question in any other sense than this, that it is suggested to the court that he had a list before him, and in that list he omitted two pieces of property in question and repeated two other descriptions that were there, and therefore it is suggested that he does not convey those two pieces that were therein contained which he meant to convey.

Now, the rule about reforming a mortgage, as I understand it, and as admitted by plaintiff's attorney, is that the evidence whereby it is

sought to make a reformation should furnish clear and convincing proof that the mistake in question was made. This evidence fails to satisfy me—the party who drew up the mortgage is not here to explain about those two pieces—is not here to explain whether the mortgagor decided on the whole to omit the two pieces in question that are referred to, and whether, therefore, in the carelessness of the conveyancer who drew up the mortgage, when he skipped them, or proposed to, but took the next one in order—that he didn't go back and repeat, or how it came about.

There does not seem to me sufficient evidence on this to ask the court to incorporate these because he had expressed a determination some little time before, perhaps a day before, that he meant to make a mortgage of all his property that he had there, and that in order to embrace it all, those two pieces should have been incorporated that are now omitted. I don't think the evidence is sufficient to incorporate two pieces of property entirely left out without any description. Therefore, as far as those two pieces of property are concerned (counsel will remember what they are, and draw the description accordingly), the reformation asked for is denied.

There is another piece of property, that in its description turns out that it is described triangular, while in fact it is quadrangular, and one side is about thirty feet and the other twenty-nine feet included within parallel lines; so that it should have been described as quadrangular instead of triangular. In my judgment, that correction ought to be allowed; it is evidently designed to embrace that piece of land. There is no reason why it should not be allowed, unless there is some *bona fide* purchaser subsequent to him, who has acquired rights, when it would be wrong to allow it to be done, but there being no one here to make that claim, the correction will be allowed to all the pieces of ground, except the two that I have referred to.

To this petition there is an answer made and cross-petition. It is said that Strong and Cary had been sub-contractors on the Connotton Valley road, and had done a large amount of work there, in value nearly half a million dollars and had received pay upon their work with the exception of about \$110,000 or \$111,000, somewhere in that vicinity. They had brought their action on a claim based against Patterson, setting forth that he was the principal and original contractor for this work and that they were sub-contractors under him, and had done the work in question, and that there was money due, and had issued an attachment against these very lots that are embraced here in the mortgage in question, and in this answer that they have filed, which is a proper answer so far as that is concerned to the petition of the plaintiff, setting up the order of his lien, they ask to have their attachment protected—their rights under that attachment. But they proceed further in their answer, and say, that there was fraud in the inception of this mortgage sufficiently to entirely annihilate it—wipe it out; that the company of which Bartlett was the president, and while he was the president, knowing that this property that was embraced in the mortgage was property that really belonged to the Connotton Valley R. R. Co., colluded with Patterson in going through the form of this mortgage, to make the conveyance of it to himself, for the purpose of putting it where the creditors of the Valley R. R. Co. could not reach it. They say that this fraud consisted in various things: First, especially in holding forth Patterson to be the contractor with the company, an independent original contractor, when in reality he was only an agent of the company, and that, there-

fore, their contract that was made with him was a contract with the company directly, instead of being a contract with the contractor. That instead of being sub-contractors, they were contracting with the company, and they make quite an elaborate statement concerning certain acts that they say were done by him and by the company in the way of carrying out this fraud—turning over all the securities—their stock to, and many of the securities of their road, and they say that they put all their assets—everything that they had, into his hands, and practically, that he had the control of it—that he actually became the road in this respect, that he was so general an agent that the road did nothing but what he did—that he was the general accredited agent. I don't understand that they charge he was the corporation, but that he became so fully the agent of the corporation that everything he did was done as its agent, and all that he contracted therefor was really contracted with the company, and they say that this fraud consisted also in combining with Patterson, as I have stated, by this mortgage and by other steps that he might take with the consent of the various officers of the company, to put all the assets of the company in the hands of Patterson, and allow him to turn them over, as he did, to this plaintiff. They also in answer set up further, that they have a right to enforce a lien as against the Valley Ry. Co., and they ask for this purpose to have the Valley Co. brought in here and made party to this suit for the purpose, first, to declare void this mortgage by Patterson to Bartlett—declare that conveyance void, and to have the court hold that the title in Patterson was merely as a trustee, and then having accomplished that, permit them to go and prove their claim to judgment against the Valley Ry. Co., for which they had judgment against Patterson, and to enforce that judgment by making it a prior lien against this property, and thus exclude the plaintiff's mortgage.

This is the scope of the relief, as I understand it, that is asked for. As I have stated, they have asked the railroad company to be brought in for that purpose. They say, also, we want to have the railroad company brought in because under the laws of the state, section 2237, we have a right to have a lien against a company, as labor men and material men for the amounts due us, \$110,000, or as it has been audited, about \$90,000 by the engineer of the company. "We want that lien enforced against that company after the court shall decide it to be the railroad company's property."

Now the first objection that is taken to this matter, is, that the code, with all its elasticity, is not elastic enough to bring in a side contest of this kind, even in an equitable suit, and permit parties who have not obtained a judgment—who are not judgment creditors, to come into this court and seek to obtain a judgment against a party who is not a defendant at all in this proceeding, and ask to have him brought in and judgment rendered against him, and then proceed to enforce that judgment as against him as the real equitable owner of the property, to the injury of the claim that is made by the mortgagee against the mortgagor.

It is said by the plaintiff that this rests upon independent grounds: First, that the code has made no provision wide enough for such a thing. Second, if it had made such a provision, the party cannot come in here and elect in this suit to ask the court to enforce a lien against Patterson as being the real owner of this property, and at the same time ask to have the judgment set aside, and to have judgment rendered against the

railroad company, and seek to enforce that judgment against it. Now there are cases, undoubtedly, in which the party dealing with the agent may have his remedy both against the principal and the agent at the same time, in questions that are strictly tort, where a tortious act has been committed by an agent with the knowledge and consent of that principal, or where it is being done in the discharge of his duty and within the scope of his agency, even though there is no immediate knowledge on the part of the principal that this act has been done. There have been cases where it is holden you may proceed against both. What the defendant here is seeking to do, is to bring in this railroad company on the charge that a great fraud has been committed by what has been done here, and has been committed by the railroad company, the principal, and by Patterson, who is the agent. What might be done if this was an original action brought for that purpose, I need not say. The question comes up, whether the statute is broad enough to let the defendants, Strong and Cary, who are the necessary parties here for relief asked by plaintiff because of their attachment against Patterson—to let them bring in the railroad company and contest such matters in this action, or whether they should bring an original action for that purpose.

Now, undoubtedly, if they had obtained a judgment against the Valley R. R. Co., and undertook to charge that this property was not the property of Patterson, but was the property of the railway company, they might have filed a bill in equity, saying Patterson claims to hold this title, and he has given a mortgage on it to Bartlett, and Bartlett is therefore an essential party, and asks to have him brought in. But they say that the property is really the property of the Valley Ry. Co. against whom we have no judgment, and we ask, therefore, in this proceeding, to be allowed to take judgment against the railway company and then to enforce it against these lots. But does it follow, therefore, that in any action that concerns this very property, they may come in and set up such a collateral matter, and have it tried in this suit and determined? Most of all, does it follow they may do it while they have been holding this advantage they obtained by issuing an attachment against this property as property of Patterson? Let us look for a moment at what the code provides in regard to such proceeding. Section 5013, 14, "That the court may determine any controversy between the parties before it." Now at the time this cross-petition is filed, the Valley R. R. Co. is not a party before the court. Does that mean that they may determine any controversy that can be made against any party that any defendant seeks to bring in, and after he gets service upon him, that then he is a party, and this section applies? I don't undertake to say that it does not give authority to bring in as many defendants as you have a mind to; and if they see fit to come in, they will be parties before the court, and if this section allows any controversy between them then to be determined, I don't see why a defendant might not bring in parties on any other transaction, a horse trade, or anything. That certainly cannot be the meaning of it, but it must be—may determine any controversy between parties that are before it in the proceeding that has been there commenced and touching the matter before the court, or between any parties that are necessarily brought in by virtue of what is said hereafter—if any authority that is given hereafter. "But when a determination cannot be had without the presence of other parties, the court may order them to be brought in or dismiss the action without preju-

dice." Now it is said, a determination of this controversy cannot be had without bringing in the Valley R. R. Co. Why? Not because the Valley Railroad Co. is making any claim against this property, they don't say that. There is nothing in the petition of that kind. But it is said, that here is a person who has a claim against the Valley R. R. Co., who is a party to this proceeding, and he claims that the Valley R. R. Co. has an interest there. Now is that a ground for bringing in a party, because a defendant says that somebody else has an interest there? The party don't claim any interest, but a defendant says that he has. It may be granted that to the extent of excluding the party in question of any interest that he has in there, that may furnish sufficient reason, and I am inclined to think that if a party who has a valid lien comes into court and sues another party and sets up and claims a certain right and wants to have the title entirely disposed of so that a good title will pass when this property sells and asks to have him made a party, and have him set up what title he has or claims—if that was the extent to which he went, I am inclined to agree that he may be made a party for that purpose.

What are the next sections on this? Section 5071 is the next one: "The defendant may set forth in his answer as many grounds of defense counterclaim and setoff as he has, whether they are such as have been heretofore denominated, legal or equitable, or both; he may claim therein relief, touching the matters in question in the petition against the plaintiff or against other defendants in the same action, and which must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer." They may say, "You may have loaned that money in question; you have had your pay, and we, as creditors, contest it." That would be a competent defense, but is it any defense against Bartlett to say, Patterson when he made that conveyance to you, held the title in trust? The real owner was the Connotton Valley Ry. Co., and we, Strong & Cary, now choose to come in here and say, they ought to hold on to that title, so that in a claim against them we may reach that property as against you. We have not established that claim yet; we want to come in and contest that. Is that making a defense in this action against this claim of plaintiff? It don't seem to be so to me.

Mr. Russell: The claim is, it is against the valid title.

The Court: Yes, because this man who had the legal title, and had it conveyed to him did it in order to accomplish fraud at the time. Now mark, it is not done for the mere purpose of disputing a consideration for his conveyance. If that was all that it was, that is one thing; if it only sought to go to the extent of saying, "Your mortgage is not a good one, because when you took it you committed fraud with this party, and colluded with him, and knew you was colluding as against those who had rights against this man Patterson"—if it merely stopped there and didn't ask anything more, there might have been some show for saying they had a right to insist on that, and if they can prove this conveyance was a fraud, conceived as such by Patterson, they have a right to say, "We want the company here to prove that." So far as it attacks the consideration of Bartlett's mortgage, it is competent, but when it seeks to go beyond that and say, "We wish to establish here in this suit, a claim against the Valley Ry. Co., and then have that claim established the first lien upon the property in question," then they are seeking something more than to impeach Bartlett's title to this property

here by saying there was any other consideration for this mortgage. Let us see whether the sections here will allow them to do that. Section 5072: "The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." They must have a counterclaim that they could enforce against the mortgagee, Bartlett, between whom a several judgment might be had in the action. Would they have any several judgment against Bartlett in the action? They could only have a several judgment by showing that he took the property knowing that Patterson only held it as a naked trustee, and that therefore he got no security, even if he did make advancements for it. To that extent they could give judgment against Patterson in a proper action. They don't stop at that. To that extent, I say, they might ask for relief, but the character of and condition is further limited thus: "And arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." The contract set forth in the petition is a mortgage. If they say that contract is not good because it was done with the knowledge of Bartlett that he was trustee, and not having the right in it by virtue of something giving the use and right as the original owner—if you want to attack that, do it. But that is not the position Strong and Cary take. They say, "We want to have the court first find us a lien, and then we want to have it turn around and enforce the lien." Now I have not found anything in this section of the code broad enough to allow that.

The next section is: "If a defendant omit to set up a counterclaim or setoff, he cannot recover costs against the plaintiff in any subsequent action thereon." 5074: "When it appears that a new party is necessary to a final decision upon a counterclaim, the court may either permit the new party to be made by the summons to answer the counterclaim, or may direct the counterclaim to be stricken out of the answer and made the subject of a separate action." Now we have reached the point where a court may bring in a new party in order to reach the decision upon a counterclaim that the defendant, that is already in, has against the plaintiff. To what extent is it necessary to bring in this party to reach that? Why, it is necessary to bring in the railroad company to the extent of setting forth whether it has any interest, which you say they do have, so that their rights may be enforced in this sale. It is not necessary to bring them into this matter in order to get judgment against them. It is not necessary to have that passed upon in this action except for this purpose of enforcing the lien created thereby on this property, if the court shall ultimately find it to belong to them. Now, where is there any authority? There has none been pointed out to me in any other section of the code. So that on looking this matter over, I conclude that to the extent of coming in here to impeach this matter for fraud, it is right enough to make the Valley R. R. Co. a party, and they are properly parties before the court, and if the evidence is sufficient to show that this conveyance that was made by Patterson was a fraudulent conveyance of land that did not belong to him at the time, and made so with the knowledge of Bartlett at the time so much would be in order. Now the evidence on that point is very defective to establish such a claim. It is true that a great many things are done here as they are with a great many other railroad schemes that are brought before the public, where it appears that one man does most of the managing and

figuring with regard to taking the stock. It does not impeach, I apprehend, a railroad transaction because Mr. Patterson, for instance, subscribed a greater part of this stock to this road. That does not impeach the organization of this road. You cannot say there is not any corporation because he did that. You cannot say that because that was done, that that made him and the road identical and one. But what should be necessary to be done in order to establish this fraud? You would have had to prove fraud in this case with regard to this property to show that at the time this was done there was some fraudulent collusion in regard to taking title to this property that really belonged to the road in Patterson's name, to keep it away from the creditors of the railway company. There is nothing of that kind in this case. There is no dispute that Patterson obtained from the corporation its authority to take those bonds and convert them into money to buy the lots, and that where he saw fit to buy the entire lot, he did--and then offered to the road that part of it which the road wanted to use, and kept the title to the rest of it in himself, crediting the bonds to the company on his contract with them to build the road, that is what the testimony shows, and that while the titles were there in this way, these advances were made by Bartlett, upon which this mortgage was taken and for which he seeks to recover. It would require the greater part of the day to go over all the things cited by counsel of Strong & Cary as marks a fraud. Suffice it to say that the evidence was very insufficient to establish in my mind the charge, that when the advances were made by Bartlett, he had any reasonable ground of notice, or that there is any evidence tending to show that it was property of the railroad to make it railroad property--that it was not the railroad's property in any sense except a very insufficient sense in law, to-wit: That the railroad company had furnished Patterson with the money used in buying these lots on a contract with him for building the road, and had undoubtedly in some instance furnished it in advance of the contract. But that don't take away the title that a man gets to independent property that he has. It was not shown that there was any desire in doing that, to get any advantage against Strong and Cary, or cover property from them or from any creditor of the railroad, so that I think there is a failure here to show this title was taken in any such fraudulent way as can be impeached against Bartlett. I think the evidence shows that he is the holder for value in the ordinary course of business, and as such should be protected in his mortgage, for the advances he has made.

As for the lien here that is said to be established, it seems to me that it cannot be enforced in this action, for two very good reasons. Under section 3207 of the Rev. Stat., it seems to me, that the two positions occupied by counsel for Strong and Cary are directly incongruous and inconsistent with each other. I cannot harmonize them in my mind with any view that I can take. They say in their main action they recover a judgment against Patterson on the ground that Patterson was an original contractor, and that they were sub-contractors under him. Now they argue that this lien law beginning with section 3207, means to give them a lien in their capacity of a sub-contractor--not that it means to give to an original contractor--but in their capacity as sub-contractors, means to give them a lien against Patterson and against the railroad company. If that is so, it is necessary in enforcing that for the court to find he was an original contractor and they sub-contractors. And yet, in their cross-petition, they say he was not an original contractor, but was really

a party, or the mere agent of the party, the railroad company. But does the law mean to give to any sub-contractor a lien merely because he has obtained work and labor and furnished them upon a railroad? It is argued on the one side, that this only meant to be a law giving such lien to the men who did the labor themselves, and men who furnish the material in the first instance themselves—I mean unconnected with sub-contractors for doing work. It is unnecessary that I should spend any time on this, having already concluded that this answer cannot seek to enforce this claim that is made up in behalf of Strong and Cary. But let us ask whether this statute was meant to protect such lien? The law provides that all those whom it was meant to protect may secure a lien and hold back the money from being paid to the original contractor. Well, suppose there was three sub-contractors. A being the original; B being the sub under him and C doing part of that work, therefore, covering work under this contract, and D taking certain work under him; so you have got three contractors in succession, covering the same work, and finally laboring men who do the work. If you say you may take the steps in favor of the first sub-contractor, B (and after certain things are done, the party may agree and pay over the money to the one who has a right to the lien—the statute provides for that); then if B proceeds to enforce his lien on the 5th day, and A wants to pay over to him on the 10th day, and C comes in under his contract and proposes to cover the same work, and on the 15th day D comes in under his contract and proposes to cover part of the same work under his contract, and finally all the laborers come in and propose to cover all that is embraced in theirs—now, where is he going to begin? The law provides that when the party agrees with the one who is entitled to the lien, that he may settle with him and pay up to him. If that should be done, is he to pay over three or four times in succession the debt?

Mr. Russell: The law don't provide that he shall.

The Court: It does if your view is correct. The only object in giving the lien can be in letting the man get his money.

Mr. Russell: When payment is made to the fourth man, it cancels what it laps on to.

The Court: Where has the law said that by payment to somebody else, who has not taken steps to get this lien at all, the lien should be discharged against those who have made attempts to enforce the lien! The only thing to be determined now is, that the object was to protect men who do labor and who furnish material themselves. Subsequent legislation went so far as to define in addition to that, how a lien might be furnished also for sub-contractors, defining them as a distinct and separate body. So that I conclude that under this statute, and a proper interpretation of it, if this was a proper case to bring it in, the party has not brought himself under any right, under this statute, to seek to enforce his lien as a labor and material man, and for that reason he could not get the relief asked for in that part of his answer, so that in this case the order will be for a decree foreclosing the mortgage, amending the descriptions in all except the two that are redesignations referred to and that, therefore, should be left out altogether, and a dismissal of the cross-petition of the defendants. The cross-petition of the defendant, as far as it seeks to establish new rights, anything not being an answer to, and contesting the claim of, the plaintiff as a cross-petition will be dismissed.

Mr. Russell: Now, if the court please, it was suggested, during the hearing, that instead of supposing that we maintained our rights in this action as a co-defendant, we had begun an independent action against the railroad company on the suggestion of that fact, and the equity that was asked to foreclose the mortgage the court would delay its foreclosure until that remedy be had—cannot that be done in this action?

The Court: You can possibly do it by imposing terms on you; you should give bond, of course, to the mortgagee, to the effect that his security shall not depreciate in the meantime. I don't know but that would be proper enough.

Mr. Russell: It is suggested to me that there is already pending in this court an action that will determine that question.

The Court: I think, then, the proper place to make that application will be in that action, and that they be enjoined, and the court if the case is made out for that, will determine in that case how much the bond should be to answer for the depreciation of this property.

Mr. Russell: Then it seems to me there ought no decree to be entered here.

The Court: Oh, this decree should be entered, and in that case that application should be made in the other suit for fixing the terms upon which the suspension of the sale should take place. I will make an entry "order, see journal," and the counsel can draw up the entry in accordance with these views.

Lynch, Day & Lynch, for plaintiff.

Adams & Russell, for defendant.

MISAPPLICATION OF PARTNERSHIP NOTE.

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[Cuyahoga Common Pleas.]

BRADLEY V. FELIX NICOLA, ASSIGNEE.

1. Where a note made by one partner in the firm name was sent by him to plaintiff to pay an individual debt, and was endorsed by plaintiff to a *bona fide* purchaser without notice, and not being paid when due was taken up by plaintiff, he cannot hold the partnership on such note. He does not hold the note as an innocent purchaser but because of his liability as endorser.
2. Under circumstances above stated, although it is not shown that plaintiff knew the note was misapplied by one partner yet being appropriated to pay a private debt due him he is presumed to know that it is a diversion of the firm's property and he cannot hold the firm.

BLANDIN, J.

This is an action brought by N. B. Bradley, against Felix Nicola as assignee for the benefit of creditors of Spencer & Taylor, a copartnership, to compel the allowance of a claim.

The claim consists of two promissory notes, one made by the firm of Spencer & Taylor, defendant's assignors, and payable to the plaintiff.

The evidence shows this note to have been made by John E. Spencer, who signed the firm name of Spencer & Taylor thereto as makers, of which firm John E. Spencer was a member. After thus making the note and signing the firm name thereto, he sent it to the plaintiff, at Bay City, Michigan, where it was endorsed by the plaintiff, Bradley, and

returned by him to Jno. E. Spencer at Cleveland, to be used, and it afterwards was used to pay an individual debt of John E. Spencer to the plaintiff, Bradley—a note of Jno. E. Spencer to Bradley then about maturing.

When the note became due it was duly protested for non-payment and was taken up by Bradley, who now claims a right to recover from the assignee of Spencer & Taylor.

This note was dated January 28, 1880, and payable three months after its date.

The petition sets forth another note which plaintiff asks to have allowed as a claim against the assignee.

This note bears date January 20, 1880, and is payable in three months after its date. It is signed by Jno. E. Spencer & Co., as makers, and the evidence shows that Jno. E. Spencer had no partner, but was doing business under the firm name of Jno. E. Spencer & Co., while he alone was the firm. It is therefore equivalent to saying that the note was signed by Jno. E. Spencer as maker and payable to Spencer & Taylor, and the firm name of Spencer & Taylor endorsed thereon. All this the evidence shows was done by Jno. E. Spencer, and in this condition Jno. E. Spencer sent the note to plaintiff to pay an individual debt of Jno. E. Spencer to Bradley—being a note of Jno. E. Spencer & Co. to Bradley, then about maturing. This note, like the other, was discounted, and upon its maturity was duly protested for non-payment, and was taken up by Bradley as an endorser, he having endorsed it before getting it discounted.

The proof shows that Taylor, the other member of the firm of Spencer & Taylor, never authorized the making of either of the notes in question, by Spencer, and that neither he or the firm of Spencer & Taylor received consideration therefor, and that the firm name was used in this manner by Spencer to discharge his private debt, and this is relied upon as a defense by the assignee.

It is too clear for controversy that one partner cannot use the partnership property to pay his private debts without the consent of the other partners. Certainly no other person can acquire any rights against the firm, because they aid a partner in doing what he cannot himself lawfully do. Neither the partner acting alone or in conjunction with his creditor, can succeed in rendering the payment of the partner's debt out of partnership funds lawful. The act of payment by the partner and receiving by the creditor are alike impotent to bind the partnership.

The creditor cannot, if he has knowledge that partnership property is being appropriated by the partner to pay his individual debt to the creditor, thereby acquire any rights against the partnership, the act being in fact unauthorized by the partnership. This being so, the important question in this case is, did Bradley have knowledge that Spencer was paying his debt with the property of Spencer & Taylor.

So far as the note first referred to is concerned, it being signed by Spencer & Taylor, was their property until it was delivered and took effect as a note; and being made payable to Bradley and first taking effect, when it was delivered to him, he is in law presumed to know that it is a diversion of the firm property from the partnership purposes, when he appropriates it to the payment of the private debt of Spencer to himself; and in the transaction he could acquire no rights against the firm whose property he thus got from them, to pay a debt due himself from Spencer.

In relation to the other note it is claimed that the law merchant as applicable to negotiable paper places it on a somewhat different footing. This note was made by Jno. E. Spencer & Co. or Jno. E. Spencer, and payable to the order of Spencer & Taylor, and when it came to Bradley, it came through Jno. E. Spencer, not from Spencer & Taylor. So far as the form of the note in its then condition was concerned, it expressed ownership in Spencer & Taylor. It was thus, according to the facts expressed on its face, the property of the firm of Spencer & Taylor and in their hands, called for its face as a debt due the firm from Jno. E. Spencer. If so, then its application by Jno. E. Spencer to the payment of his debt to Bradley is in principle exactly the same as if it had been signed by Spencer & Taylor as makers, and was the appropriation of their property to the payment of Spencer's individual debt. If on its face it did not appear to be the property of Spencer & Taylor, the payees, then it was in the hands of the maker, Jno. E. Spencer, after being endorsed by the payees, and this would impart that it had been paid and canceled by him and its negotiability thus destroyed, and no rights could arise upon it in his favor such as attach to negotiable paper. The case of *Redlon v. Churchill*, decided by the Supreme Court of Maine, and reported in *Cent'l Law Journal*, May 26, 1882, 412, is cited by plaintiff as sustaining his claim. In that case a note made and endorsed precisely like the one here before the court was negotiated by the partner who was the maker, and the proceeds applied to his own use, without the knowledge of or consent of his partner. The note was negotiated or sold by a broker to plaintiff in that case, who bought it without knowledge of any facts affecting its validity. The firm were held liable to him on their endorsement thus made. There was nothing in the case to show that the purchaser had any knowledge whatever of the fact that the note or its proceeds were being used by the partner to pay his individual debt, and this is the very point here upon which the assignee relies for his defense, and which is material.

Edwards, in his treatise on Bills and Notes, (marginal page 103,) says, "Though a note be made by one of the partners in the firm name, out of the usual course of its business, yet if it be signed by them, or being made payable to them or order, it be indorsed by one of them in the name of the firm and then discounted or transferred to a *bona fide* holder, all the partners are responsible on the note. In the hands of the person who receives such a note from the partner making or endorsing it with knowledge that it is given or endorsed for his private debt, or in a transaction unconnected with the partnership business, it is not binding on the firm." And many cases are there cited which sustain this position.

These principles would therefore seem to defeat the plaintiff's claim, unless the plaintiff acquired the right of a *bona fide* holder of negotiable paper, by taking up the notes as endorser after they had matured in the hands of the bank that held them when they thus matured discharged of equities. The case of *Bassett v. Avery*, 15 O. S., 299, is relied on for this proposition. In that case the note came into the hands of plaintiff before maturity, and it was held that he took the title and rights of the party from whom he purchased, although at the time he so purchased he had knowledge of infirmities in the note. I know of no case that goes so far as to say that, because a promissory note matures in the hands of an innocent holder, that therefore, after maturity it could be transferred discharged of equities in the hands of innocent transferees

even. If so it would be difficult to see the effect of maturity upon negotiable paper that had matured in the hands of innocent and *bona fide* holders.

It is clear, however, that the plaintiff took up these notes after maturity, not as a purchaser of negotiable paper, as that character is understood in law, but because of his liability as an endorser to his endorsee, and not otherwise, and that under the facts he has no claim against the firm of Spencer & Taylor, and consequently none against their assignee, and the petition must be dismissed.

William B. Sanders, for plaintiff.

Estep, Dickey & Squire, for defendants.

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ASSIGNOR AND ASSIGNEE OF NOTES.

[Cuyahoga Common Pleas, September Term, 1883.]

EXCHANGE BANK V. ROBERT E. EDDY ET AL.

Where an assignor of a series of notes falling due in successive years, secured by a single mortgage, agrees with the assignee to be liable as indorser on all except the last due, and takes up two of the notes as they fall due, he has no equity to have the notes he has taken up held as an incumbrance prior to the later notes of such assignee, and therefore his creditors cannot claim, that he has an interest superior to that of his assignee, and the fact that he became owner of the property does not affect the priorities.

BLANDIN, J.

This is an action in the nature of a creditor's bill to subject the interest of the defendant, Eddy, in the land described in the petition to the payment of a judgment obtained by the plaintiff against Eddy in the court of common pleas of Holmes county. The judgment debt is not denied. By the record the title to the land sought to be subjected appears to be in the defendant, Thomas Henry, who, it is averred, holds the title in trust for the defendant, Eddy, who is in fact the beneficial owner of the premises. The averment of this trust is not denied by the defendant, Henry, who has not answered, and as to him the averments of the petition are taken as true.

The defendant, Eddy, answers with a denial of any title in or real or beneficial ownership of the premises, and in no manner, so far as any claim or interest of his in the premises is concerned, makes any objection to the granting of the relief prayed for in the petition.

The defendant, Abner Slutz, as administrator of S. Jenny Slutz, deceased, by way of answer and cross-petition sets up the execution of certain notes and a mortgage to secure their payment upon the land described in the petition, made by one G. S. Egts to William R. Harper, and by him transferred by mesne assignments to S. Jenny Slutz in her lifetime, and that there remains due and unpaid thereon the sum of \$321.15, with interest.

The immediate endorser of these notes and assignor of the mortgage to S. Jenny Slutz was the defendant, Eddy, and the title to the land in controversy came directly by deed from the mortgagor and maker of these notes to the defendant, Henry, and is now found to be in the defendant, Eddy, who thus endorsed the notes to Mrs. Slutz.

The notes were a series of four, falling due one year apart, and secured by a single mortgage, and, so far as they have been paid to the holder, were paid by the defendant, Eddy, and delivered back to him, and whether collected by him from the maker, Egts, does not appear, but so far as is here disclosed, are still in the hands of the defendant, Eddy.

The claim set up by the plaintiffs by way of reply to this answer and cross-petition of the administrator, Slutz, is that these notes thus secured as a series, by a common mortgage, are liens upon the mortgage premises in the order of their maturity, and that the notes thus taken up by Eddy, as endorser, being prior in their maturity to those still in the hands of the administrator, Slutz, are in the hands of Eddy, as the holder of them, prior liens in his favor to the unpaid notes still held by defendant, Slutz, and that in this action they are entitled to have this lien of Eddy ahead of the defendant, Slutz, subjected to the satisfaction of their debt.

The plaintiff also claims that the defendant, Slutz, is not the *bona fide* owner and holder of these unpaid notes. Upon this question of fact the preponderance of the evidence is clearly against the plaintiff. Against the testimony of Mr. Slutz there is in fact no evidence on this point on behalf of the plaintiff, except some alleged admissions of Mr. Slutz that are denied by him.

All of these notes were endorsed by Eddy to the deceased, the last one only being endorsed "Without recourse," for the express reason that the mortgaged premises were not regarded by Mr. Slutz, who acted as agent for his wife in their purchase, as sufficient security for more than this last note, and the personal liability of Eddy as endorser was required and given upon the other notes, in addition to the security of the mortgage.

The question, therefore, is, whether under these facts an equity exists in favor of the defendant, Eddy, as against the administrator which the plaintiff has a right to assert to the extent of the notes thus taken up by Eddy, as endorser, and postponing the administrator's rights on the last notes to those paid off by defendant, Eddy.

The plaintiff can be entitled only to the relief that Eddy would be entitled to, were the questions raised directly between them. The levy of the plaintiff, which is the foundation of his right in this action, attached only to the legal and equitable rights of Eddy, and whatever interest or rights Eddy could not have asserted against this administrator are equally unavailable to the plaintiff.

By the contract between Eddy and Mrs. Slutz at the time of the purchase of these notes by her, Eddy consented that the last note should be specially secured by the mortgage, while his individual liability as endorser should be added thereto upon all the prior notes. As between them, therefore, he could not now claim anything by way of advantage to himself, as holder of the prior notes, to impair the full force and benefit of the mortgage security to this last note. He is estopped to deny the subsisting security to this note by the mortgage, having agreed it should be so secured, while his personal liability should secure the others. Taking up the prior notes was simply redeeming his promise as endorser so to do, and did not impeach or in any manner impair the mortgage security to the last note, which was specially contracted for between the parties; and, so far as the note is still unpaid on which he is also liable as endorser to the administrator, there would be the stronger reason why

he could not assert any equity in his own favor under the mortgage, against the administrator, to collect the notes he holds before the administrator is paid.

It is argued that no merger took place by the purchase of the property by Eddy to defeat his right to assert the lien of his notes against the lien of the later notes. Whether this be true or not, it could not be material, if in fact, as against the administrator, he had no equities.

Having found this, it becomes unnecessary to determine whether they would have merged or not, had this question been solved against the administrator.

A decree should be entered finding the amount due the defendant, Stutz, as, claimed by him in his cross-petition, and which is the first lien on the premises, and an order to sell the same, and after paying this claim the balance of the proceeds of the sale to be applied on plaintiff's claim.

George L. Dake and T. E. Burton, for plaintiff.

Abner Stultz, for defendants.

390**AGENT—NOTICE TO PRINCIPAL.**

[Hamilton District Court.]

CHRISTENA MEHNER V. SCHMIDLAPP & Co.

Notice to an agent, proved or admitted to be employed to purchase goods for his principal, of the falsity of the representations of the seller concerning the goods, and the agent's omission to rescind the contract, is notice to and omission by the principal.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

Schmidlapp & Co. seek to recover of Christena Mehner, doing business under the name and style of Louis Mehner, the price of 900 barrels of whisky undelivered and refused by her, out of a lot of 1,000 barrels of a certain brand known as John Hanning Sour-mash Bourbon Whisky, contracted for by Edward Mehner, her son and business manager, and who was conducting the ordinary business of the house of Louis Mehner. The answer of Christena Mehner admits the making of the contract by Edward Mehner, but avers that the representations made by the broker of Schmidlapp & Co., and which induced the making of the contract for the purchase of the whisky, were false, and made with the knowledge of their falsity and with the intent that the purchaser should rely upon them as true, and further that upon discovering that false representations had been made as to the quality of the whisky, she offered to rescind, and tendered back 100 barrels already received and paid for. A great deal of testimony was taken as to the representations made by the broker at the time of entering into the contract, tending to prove that the broker stated that the particular brand of whisky to be delivered under the contract and not yet manufactured would be of as good merchantable quality as any other whisky made in Davies county, Kentucky, where the whisky of the brand in question was manufactured. In the court below the jury returned a verdict for the plaintiff in the amount claimed, and to reverse the judgment the defendant filed his petition in error in this court. The principal objection relied upon by the plaintiff in error is that the court

charged the jury, that if Edward Mehner, the son of the defendant, Christena Mehner, doing business under the name of her late husband, Louis Mehner, discovered that the representations made to him at the time of purchase were untrue, he was entitled to refuse to receive the whisky and to rescind the contract, but if, after he had discovered or been advised that the whisky was not of as good merchantable quality as the other whisky manufactured in Davies county, did not act upon that advice, his right to refuse the delivery or to rescind under the contract, would be considered as having been waived, and the question would arise as to whether he had not acquiesced in or recognized the irregularity of the transaction. The objection arises under the assumption of the court, that Edward Mehner was the agent of the firm of Louis Mehner, or of his mother, duly authorized to act in the purchase of so large a quantity, and contrary to the custom of the house, for they were doing but very small business in the way of purchase and sale of whisky; or rather that the court misled the jury and erred by omitting to notice that Christena Mehner was the real defendant, and charging that if the defendant, referring to Edward Mehner, did not act upon the advice which he obtained after entering into the contract, that the whisky was not of as good quality as that represented, and having acquiesced, he would be bound. It is claimed that as Christena Mehner is the real defendant the notice of defect in quality of the whisky conveyed to Edward Mehner, was not notice to Christena Mehner, the real defendant, that the agency of Edward Mehner was not shown to be complete, and that as Christena Mehner had not authorized the contract and had no opportunity of rescinding, because of her want of knowledge of the acts of Edward Mehner, she was not put upon notice, and as the real defendant, she could not be liable.

The record displays but two issues; the first, as to the agency of Edward Mehner; the second, as to the false representations by the plaintiff, and relied upon by the defendant. We are of opinion that the agency of Edward Mehner is admitted, for at the close of the plaintiff's testimony set out in the bill of exceptions the following recital appears: "The defendant at this point admitted that the whisky had been delivered by proper tender, and warehouse receipts were made out to the order of Louis Mehner by The John Hanning Distilling Co."

Again: Edward Mehner testified on the trial below that he represented his mother in the transaction, or in the purchase of the 1,000 barrels of whisky, and upon cross-examination in answer to question "how long have you been in this business representing your mother?" he said, "since 1875." And in answer to question "your father had the business before that?" he said, "yes, sir." And in answer to question "upon his death you took charge for your mother," he said, "yes, sir."

We are therefore of the opinion that the testimony of Edward Mehner and the admissions on the record show that Edward Mehner was in fact the agent of Christena Mehner, and authorized to enter into the contract as stated. The question as to whether the representations as claimed were made, and if so made were false, is a matter for the consideration of the jury.

We find no error in the action of the court below.

Judgment affirmed.

McDougall & Longworth, for plaintiff in error.

Healy, Brannan & Desmond and Howard Douglass, for defendants in error.

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BENEFICIAL INSURANCE.

[Hamilton District Court, November 20, 1883.]

ODD FELLOWS' PROTECTIVE ASSN. OF CINCINNATI V. MONICA HOOK.

1. Under the by-laws of a mutual association for the payment to the widow of each member, upon his death, of a sum raised by assessment on the surviving members, the obligation is that of a contract of life insurance.
2. The by-laws providing that each applicant for membership should be a member in good standing of a lodge of Odd Fellows, and that if dropped or expelled from his lodge his membership should cease and the association not be bound to his widow, and the rules of the lodge providing that notice should be issued by the secretary to members in arrears for dues, and if not paid within four weeks from the date, they should be dropped: *Held*, that it was not sufficient to cause the forfeiture of his rights in the association that the books of the lodge contained an entry that he had been dropped, in the absence of evidence that he had received the required notice.

ERROR to the Court of Common Pleas.

AVERY, J.

The plaintiff in error is an incorporated association, formed for the securing to the widows of its members, or to their orphan children a fund raised upon the death of each member, by assessment on the surviving members. Each applicant for membership was required to be a member in good standing of a lodge of Odd Fellows in the state of Ohio; and to retain membership was required upon the death of each member to pay to the secretary \$1.25. It was further provided: "Should a member be dropped or expelled from his lodge, his membership immediately ceases in this association, nor is this association bound to his widow, orphans or heirs for any pecuniary protection or aid from the protective contingent fund."

Benjamin Hook became a member August 22, 1871, and received the customary certificate in the following form: "This certifies that Brother Benjamin Hook is a member of the Odd Fellows' Protective Association of Cincinnati, Ohio, and is entitled to all the privileges and benefits thereof as long as he complies with the rules and requirements." Up to the time of his death, which took place February 17, 1881, he had punctually paid the assessments upon the death of each member, the number in all being 108; the last payment having been made January 29, 1881.

The defendant in error is his widow, and in the court of common pleas she recovered judgment for the amount under the by-laws, payable to the widow of a member.

The defense was that her husband had been dropped from his lodge January 1, 1877, and that the association did not discover it until after the last payment; whereupon the secretary returned the amount, \$1.25, February 11, 1881, six days before his death. The secretary testified to communicating with him by letter of that date, advising him that he could no longer be considered a member and tendering back the \$1.25, in reply to which his daughter called and returned the receipt for the assessment as requested, and received back the money. It was agreed that the books of his lodge showed no payment of dues after October 1, 1875, and that his account closed with this entry: "Dropped for non-payment of dues January 1, 1877."

The jury found specially, in answer to an interrogatory propounded, that he had not been dropped. This was the second trial with the same result. The question is, whether the finding can be sustained.

The nature of the obligation under the certificate of membership, in connection with the articles of association and by-laws, was that of a contract of life insurance. *State v. Standard Life Assn.*, 38 O. S., 281, 287; *Bolton v. Bolton*, 73 Me., 299; *Commonwealth v. Wetherbee*, 105 Mass., 149, 161; *State v. Merch't Exch. Mut. Ins. Co.*, 72 Mo., 146; *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis., 369, 378; *Tennessee Lodge v. Ladd*, 5 Lea., Tenn., 721, 722. Upon death, the right of the widow as beneficiary vested. *Masonic Mut. Ins. Co. v. Miller*, 13 Bush., 489; *Catholic Ben. Assn. v. Priest*, 46 Mich., 429; *Grundlach v. Germania Mech. Assn.*, 4 Hun., 339. Her remedy was by action as for a breach of contract. *Burland v. N. W. Mut. Ben. Assn.*, 47 Mich., 424.

The burden of proof was upon the association to show that before the death of her husband, his beneficial right, under the articles of the association and by-laws, had been forfeited. The certificate of membership was admitted; and the state of facts once existing was presumed to continue until the contrary was shown. *Knights of Honor v. Johnson*, 78 Ind., 110.

The forfeiture claimed was that he had been dropped from his lodge. It was agreed that the books contained an entry of that kind. But they contained nothing more. They did not show notice, and the rules of the lodge required notice. The provision was as follows: "Section 7. The permanent secretary shall quarterly, at the first stated meetings in January, April, July and October, report to the lodge the name or names of any member or members who are one year or more in arrears for dues; and it shall be his duty without further order by the lodge to issue a notice under seal to each member so reported, advising him of such delinquency and the amount thereof, and notifying him that if the full amount of such arrearage is not paid within four weeks from the date of such notice, his name will be dropped from membership. If the requirements of the notice are not complied with, it shall be his duty to drop the name of any such member from the roll, and to notify the lodge and the brother thereof."

The only witness offered to prove the notice, was the permanent secretary at that time. He testified that he made the entry against Benjamin Hook, "Dropped for non-payment of dues, January 1, 1877;" and that notice had been sent before dropping him. The stub book of notices was then produced, but the only notice shown by the stubs bore date, April 10, 1878. The witness then explained that this was the second notice, that the first notice sent was not in the book: "I wrote it on a sheet of paper, I believe. I do not recollect that we had a book at that time." But the book itself showed that it had been in use since January 20, 1873.

This cross-examination then followed: Q. "How do you know you sent the first notice?" A. "Just from memory." Q. "You were a witness here on a former trial of this case?" A. "Yes, three or four times." Q. "Did not you testify that you did not give Benjamin Hook a second notice?" A. "I do not recollect that I did now." Q. "Well, if you did not, would the report be correct or not?" A. "Well, I think I did give him a second notice, but I find I did say I did not give him a second notice on the second time the trial was brought up."

The manner of his testimony in chief was as follows: Q. "Will you state what you did in dropping Benjamin Hook?" A. "Sent him a notice." Q. "State what that notice contained; we want to know?" A. "This is the form of the notice sent to Mr. Hook April 10, 1878." Q. "What did that notice contain?" A. "It says, you are dropped as a member of the Odd Fellows of Wm. Tell, No. 335, for non-payment of dues." Q. "So that was the notice he had been dropped?" A. "Yes, sir." Q. "Will you read to refresh your memory section 7, and state what you did in this case in dropping Benjamin Hook. Have you any recollection independent of that book?" A. "I have read this." Q. "Well, before you read it, had you any recollection of the steps you took?" A. "Yes, sir." Q. "Well, state what your recollection is?" A. "Well, I recollect sending him a notice, I think." Q. "Before you dropped him?" A. "Yes; I know more now." Q. "What did that notice contain? After refreshing your memory by reading that section, state what you did." A. "You are hereby notified that you are dropped as a member of Wm. Tell Lodge No. 335, I. O. O. F. Signed by me." Q. "What was the date of that?" A. "I do not recollect now." Q. "I will ask the question, after refreshing your mind from this notice, as to the contents of that first notice given before Benjamin Hook was dropped?" A. "You are hereby notified that you are in arrears for dues; and then it was read off in the lodge room, and they said, well, we give some members longer time, and of course we give him longer time."

Forfeitures are not favored. The loss of all beneficial right, under the articles of association and by-laws require that the "dropping" of a member by his lodge should be strictly construed. The inquiry must be not merely whether he was dropped, but whether it was in conformity to the rules of the lodge. These rules made notice essential, and required that it be issued to the member before dropping him. The witness left it uncertain whether it had been issued before. The notice shown by the stub book was afterward. The only testimony to the notice was that it was sent; but not how it was sent. It did not appear to have been delivered at residence. It could not have been delivered personally. The witness testified: Q. "Did you know Benjamin Hook personally?" A. "No, sir, I never saw the man."

The rule prescribed was to issue a notice under seal to the member advising him of his delinquency and the amount thereof, and notifying him that if the full amount of such arrearage was not paid within four weeks from the date of the notice his name would be dropped. The mode of service was not provided for. The only special provision in the by-laws was under the head of trial, when, upon charges preferred, "if the accused reside in a distant town the citation must be sent by mail to his last known residence."

Notice is a part of the law of forfeiture. In *Wachtel v. Benevolent Society*, 84 N. Y., 28, 31, under a provision, that the financial secretary shall give to each member who is six months in arrears written notice calling his attention to the fact that he would be stricken from the roll in case he does not pay his dues in 30 days, it was held, that in the absence of any agreement by the member, or any provision in the charter or by-laws for a different mode of service, it should be made personally, as required at common law where the object is to deprive the person of his rights or property.

The uncertainty whether notice was sent, the witness evidently testifying merely to impressions, was such that the verdict might be permitted to stand upon the supposition that it was not sent. But even if sent, the inquiry remained open whether it was received. There was no testimony that it had been received. There was no testimony to any statement or admission by the deceased that his membership in the lodge had ceased. There was no testimony whatever to any conversation with him or admission upon the subject. And the association had gone on collecting assessments from him, no less than fifty being collected after January 1, 1877, without question, until, if his widow was to be believed, it was too late to talk to him upon the matter—too late for him to be heard.

The surrender of the receipt for the last payment, and acceptance of repayment, relied upon by the association as an admission, was explained by the testimony of the daughter, and the credibility of the explanation was for the jury. The daughter and her mother both testified: The deceased was at the time lying sick of the mortal illness of which he died. They could not talk to him, no one could talk to him. The notice came by postal card to call upon the secretary of the association, and the daughter went and received back the money, surrendering at the same time the receipt, because the secretary told her to do so.

Exception was taken that the court sustained an objection to the offer of the letter which had been written by the secretary to the deceased, and in response to which he testified the daughter had called. But he had already given the contents of the letter in his testimony. Again, the offer was not of the original, but of a copy, without any showing of notice upon the plaintiff to produce the original. Again, while the letter itself might have been competent by way of rebuttal of the explanation given by the daughter, the offer was made in chief; in which case its receipt by the deceased must first have been shown in some way, or the presumption raised that its contents came to his knowledge.

The beneficial object contemplated by the articles of association in mutual organizations of this kind, has been held to justify a court in seizing upon any circumstance to save forfeiture. *Erdmann v. The Mut. Ins. Co. of Order Herman's Sons*, 44 Wis., 376. Certainly it would be unwarrantable to construe the surrender of the receipt, and acceptance of the repayment of \$1.25, as leaving that assessment in default and so resulting in a forfeiture. The original payment had been made as required, upon notice from the secretary; the return of the amount by him was voluntary. The death of the husband and father was then impending, and surely it could not have been intended by the widow and daughter to relinquish the provision toward which so many payments had been made. See *Relief Society v. Billau*, 5 Dec. R., 217; (3 Am. Law Rec., 546.)

Judgment affirmed.

Warner & Shattuck, for plaintiff in error.

J. C. Robinson, Jr., for defendant in error.

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STOCKHOLDERS' LIABILITY—SERVICE.

[Superior Court of Cincinnati.]

S. M. LAMONT V. HOME INS. CO. ET AL.

An action to enforce the statutory liability of stockholders is not "rightly brought" in this county within the meaning of secs. 5038 and 5030, Rev. Stat., when none of the defendants resided or could be or were summoned here, although one of them endorsed upon a summons issued for him to the sheriff of this county and mailed to him by plaintiff's attorney at his residence in another county, his acceptance of service and entry of appearance.

HARMON, J.

Charles Huston, having been served with summons herein issued to Franklin county, where he resides, files an answer challenging this court's jurisdiction of this action and of him because of the facts therein set forth, the sufficiency of which is the question which now arises upon plaintiff's demurrer to said answer.

This action, commenced March 22d, is one to enforce the statutory liability of stockholders of the Home Insurance Co., plaintiff being a judgment creditor thereof; and the only persons originally made defendants were said company and one W. G. Williams, a stockholder. The answer avers that neither of these defendants was a resident of this county, and that neither of them could be or was served with summons here, that the company had its principal office in Franklin county and no office or agent here, and Williams was a resident of Delaware county and not present in this county, that the summons herein for the company was issued to the sheriff of Franklin county and there served, and that the summons for Williams was issued to the sheriff of this county, though never delivered to him, and was taken by plaintiff's attorney and mailed to Williams at his place of residence, where, at the request of such attorney, he endorsed the same as follows over his signature, "I accept service of this writ and enter my appearance herein" and returned the same by mail. This is the only service upon either of said defendants. On March 28, and before any further step had been taken in the case by any one, a similar action was brought by another creditor in the Franklin county court of common pleas and summons there served upon the company and its stockholders, most of whom reside in that county. After this, again, the other stockholders were made parties to this action and summons issued for them, including said Huston, who had already been served with summons in the other case.

As Huston makes his objection in his answer, which is his first appearance in the action, it is not waived. *Allen v. Miller*, 11 O. S., 378. As the entire remedy of all creditors against all stockholders must be asserted in a single action, sec. 3260, Rev. Stat., *Kilgour v. St. R. R. Co.*, 6 Dec. R., 1157, and *Wright v. McCormack*, 17 O. S., 86, this court and the Franklin county court cannot both have jurisdiction, but that which first attached is exclusive. And as for the same reason no court can obtain jurisdiction of such action when stockholders reside in other counties unless it be so brought that summons may issue to such counties, the question of this court's jurisdiction over the action and that of its jurisdiction over Huston depend for solution upon the same considerations, although the latter is strictly speaking all that concerns him. In other words, while the action is transitory, so that consent will confer

jurisdiction upon any court of general jurisdiction, yet as the action is one in which the liability of all the stockholders in the state is to be enforced, when it appears that there are stockholders in other counties for whom the court has no authority to issue summons, it necessarily follows that the court has no jurisdiction of the action unless the consent of all has made such summons unnecessary.

The jurisdiction of the other court is unquestionable, unless what had already taken place herein as above recited and conferred jurisdiction upon this court. Subsequent proceedings herein cannot affect the question, more than sixty days having elapsed without further service upon the only two parties made defendants before the commencement of the other suit, section 4988, Rev. Stat.

The argument is unsound that the action was rightly brought here under section 5026, Rev. Stat. Although the insurance company is a necessary party, *Umsted v. Buskirk*, 17 O. S., 113, this is not an action "against" it within the meaning of that section. If it were, the cause of action did not arise in this county. Plaintiff already has a judgment on his policy rendered by this court under that section. The present cause of action is the insolvency of the company, *Wright v. McCormack*, *supra*, which, if the section in question could be supposed to apply to such cases as this, arose at the main office of the company in Columbus, certainly not here where it had no office at all.

The jurisdiction of this court depends upon the proper construction of sections 5031, 5038 and 5043, Rev. Stat., and their application to the facts above recited.

The power to bring in defendants resident in other counties, which it is conceded does not exist unless especially conferred, is given by section 5038 in chapter six, relating to actual service of summons, and is expressly confined to actions "rightly brought in any county according to the provisions of chapter five," etc., that being the chapter relating to where actions shall be brought. The only section of chapter five, except 5026 already referred to, which by any possibility can apply to this case is 5031, by which it "must be brought in the county in which a defendant resides or may be summoned."

Probably, as section 5026 provides, where suit shall be brought against Ohio corporations, residence within the meaning of section 5031 is not to be predicated of them. But if they reside in any county it certainly is not in one where they have neither office nor officer. The demurrer, however, admits that neither defendant resided and that neither was or could be summoned in this county. Plaintiff therefore must rely entirely upon section 5043, likewise in chapter six. It provides that "an acknowledgment on the back of the summons or petition by the party sued or the voluntary appearance of a defendant is equivalent to service."

It is certainly open to question whether the appearance here referred to is not actual appearance in person or by attorney or by pleading. The first clause would seem to cover all that is to be effected by endorsement of the summons. But it may be conceded for present purposes that what Williams did was sufficient, had the suit been against him alone or required the issuing of no summons to other counties, to bring him within the jurisdiction of the court. The question still remains was the action rightly brought here within the meaning of section 5038.

While the Supreme Court has never passed upon this exact question it has shown an undoubted inclination to protect the citizen in the right

to be sued at home, if he remains there, by construing strictly statutes in contravention thereof. *Dunn v. Hazlett*, 4 O. S., 435; *Allen v. Miller*, 11 O. S., 374; *Drea v. Carrington*, 32 O. S., 595.

In *Allen v. Miller* it was said "and the important question of jurisdiction must not be permitted to turn upon individual caprice or fictitious and colorable arrangement," etc.

Now, it will be observed that it is not provided that when the court in any county obtains jurisdiction of a defendant, summons may issue to other counties for other defendants, but when the action is rightly brought according to chapter five, *i. e.*, in a county where a defendant resides or may be compelled to appear. It is manifest that an action may not be so rightly brought, and that the court may nevertheless afterward obtain jurisdiction by the consent of all entitled to object. But was it the intention of the legislature to permit one to consent for all? Surely this would open the door, especially in such cases as this, to the evils deprecated so strongly in *Allen v. Miller*, *supra*. And if it be said that a willing defendant may accomplish the same thing by coming into the county so as to permit service, the answer is *ita lex scripta est*, and, besides, the trouble and expense of doing so are a protection against collusion which the legislature may well have intended to preserve, while a serious question might be raised as to the acquisition of jurisdiction when there is such collusion.

But, it is said, acknowledgment on the back of the summons or petition is equivalent to service. Service of what? In this case, says plaintiff's counsel, of a summons issued to Hamilton county, because it was upon such summons that Williams wrote his acknowledgment. But by the express terms of the law the same result would have followed had the petition been mailed by him and his endorsement made upon it, so that the trouble and expense of the summons were wasted. The service to which such acknowledgment was intended to be made equivalent is the service which might be actually and lawfully made, equivalent in this case to service of summons in Delaware county. It is a statute of evidence, in other words, substituting other proof of notice of the pendency of the action for the summons and officer's return.

Or it may be said that as the party must be summoned, which can only mean served with summons, in the county, section 5031, the acknowledgment is not equivalent to service in the county unless made there. So voluntary appearance, to be equivalent to service in the county, must be appearance there, *i. e.*, actual as opposed to constructive appearance.

But however this may be, in my opinion, section 5043 was not intended to in any way qualify or enlarge the provisions of sections 5031 and 5038, and the demurrer should be overruled.

Ramsey & Matthews; Moulton, Johnson & Levy and Chas. C. Davis, for plaintiffs.

M. A. Dugherty; Follett, Hyman & Kelley, for defendant.

Chas. Huston and Bateman & Harper, for other defendants.

MECHANICS' LIENS.

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[Hamilton District Court, November 13, 1883.]

†A. IVES & SON V. S. S. HOLBROOK ET AL.

1. Under the mechanics' lien law, the account filed is an entirety, whether the work done is under a contract or there is a running account for items furnished.
2. Where a contractor, on the death of the owner, filed an account and took out a mechanic's lien and afterward filed a second account for work and materials, subsequently furnished for the same building: *Held*, that he could not secure a second mechanic's lien for said second account.

ERROR to the Superior Court of Cincinnati.

SMITH, J.

This is a controversy between the holder of a mechanic's lien and an execution creditor. The court below found in favor of the mechanic's lien. To reverse that judgment a petition in error is filed in this court.

The facts in the case so far as they are material are as follows: Previous to November, 1879, Maria Plant, the wife of Thomas Plant, was the owner of a leasehold, and had made a mortgage to Benjamin Marsh, who was the owner of the fee, to secure the payment of \$1,000. On the first of November, 1879, Marsh brought suit in the superior court to foreclose this mortgage and to recover certain ground rents then due, and made the necessary parties, and on the 27th of January obtained a decree for the sale of the premises for the amount due on the mortgage, the ground rents and delinquent taxes. An order of sale was issued and stayed.

It appears that in March, 1882, S. S. Holbrook made a contract through Thomas Plant, the husband of Mrs. Plant, to furnish a quantity of lumber for a building on the premises in question. Thomas Plant made out a bill of lumber amounting to \$388. Holbrook, desirous of holding Mrs. Plant, made on the back of this bill a memorandum to be signed by her declaring that she was personally responsible for this bill, also adding some \$20 or \$30 which Mr. Plant, the husband, already owed to Holbrook. This lumber was delivered. The items run from March 7, to April 1, 1882. The account for the lumber delivered was \$419. Soon afterwards, the exact time does not appear, Mrs. Plant died, and on the 7th of June Holbrook made his affidavit and recorded it in the recorder's office for the purpose of securing a mechanic's lien for the amount of lumber already furnished.

Mrs. Plant left a will by which she devised the premises in question to her husband, making Mr. Baldwin her executor. Soon after the will was admitted to probate, A. Ives & Son, who had an old judgment against Thomas Plant, the husband, caused an execution to be issued and levied upon the premises in question as the property of Thomas Plant, and thus secured a lien by levy in May, 1882. During the following month Mr. Baldwin, the executor of Mrs. Plant, deceased, and Thomas Plant, the devisee, seeing the condition of the building, partly up and unfinished and the premises not saleable, thought it for the interest of the estate to have this building completed, and procured a statement signed by all creditors, except Ives & Son, whom they

† The judgment in this case was reversed by the Supreme Court; see opinion, 44 O. S., 516.

seem to have overlooked, recommending that the building be completed. They made an arrangement with Mr. Holbrook to go on and complete the building. He furnished lumber, paid certain sums of money for different parts of the building, and employed Mr. Plant, who was a carpenter; and it is claimed that it was such a building as Mrs. Plant intended to erect. Mr. Holbrook furnished the lumber in pursuance of this new arrangement, and this account ran from July 1 to December 22, 1882, amounting to \$1,018.68, and on the 5th of April, 1883, and within four months from the closing of the account, he filed a second mechanic's lien to secure this last amount, reciting, however, in the affidavit, that Mrs. Plant had died, leaving the building incomplete, and it being necessary for the protection of all the parties to have it completed. Mr. Holbrook had proceeded to complete it according to the original plans.

On July 25, 1882, the death of Mrs. Plant was suggested on the record in this case and the original judgment revived against the executor, Mr. Baldwin, and Thomas Plant, the devisee. An order of sale was issued and the premises sold in May, 1883. In the meantime new parties had been made, viz., certain creditors of Thomas Plant and among them A. Ives & Son and Mr. Holbrook, who set up his mechanics' liens. The premises were sold for \$4,100. The sale was confirmed and a distribution had, providing for the costs and unpaid taxes, then for the delinquent taxes and the plaintiff's original judgment, which at that time was \$1,482, then for the ground rent due on the lease, then for Mr. Holbrook's two liens, viz., \$419 for the first, and \$1,018.68 for the second lien, leaving a residue of \$555.83, which the court ordered to be delivered to the executor for the purpose of settling Mrs. Plant's estate in the probate court.

A. Ives & Son say that the superior court ended in finding that Mr. Holbrook had a mechanic's lien on said premises, and ordering the same to be paid, and also in remanding the residue to the executor to be settled in the probate court.

First, we think that whatever claim A. Ives & Son have by virtue of the execution against Thomas Plant, it is subject to the liens created by the wife and to whatever debts exist against the wife's estate.

Secondly, we think that the executor, as such, had no power to create a mechanic's lien against the estate of the deceased. The duty of an executor is to settle the estate as he finds it when it falls into his hands, and whatever authority Thomas Plant had to bind his interest in the property, was subject to all prior liens created by Mrs. Plant, and to all necessary charges and expenses for settling her estate.

Mr. Holbrook claimed that his second lien was created under section 3205, Rev. Stat., which provides "if the progress or completion of the work on any property designated in that chapter be suspended by the default or decease of its owner, without consent of such head or subcontractor, or material man, he or they, or any of them may proceed with the work in accordance however with the terms of the original plan or contract, and on completion thereof have either or all the remedies provided by this chapter."

It is claimed that the work was suspended by reason of the decease of its owner, and that this was a necessary expense by Mr. Holbrook for the purpose of securing his lien, and he went on according to the terms of the original plan and contract.

It seems to us that this section is to be construed with reference to the remedy sought, viz.; for the security of the lienholder, not necessarily for the benefit of the owner, nor for the benefit of other creditors who are not lienholders. It is a remedy given to a person who has made a contract, or furnished materials, relying upon the statute for the lien and to enable him to go on and complete his contract, if necessary to secure the lien. But under this section of the statute Holbrook is not entitled to a lien for his second account. In the first place, it appears from the testimony that it was not necessary for him to make a new contract to secure his lien for the \$419, the amount of the first account. Secondly, it appears from the testimony that the building was completed for the benefit of the estate generally; and thirdly, that the second account was a distinct and separate account. The first account was for a specific bill of lumber, for a specific amount, and it was furnished to the wife before her decease; and it was stated by Mr. Holbrook in his testimony that his account was evidenced by an original memorandum signed by the wife, and this was treated as a separate and distinct account by Mr. Holbrook himself. He filed his lien under the statute for this account as a separate account, and afterwards took out another mechanic's lien for the second account as a separate account, and when he came to file his answer in the superior court, he made two separate counts, one for the amount of the first lien, and the second for the second lien. Again, there were no plans or specifications for him to finish the house by, nor contract to be completed. According to the acts of the parties, these were treated as distinct and separate accounts.

Under the mechanic's lien law, the account is an entirety, whether the work is done under a written contract, and the contract is filed for the purpose of securing a mechanic's lien, or whether there is a running account of items, furnished from time to time by the material man to the owner of the premises. From the time of the first item of the account it is treated as an entirety, so that if any lien may accrue, by a mortgage or judgment, during a continuous account, it is subject to the mechanic's lien, and this lien is preserved from the beginning of the account, and the lienholder has four months from the last item to file his lien. *Choateau v. Thompson*, 2 O. S., 114; *The Hazzard Powder Co. v. Loomis*, etc., 2 Disney, 544.

It seems to us, therefore, that there is no mechanic's lien preserved for Mr. Holbrook for the second account. He stands there as a creditor of Mr. Plant, or those who employed him to go on and complete the work, which is a matter with which we have nothing to do.

The judgment of the superior court, so far as it found a mechanic's lien for the second account of Holbrook, was erroneous, and should be reversed and the case remanded to that court for further proceedings.

The other ground of error, we think, is not well taken. The probate court has exclusive jurisdiction for settling the estates of deceased persons, and after the liens which have been acquired against this property have been satisfied in the superior court, and paid, then the residue of the fund should be handed to the executor for him to settle the estate in the probate court.

Ferris & Wilder, for plaintiff in error.

J. F. Baldwin and Archer & McNeill, for defendant in error.

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FIRE ESCAPES—OWNERSHIP.

[Cincinnati Superior Court.]

†JAMES LEE ET AL., ADM'RS, V. ANNA C. KIRBY ET AL.

The owner in fee of a lot and building thereon which he does not in any way himself use or occupy, but which is let to a firm which occupies and uses the same as factory or workshop, is not the "owner of any factory, workshop," etc., within the meaning of the act relating to fire escapes. 80 O. L., 187.

HARMON, J.

Defendants, owners of certain lots with five story buildings thereon, in this city, are sued under the act relating to suits for wrongfully causing death, sections 6135-6, Rev. Stat., for causing the death of plaintiff's intestate by wrongfully neglecting to comply with the provisions of the act relating to fire escapes, 80 O. L., 187. The petition on demurrer to which the case now comes. for hearing, avers that said buildings, with the knowledge and consent of defendants, are used as a factory or workshop for sorting rags and preparing them for the manufacture of paper.

Of the many questions argued by counsel, the only one upon which it is necessary now to pass is whether or not these defendants are the owners of said factory or workshop within the meaning of the statute referred to.

It will be observed that the language is not "the owner of premises used as a factory" nor "the owner of the lot or land on which a factory, etc., is operated," but "the owner of any factory," etc., differing in this regard from the law relating to the liability of owners of property used for the sale of intoxicating liquors, section 4357, Rev. Stat., from that relating to the liability of owners of buildings, wherein gaming is carried on, section 3275, Rev. Stat., and from the original law relating to mechanic's liens, S. & C., 833.

It may certainly be truly said of this act, as of that last named in *Choteau v. Thompson*, 2 O. S., 123, that it "is so loosely drawn as to be open to constructions very different or indeed quite opposite." It was, however, held in that case, and *Dutro v. Wilson*, 4 O. S., 101, that the word "owner" did not necessarily mean owner in fee, but would include the owner of any lesser interest, the intent being clear to give a lien upon the interest of the person ordering the work or materials.

It seems quite plain that the "owner of a factory, etc.," does not here necessarily mean the owner of the fee of premises used as, or upon which there may be a factory, but would apply as well to the proprietor of the establishment whose operation constitutes the place a factory or workshop. The question here is, then, upon which did the legislature intend to impose the duty of providing a convenient exit from the upper stories, etc., in cases where the ownership of the fee of the premises and their actual possession and use are in different persons. It is not intended, and certainly could not be successfully, that it was the intention to impose it upon both or upon either. It is "the owner or agent for owner" of any factory, etc., who is to perform the duty.

It might be contended with much force that the mere difference in the language used here, from that used in the other laws referred to above, indicates the proprietor of the factory as distinguished from the

† This decision was affirmed by the district court; see opinion, *post* 000.

owner of the building. It is certainly plain that it will apply to either, and the court is therefore by well known rules of construction at liberty to consider what was in the minds of the men who enacted the law, and to adopt the construction most consistent with those ideas of justice and fair dealing which they are presumed to entertain in common with the court.

Now, the intention being to require the means of exit to be provided in all cases, the legislature must more naturally be supposed to have intended to impose the duty of providing them upon the person, *i. e.*, the actual occupant and user of the building whose right to the entry and occupancy necessary for that purpose is unquestionable, rather than upon the person, *i. e.*, the owner of the reversion, whose right to enter is generally confined to entry for the collection of rent and who cannot even enter to make repairs unless he have reserved the right to do so.

And it would certainly seem unfair to require this of and impose liability for failure upon one who may be ignorant, rightfully so and ought fully so, of the use to which the buildings are put by a tenant. In both the gambling and liquor law above referred to, knowledge of the use is made essential to the owner's liability. The omission of such provision here is not without significance. It would seem, too, more consistent with fairness to require the provision of such means of access from him whose use of the building makes them necessary, and at the termination of whose use they may become unnecessary or who may make them so by discontinuing such use, rather than from him who has no right to forbid such use or determine how long it shall continue, and whose expense might therefore be a vain outlay.

The use of the words, "owner or person having control of" with reference to inns, etc., in the first section of the act, is of no significance in this regard. They do not occur in the second section as they certainly would, if considered to mean anything different from "owner or agent for owner."

In my opinion the "owner of a factory or workshop," intended by this act, is the person who has present dominion over the place and control over the employees, tools, machinery and materials which, taken together, constitute a factory, the proprietor of the establishment, and not the owner of the fee who has parted with his right to use and occupy, and who, while he owns the land and the building, in no sense owns the factory or workshop carried on therein.

Demurrer sustained.

E. W. Kittredge, N. Longworth, R. Tyler and W. T. Cahill, for the demurrer.

E. G. Hewitt, W. M. Ramsey and John Coffey, *contra*.

ELECTION BALLOTS.

7

[Hamilton District Court.]

SAMUEL BERESFORD V. MORTON L. HAWKINS.

At the general state, congressional and county election of October, 1882, in Hamilton county, the tickets of the opposing political parties being printed, with the words at the top, "Democratic Ticket," or, as the case might be, "Republican Ticket," and with the names of the respective candidates following in their order, under the separate headings of "State Ticket," "Congressional Ticket," "County Ticket," another ticket was printed with the words

"Democratic Ticket" at the top, and in all other respects the same as the democratic ticket, except that, in small type, the words "Except for Sheriff" were added beneath the heading "County Ticket," and the name of the republican candidate for sheriff was then printed in place of the democratic candidate: *Held*, that under section 2952, Rev. Stat., in counting the ballots cast at the election, such tickets should not be counted for the name so printed thereon.

ERROR to the Court of Common Pleas.

AVERY, J.

(After stating the case, a contest of election for sheriff, wherein, upon a recount, the plaintiff in error, who was the republican candidate, had a majority of 197, which included the counting for him of 207 "except tickets,"—Democratic tickets, except that his name for sheriff was printed upon them.)

The Democratic ticket at that election—and the Republican ticket was like it in form—was printed on a single piece of paper bearing at the top the words, "Democratic Ticket," and with the names of the respective candidates, state, congressional and county, in their order, under separate headings as follows: "State Ticket;" "Congressional Ticket;" "County Ticket." The "except tickets" were printed exactly the same, with the addition under the heading "County Ticket" of the words in small type, "Except for Sheriff," and with, "For Sheriff, Samuel Beresford" then following, in place of, "For Sheriff, Morton L. Hawkins," as upon the regular Democratic ticket.

The statute regulating the conduct of elections and in force since 1874, (71 O. L., 31,) provides as follows, section 2952, Revised Statutes: "When a ballot, with a certain designated heading, contains printed thereon, in place of another, a name not found on the regular ballot having such heading, such name shall be regarded by the judges as having been placed thereon for the purpose of fraud, and the ballot shall not be counted for the name so found." This, as is said in *Roller v. Truesdale*, 26 O. S., 586, 592, *McIlvaine, J.*, is "intelligible only in the light of the history of parties. Each party nominates candidates for the various offices to be filled. A list of the nominations thus made by a party, when printed on a piece of paper, to be voted by an elector, is the 'regular ballot.' And when certain words designated by the party are placed at the head of such list to distinguish it from other ballots containing the names of other candidates, it then becomes a 'regular ballot with a certain designated heading.'"

The object had in view by the statute is obvious. The evil had grown up of the printing, in the interest of candidates upon one side, of the tickets of the other side, with the name of the candidate for whom the ticket was printed, in the place of the regular nominee. The legislature had already struck at the distinguishing marks by which, in its appearance, one ballot might be known from another, by prescribing (act of May 1, 1868, S. & S., 343), that they should be written or printed on white paper without device or mark, except the words at the head of the ticket; but with a proviso that this should not be construed to prohibit the erasure, correction or insertion of any name, by pencil mark or otherwise, upon the face of the printed ballot. This enactment was continued in force, with a provision for the width of the tickets, and for one-fifth of an inch between the names, to allow space for erasures and insertions; the entire section as incorporated in section 2948, Rev. Stat.: "All ballots shall be written on plain white paper, or printed with black ink,

with a space of not less than one-fifth of an inch between each name, on plain white newspaper not more than two and one-half, nor less than two and three-eighths inches wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket ; and it shall be unlawful for any person to print for distribution at the polls, or distribute to any elector, or vote any ballot printed or written contrary to the provisions hereof ; but this section shall not be considered to prohibit the erasure, correction or insertion of any name, by pencil mark, or with ink, upon the face of the printed ballot." Whatever may have been the latitude of construction previously adopted, the provision that a ballot with a certain designated heading, containing printed thereon in place of another a name not found on the regular ballot having such heading, should not be counted for that name, makes it certain, that the printing, for distribution at the polls, of party tickets containing printed thereon a name in the place of any nominee of such party, and the distribution of the tickets to any elector, or the voting thereof, were intended to be prohibited.

The power of regulation thus exercised by the legislature cannot reasonably be questioned. The right of a vote by ballot is guaranteed by the constitution to every elector. But it must, nevertheless, devolve upon the legislature to establish such regulations as will enable all persons entitled to the right to exercise it freely and securely. *Cooley*, Const. Lim., 601 ; *Kirk v. Rhoads*, 46 Cal., 398-407. The Supreme Court has held that "all reasonable latitude should be allowed to the legislature over such power of regulation, and every reasonable intendment in favor of the constitutionality of laws enacted for that purpose should be made by the courts." *Monroe v. Collins*, 17 O. S., 666, 686, *Welch*, J.

True, such laws must be reasonable, uniform, and impartial, and calculated to facilitate and secure, rather than to subvert or impede the exercise of the right to vote. But is there anything in the law in question to expose it to an objection of this kind? The reason for the legislation was, that since nothing was left to distinguish one ballot from another, except the words at the head of the ballot, there was a possibility that by the printing, for distribution at the polls, of ballots with a certain designated heading containing printed thereon a name not found on the regular ballot having such heading, voters might be deceived. The legislation was calculated not to impede or subvert the right to vote, but to enable it to be exercised freely and securely. The objects, as has been expressly declared by the Supreme Court, were: 1. The prevention of actual fraud in procuring an elector to vote unintentionally for a candidate whose name is not on the regular ballot of his party ; and 2. To remove inducements for attempting such fraud by declaring that a name so printed in a regular ballot, instead of the regular candidate, should not be counted. *Roller v. Truesdale*, *supra*, *McIlvaine*, J.

It is not denied that the name of the plaintiff in error for sheriff was printed in these 207 tickets instead of that of the defendant in error, who was the regular democratic candidate,—the tickets themselves of course conclude that question. But the contention appears to be that by reason of the words, "Except for Sheriff," under the heading "County Ticket," voters could not have been deceived ; and that these words, of themselves, constituted a "certain designated heading."

The question whether voters could have been deceived opens a field of conjecture, in which, the conclusion of each individual probably would be found to depend upon his own thinking whether he himself

could have been deceived. Whether voters were in fact deceived could not be known except from conjecture, for the fact of their being deceived involves their own ignorance of it. The wisdom of the legislature has been shown, therefore, in not requiring that the law should depend upon whether voters were in fact deceived. The rule, that when a ballot with a certain designated heading contains printed thereon in place of another a name not found on the regular ballot having such heading, such name shall be regarded by the judges as having been placed thereon for the purpose of fraud and shall not be counted, is a rule for the government of judges of elections, and the nature of the duties of such officers, and of the occasion, demand that its application should not be left to be determined by conjectures upon whether the voter had in fact been deceived. Such a question, being one upon which men might honestly differ, might be expected to be decided like the election itself,—by a majority vote.

The other contention, that the words, "Except for Sheriff," under the heading "County Ticket," made the ballots, of themselves, ballots with a certain designated heading, rests apparently upon a division of opinion reported in *Roller v. Truesdale*, *supra*, from which case extracts have been already read. The language of McIlvaine, J., is as follows: "Now, some members of the court are of opinion that the phrase 'certain designated heading' applies as well to words used on the ballot to designate each class of offices to be filled, as to the words at the head of the ballot or piece of paper delivered to a judge of the election; so that each ballot may be said to have several designated headings, as in the form of ballot No. 1, 'Republican State Ticket,' used as a descriptive of that part usually called the state ticket; 'Republican District Ticket,' to designate the district offices and candidates; and 'Republican County Ticket,' designated county offices and candidates therefor."

To understand this language requires a reference to the facts of the case. It was from Mahoning county, in which county a party had been organized for local purposes, known as the "County Removal Party." The names of the candidates of this party for county offices, were printed in place of those for the same offices on the democratic and republican tickets, under the heading, "County Removal Ticket," but as the party had only a county organization, the rest of the ticket was printed, in one form as the democratic state and district ticket, and in another form as the republican state and district ticket. The republican state, district and county ticket—and the democratic state, district and county ticket was substantially like it—was printed with the headings for state, district and county offices, respectively, as follows: "Republican State Ticket," "Republican District Ticket," "Republican County Ticket."

The difference of opinion, whether the phrase "certain designated heading" applied to each of these can be understood, for each contained the distinguishing party name; and the decision itself that the "county removal party" had the right, for fair and honest purposes, to adopt not only the nominations of the other parties for state and district offices, but also the headings of their ballots, is commended by good reason. But we fail to see what color is given to the claim here, that the name, "County Ticket," with the words "Except for Sheriff" under it, was a "certain designated heading," or how the right of a party, for local purposes, to adopt the state and district nominations of other parties, with the headings of their ballots, sustains the right of a candidate of one party to have his name printed upon the ballots of another.

There was only one "designated heading" of the ballots in question,—the distinguishing words by which to know the party were only at the top of the ticket. "Ballot" and "ticket" are convertible terms, as is shown. Section 2949, Revised Statutes. "Each elector shall * * * deliver to one of the judges of the election a single ballot, or piece of paper, on which shall be written the names of the person voted for," etc. The name, "County Ticket," with the words "Except for Sheriff," was not a "certain designated heading." It designated nothing. The ticket was not a county ticket, except for sheriff. The words could only mean that it was a democratic ticket, except that for sheriff there was a name printed on it in the place of the regular candidate. But this was exactly what the judges of the election were required, by the law, to regard as having been done for the purpose of fraud. "The legislature has power to declare a rule of evidence, by which fraud, in a particular case, shall be conclusively established, without inquiry into the fact whether it did or did not exist. Such rule is declared by this statute." *Roller v. Truesdale, supra*, McIlvaine, J.

We are not unmindful that "great care should be taken in enforcing this statute, lest it be applied to a case not intended by the legislature, and thereby honest electors be disfranchised, in the name of the law, but contrary to its intention." *Roller v. Truesdale, supra*. But the most careful consideration has left no room for any other conclusion, than that the case here is within the intention of the law. To construe the statute otherwise would make it a dead letter. The inducements for attempting fraud, by printing upon tickets, bearing the heading of one party, the names of candidates of another, would no longer be removed, but as before the enactment would be in full force. It would only be necessary to print the name with an "except" over it, or the heading with an "except" under it; the size of the letters being left to option. To thus defeat by construction the very purpose of the statute, can surely not be the province of a court. Nor is there danger, in declaring the law as written, that honest electors may be disfranchised. The elector who knowingly voted one of these ballots could not be, in law, an honest elector, for the law charged him with notice that the name would not be counted. If he voted the ballot unknowingly, it is in his interest that the name should not be counted.

The unanimous judgment of the court is, that the 207 "except tickets" should have been rejected from the recount for the plaintiff in error, as was done by the court of common pleas.

Affirmed.

Sage & Hinkle and Cowan & Ferris, for plaintiff in error.

Campbell, Bates & Von Martels and C. W. Baker, for defendant in error.

DIVORCE—FRAUD.

10

[Hamilton Common Pleas.]

†WILLIAM RINE V. ISABELLA HODGSON ET AL., ETC.

1. A decree of divorce obtained by a wife who was imbecile, but never so adjudged by any court, and having no guardian, will not be set aside after the term and after her death upon the petition of the late husband, the wife residing in good faith, when she filed her petition, within the jurisdiction of the court,

†This judgment was reversed by the district court; see opinion, *post* 000.

the husband having been served by publication, and the fact of imbecility not having been brought to the attention of the court.

2. Fraud in obtaining a decree of divorce will not authorize the court to set it aside after the term upon original bill.

JOHNSON, J.

The plaintiff asks that a decree of divorce entered against him at the May term, 1881, of this court, upon the ground of willful absence of more than three years, and wherein all his interests in his wife's estate was barred, be set aside and annulled.

The action is peculiar; the charges anything but commendable, if true, to the next of kin of the late Mrs. Rine. They are her nephews and nieces, and defendants herein. The case is all the more complicated, when it appears that the late wife is deceased and the effect of setting aside the decree will be in law to restore the marital relation, at least as of the date of her death. Confessedly the action is to put the late husband in a position that will enable him to take by inheritance as her heir, the property of which she died seized on Baymiller street, this city. The divorce was granted, as already noted, in 1881. She died intestate in 1883 and without issue. They were married in 1873, and he avers that soon thereafter she became imbecile and devoid of mental capacity, and so remained until her death; that in 1876, by mutual agreement with her, he went to New York City, to engage in business; that October, 1880, her said next of kin wickedly conspiring to deprive him of his wife's estate, should he survive her, and that they might inherit the same, caused his wife, she being imbecile, to file a petition for divorce against him in this court upon the grounds stated; that they caused it to be stated in her affidavit to obtain service by publication, that his residence was unknown, when he avers "that they knew that she at the time did know his actual whereabouts," that he never had any actual notice of the suit, that a copy of the petition and summons was not sent to him, and that the service by publication was not legal, and that she, his wife, although a decree of divorce was entered against him, never knew of the same up to the time of her death.

The decree is set out in full and made part of the petition. To this petition the defendants demur generally, claiming that under the law of Ohio governing divorce proceedings a decree of divorce is not the subject of review either by appeal or by petition in error—in other words, that the decree once entered dissolving the marriage relation, a *vinculo*, is final and conclusive between the parties.

The law as applied to judgments and decrees, generally, is, that after the term, they may for reasons named in the statute, be set aside by petition or original bill, fraud being one of the grounds.

The statute relating to divorce proceedings is special, and by sec. 5706 of that statute it is in terms provided, "No appeal shall be allowed from any judgment or order of the court of common pleas, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony."

It has recently been held by this court, *Wellington v. Wellington*, 8 Dec. R., 282, that the present statute is in effect but a re-enactment of the statute in force in 1853, when the case of *Parish v. Parish*, 9 O. S., 534, was decided by our Supreme Court. The syllabus of that case is as follows: "A decree from the bonds of matrimony, although obtained by fraud and false testimony, cannot be set aside on an original bill filed at a subsequent term."

The court in that case, while admitting that the fraud charged was of the most flagrant character, the husband falsely charging the wife with adultery, fraudulent contract and extreme cruelty, the husband going into a county where he did not reside to bring the suit, and the publication of the notice for service being purposely withheld from circulation in the county of her residence, yet held, that the statute law of the state prohibiting appeals in such cases "was a recognition of the principles of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who wrongfully perhaps procured its promulgation." *Bascom v. Bascom*, 7 O., part 2, 126; *Laughery v. Laughery*, 15 O., 404; *Tappan v. Tappan*, 6 O. S., 64; *Lucas v. Lucas*, 3 Gray, 136, and *Green v. Green*, 2 Gray, 361.

Notwithstanding the fraudulent conduct and the manner in which the jurisdiction was invoked, the court decided that jurisdiction was obtained, using this language: "Though there was not any actual service upon Mrs. Parish, and though, for that cause, it might be disregarded in New York or elsewhere, still the court in Brown county had jurisdiction of the subject-matter, and of the parties--of the one by his appearance and of the other by publication in a newspaper which under our statutes is as effective in conferring jurisdiction as actual service."

Our Supreme Court has never modified this decision, and it stands today as the law in this state. The counsel for plaintiff rely mainly upon a recent case decided by this court, case of Wellington v. Wellington, 8 Dec. R., 282. I have examined the case with care. That case was heard upon evidence. It is clearly distinguishable from the case at bar and Parish v. Parish, *supra*. In the Parish case, and as I must hold in this case, the court obtained jurisdiction over the parties and the subject-matter. In the Wellington case the court found as a fact, that Mrs. Wellington, the plaintiff, had neither residence or domicile in Ohio, much less in Hamilton county, that the man served as Wellington, her husband, defendant, was not her husband at all, but some one personating him at a house on west Fourth street. The court found there was absolutely no jurisdiction obtained in the premises over either, and distinguished the case from Parish v. Parish for that reason, and we think was clearly justified in holding, that to allow such a judgment to stand "would dishonor the law."

That Rine was brought within the jurisdiction of the court, by publication, I think sufficiently appears upon the face of the petition and decree embodied therein. A petition was filed invoking the jurisdiction of the court upon a subject-matter over which it had undoubted jurisdiction—divorce—in due form signed by the plaintiff. This was the place of her residence, and for aught that appears in the petition his residence as well. Admitting that she was imbecile—insane at the time, there is no averment that she had any trustee or guardian, or that she had ever been adjudged insane by any court. An insane person may be a party to a suit, without a guardian, next friend or trustee, and be subject to service as a sane person, and our Supreme Court in case of Johnson v. Pomeroy, 31 O. S., 247, decided that a judgment would not necessarily be set aside that had been recovered in an action against a person who was insane when he was sued and when the judgment was taken, although the plaintiff knew it at the time. The service was upon him alone and the judgment was taken by default. The court said: "An insane person may be sued and jurisdiction over his person acquired by like process as if he were sane. * * * No doubt it is the duty of a plaintiff who sues an insane person if he has knowledge of the insanity to inform the court thereof. But the failure to perform any of these duties does not affect the jurisdiction of the court, but only the regularity of the proceedings. Therefore it is that the judgment of a court having jurisdiction of the subject matter of the suit and of the person of such party, notwithstanding such irregularity is not absolutely void."

In *Sturges v. Longworth*, 1 O. S., 550, the court say: "The lunatic, although incapable of defending himself, is still civilly liable, and it is necessary that he should be brought into court, that jurisdiction over the person should be obtained before the court can proceed to act. If he is within the jurisdiction of the court, he should be served with process, as other parties are required to be served."

Section 5000, Rev. Stat., provides: * * * "If the insanity of a party be discovered, or he become insane after the action is brought, it shall *be thereafter prosecuted*, or defended by his guardian," etc.

Section 5002, Rev. Stat., provides: "That when the insanity of a party is not manifest to the court and the fact of insanity is disputed by a party or attorney in the action the court may try the question, etc."

It would seem from these authorities and statutory references, that jurisdiction may be obtained, notwithstanding that either a plaintiff or defendant may be insane and the cause will proceed.

"To commence a suit is to demand something by the institution of process in a court of justice and to prosecute the suit is according to the common acceptation of language to continue that demand. * * * The court must determine whether the suit is prosecuted, whether the demand for the thing to which a right is asserted is continued." *Callen v. Ellian*, 13 O. S., 453.—The decree made part of the petition recites fully the finding of the court upon the question of service, the appearance of the plaintiff, etc.

Jurisdiction was taken by the court over the plaintiff when the petition was in due form filed in court, and its process issued. There was nothing upon the face of the petition showing the insanity of the plaintiff, nothing showing any irregularity.

By section 5000, *supra*, if the party (plaintiff) be insane, *until that be discovered* the suit must go on in the name of the insane plaintiff as originally instituted.

In contemplation of law, Rine, when publication was complete, was as effectually in court as though he had been brought in by actual service. It was his right and duty, in contemplation of law, to have raised objection to the insanity of the plaintiff.

But the direct question has been decided in Supreme Court of Tennessee, in the case of Rankin v. Warner, 2 Lea, 302 (1879). Warner, an insane person, commenced several actions of ejectment in his own name, alone. Before judgment a next friend was appointed and made party with him. The court said: "It is first argued that no such action could be brought in the name of Warner, if he were of unsound mind at the time of its institution. * * * The defendants were regularly in court by summons; * * * the object of the rule requiring a next friend in the prosecution of suits for the use of persons under disability, is to have some one responsible for costs and liable to judgment therefor, and to have some one upon, and against whom the court may make, and enforce its orders," etc.

The defendant may, by proper steps at the right time, compel the presence of next friend or guardian. If both fail to ask it, otherwise, the suit may proceed to a final determination in the name of the plaintiff under disability. The law mainly designs to protect the weak and dependent, and if the courts, seeing a suitor has rights or property entitled to their consideration and judgment, turn him out because no one will, or does assume the role of guardian or next friend for him, they will certainly be guilty of a strange perversion of the object of their creation."

In C. & P. R. R. v. Mungen, 78 Ill., 300, the court say: "Until the appointment and qualification of a conservator for an insane person, it is as clear that a suit may be brought in such insane person's name for the recovery of a debt due him."

In Rebecca Owing's case, 1 Bland's Ch. (Md.), 290, the court say: "A person who is actually *non compos mentis*, but who has not been found to be so under a writ *de lunatico inquirendo*, may be permitted to sue as co-plaintiff with another."

Also as bearing to some extent on the case may be noted: 2 Brev. (S. C.), 20; 18 N. J. Eq., 438; 40 How. Pr., 328; Shelfon Lunacy, 395 (ed. of 1833); 24 Wend., 85; 1 Chitty Pldgs., 18; 1 Story, Eq. Pldgs., sec. 66 and notes; 1 Hill, 97; Lane v. Schemerheim; 1 Bland. Ch., 290; Colgate Owing's case, 373.

I may say my first impressions were against this demurrer, but the reading of the case of Parish v. Parish, *supra*, and other authorities found upon the subject, the more convinced me of the dangers to which any innovation upon the principle of public policy therein recognized might lead. The fact that Mrs. Rine is deceased, in my judgment ought not to reflect the principle recognized in the cases cited. She is not here to defend. Not only the reputation of the living, but the reputation and the memory of the dead, are to be affected. The plaintiff is asking a court of equity to go a great ways to aid him, now it seems, in a matter of property merely and not in the interest of marital happiness. Asking, as he does, such extraordinary equities, he should at least have more fully put the court in possession of the facts as to his actual whereabouts from 1876 to the filing of this petition in 1883, and have accounted for his absence from an imbecile wife, as he claims for so long a period; and whether, before her death, believing that he was still her husband, he contributed to her support, and at all times conducted himself toward her as a faithful and dutiful husband, for it may be that he had deserted her, and in equity and good conscience she ought to have been divorced from him. He should come into court with very clean hands. In Mims v. Mims, 33 Ala., 100, the law of that state no more than this, authorizing such a suit, the Supreme Court refused to disturb a decree for alimony where an insane wife, in an insane asylum, by her next friend, had prosecuted the suit against an erring husband. His petition should also have shown, whether before the wife's decease and after the divorce he remarried or has since her death, and particularly where his residence was, during the years that he apparently was living away from her, and when it was, and how it was, he first discovered that he had lost a wife and possibly an estate. The demurrer will be sustained. As the questions involved are of much interest to all the parties, the plaintiff may, if he desires to, amend and present a more complete record, take leave to do so, that the reviewing court may have all the questions of law and fact before it that the case will afford.

Gasser & Spangenberg and T. C. Campbell, for plaintiff.

R. P. Bradstreet, for defendant.

COUNTY DITCH LAWS.

18

[Medina Probate Court.]

†JOSEPH L. BECK ET AL. V. COMMISSIONERS OF MEDINA COUNTY
ET AL.

1. The statutes in force in 1881 relating to county ditches are unconstitutional inasmuch as they do not provide that the compensation for land appropriated for such ditches shall first be paid in money or secured by a deposit in money, as required by the constitution of the state of Ohio.
2. The requirement that a ye and nay vote shall appear on the record of the county commissioners on all questions involving the levying of taxes and expenditures of money applies to the record of the establishment of ditches requiring expenses to be incurred, and is not satisfied by a record merely showing unanimous consent. The record should show full compliance with law where lands or taxes are involved.
3. Revised Statutes, 4457, is mandatory, and where in establishing a ditch the service of notice on the landowners is not returned under oath, nor filed with the auditor, nor is the publication of notice to non-residents verified nor filed with the auditor, these are defects of substance and jurisdictional, and the proceedings thereafter are void and cannot be cured by the probate court.

UPON APPEAL from the Board of Commissioners of Medina county, Ohio.

HEARING UPON MOTION to dismiss the petition.

Lacey & Heath and Bostwick & Barnard, for appellants.

Joseph Andrew, for commissioners and petitioners, *contra*.

MUNSON, J.

This cause is founded upon the petition of M. V. Bates and others filed with the commissioners of Medina county for the location and construction of a county ditch, known as the Westfield and Chippewa ditch, situated in the townships of Westfield and Guilford, in said county of Medina, and state of Ohio, and extending from a point, at a bridge across Chippewa creek, at or near lands owned by Charles D. Cook, running thence northerly to the village of Seville, and from thence northwesterly along and into the line of the old ditch into Chippewa lake.

Claims were filed before said commissioners by Pelton and Colbetzer and others for compensation for lands appropriated for said ditch, and compensation was awarded Pelton and Colbetzer in the sum of three hundred dollars, and said ditch was ordered to be located and constructed; and thereupon an appeal was taken by the above named appellants and others to this court, both as to the construction of the ditch and the compensation to be paid.

On the day for the preliminary hearing of said cause before the probate court, motions were submitted by said appellants to dismiss the petition of Bates and others—first, for the reason that the statutes under which the said commissioners have proceeded to order the location, establishment and construction of said ditch are unconstitutional and void, inasmuch as they do not provide that the compensation for land appropriated for said ditch shall first be paid in money, or secured by a deposit in money, as required by the constitution of the state of Ohio; second, that the record of the said commissioners, made under said proceedings to locate, establish and construct said ditch, is not a full and complete

†A contrary opinion is found in *Zimmerman v. Canfield*, 42 O. S., 463.

record as the law requires to be kept by a board of county commissioners. After full argument, extending through nearly three days, in which the appellants, commissioners and petitioners have been fully heard by counsel, and after careful consideration by the court, carefully examining every feature of this case, the court is of the opinion that it has no jurisdiction in this cause, and that the motions should be sustained and the petition dismissed. And first, as to the constitutional provision. Section 19, article 1, of the constitution provides:

"Section 19. Private property shall ever be held inviolate, but subject to the public welfare when taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits, to any property of the owner."

Private property is here treated as inviolate, and can in no case be taken for a public purpose without compensation rendered therefor. This well settled and well defined principle of constitutional law is what gives protection to the private property of the citizen, and makes good government both possible and actual. Without such security to private property firmly grounded in the organic law, and upon which all our laws, to be valid, must be based, protection to private property would be impossible. It would be subject to the greed of corporate powers and to the whims often of fancied public improvements, and no firm and stable security to private property would be afforded.

The law, then, before us relating to the location and construction of county ditches, according to previous decisions of the Supreme Court, must be construed and interpreted in the light of section 19 of article 1 of the constitution. If, on a careful examination, we find that the present county ditch law makes no provision by which the commissioners, under this proceeding, can legally raise and pay the compensation for lands appropriated, as the constitution provides, then we are forced to the conclusion that the law is not within the pale, and therefore has not the support of constitutional authority, and is, therefore, inoperative. In a proceeding of this kind, which takes the land of the citizen against his will and protest, and converts it to a public use, the law should be so clear and well defined in its modes and operations as to leave but little, if any, doubt in the mind of the court construing the law that it defined definitely and clearly the purpose to be obtained and accomplished. Sometimes, in the construction of a law, hedged in with ambiguities, taking the whole statute together, courts are enabled to construe the law favorably and give to it a reasonable and fair construction, and thereby execute it, but when a provision is entirely left out, such a one as the constitution provides is vital to the jurisdiction of the case, then we should call a halt and examine the ground upon which we stand carefully, and determine correct premises. After full and careful examination of the county ditch law found in the Rev. Stat. of 1880, and the amendatory acts thereto, passed in 1881, the court is of the opinion that there is no provision in the present county ditch law prescribing the mode how the commissioners are to pay in money, or to secure by a deposit in money, compensation for lands appropriated by way of damages or otherwise, for, unless this is done the Supreme Court has held

that the same must be paid by the mode prescribed in the constitution before any legal entry can be made upon the lands of individual landowners for the construction of a ditch.

A brief comparison of former ditch laws with the present county ditch law will make this point more clear. The first ditch law passed February 24, 1854, under the present constitution did not recognize what the laws since and now recognize, that the taking of private property in the construction of a ditch is a public taking, nor did that act provide for compensation in a public way, which some of the succeeding laws have done (until now), but they did provide the mode and manner in which the landowner should receive compensation for his lands appropriated, which the present law fails to do. In the act of 1854, sec. 9, relating to township ditches, it is provided that "any person who shall suffer any damage, by cutting any ditch or water course, or throwing up any embankment, or changing any water course, shall be paid by those interested in the same a reasonable compensation in money, to be determined, according to the provisions of this act, within thirty days after such damage shall have been ascertained." The amendatory act of 1857 required claimants for compensation to make claim therefor to the trustees at the time of meeting to determine the location and the construction of the ditch; and it further provided that the trustees should estimate and determine the amount of the compensation to which the claimant would be entitled for the appropriation of his lands, and such compensation awarded was to be assessed against the parties interested and benefited in the construction of said ditch, and when collected was to be paid over to the parties entitled thereto. The Supreme Court sustained this act, *Reeves v. Treasurer*, 8 O. S., 333, inasmuch as it provided the mode and manner of compensation to the landowner for his lands appropriated and damages sustained, thereby coming within the provision of sec. 19 of the constitution.

Again we find that on March 24, 1859, the legislature passed a county ditch law, amending certain defects in former laws and repealing the act of May 1, 1854, and the act amendatory thereto, passed April 14, 1857, and the original act passed February 24, 1853. This act of March 24, 1859, is clearly within the constitutional provision. There is no longer any trace of anything that looks like an ambiguity, but a well-defined and public mode of how the compensation is to be paid. The law provides that when the commissioners find that a ditch, drain or water course will be conducive to the public health, convenience or welfare, and no application is made for compensation, that they shall proceed to locate and establish the ditch; but if applications for compensation shall be made, further proceedings by the commissioners shall be adjourned, and the proceedings shall be certified to the probate judge of the proper county by the county auditor, and such proceedings shall be had to determine the compensation of such claimant, or claimants, as are authorized and required by an act to provide for compensation to the owners of private property appropriated to the use of corporations, passed April 30, 1852. So far as the same are applicable, and the compensation so found and assessed in favor of said claimant, or claimants, shall be certified by the probate judge to the county auditor, and be paid out of the county treasury from the general fund, or remain deposited therein for the use of such claimant, or claimants, and the county commissioners shall, at the next regular session after such compensation shall have been assessed and paid, or deposited as aforesaid, proceed to locate and establish such

ditch, drain or water course. There is, and can be, no doubt as to the meaning of this language. It is clear to the ordinary comprehension, and well defined. It provides the mode how the money shall be raised, and to whom paid, and that it must be paid before a ditch can be constructed. It brushes away all ambiguities, and leaves not a doubt in the mind of the court that it is clearly within the purview of sec. 19 of the constitution. The same provision is contained in the act passed by the legislature April 12, 1871, and said act was in force at the time of the revision of the statutes of 1880.

The result of the investigations thus far brings the court to this conclusion, that no ditch law, township or county, passed under the present constitution of the state of Ohio, has been enacted by the law-making power of this state that has not, in some form, provided compensation for lands appropriated, except the law found in the Rev. Stat. of 1880, and the acts amendatory thereof. The constitution does not contemplate that the landowner shall wait for the value of his lands appropriated until the same shall have been raised by the slow process of taxation, or by the sale of bonds, but he is entitled to it before the commissioners enter on his premises for the purpose of constructing the ditch. The constitution does not contemplate that any body of men, clothed with authority, can take from a private citizen his lands or his property for a public purpose, and refuse him compensation therefor without either a payment in money, or a deposit in money, and drive him, at his own expense, to his remedy at common law to recover his property rights. If this was the rule of the law, there would be no security to private property, and the end would be continued and multiplied litigation—chaos and disorder.

If it be urged that no permanent settlement of this question has yet been made, emanating from the Supreme Court, that the appropriating of private property for the construction of a ditch is a public taking, within the meaning of the constitution, as provided in sec. 19 of article 1, I refer the objector to the case of *Reeves v. Treasurer*, 8 O. S., 333, in the constructing of the act by the court relating to the act of May 1, 1854, and the amendatory act of April 14, 1857, in which the said court pronounce that the said acts are in contravention of the 19th section of the Bill of Rights, "inasmuch as they authorize an appropriation of private property without reference to the public welfare." This decision clearly brings the construction of the present county ditch law within the purview of sec. 19 of article 1 of the constitution, and the provisions of said law, coming within the purview of the constitutional provision, are to be construed according to sec. 19 of article 1.

It is well to bear in mind, as we go along, that the provision relating to compensation for lands appropriated, contained in the act of May 1, 1862, providing how the money was to be raised and how paid, and which act the Supreme Court, *Sessions v. Crunilton*, 20 O. S., 349, 357, held to be within the purview of constitutional authority, has been continued in every township ditch law, authorizing township trustees to locate and establish ditches, until the present law of the Rev. Stat. of 1880, adding to the same the words in sec. 4521, "and no order for the opening or sale of any ditch, or any part thereof, located and established under this chapter, shall be made until the amount of compensation, for land appropriated, shall have been paid," and the said township ditch laws have also provided the mode of raising the money to be paid for lands appropriated, and prescribed the method and time of payment. The provision in the county ditch law of 1859, heretofore cited, relating to

the location and construction of county ditches by the commissioners, and prescribing that the value for lands appropriated shall, when ascertained, be paid out of the county treasury, upon the order of the probate judge, or remain on deposit there for the claimant, or claimants, (56 O. L., sec. 4, p. 59,) has been substantially continued in every county ditch law from that time to the county ditch law of the Rev. Stat. of 1880, where it entirely disappears, and no trace of a well-settled constitutional provision in the law is longer to be found. It has entirely disappeared. It has dropped out, either by legislative design or by legislative mistake. If the legislature intended to leave out that clause of the law relating to compensation, embodied in the act of 1859 and of the act of 1871, which provided that the compensation found due for lands appropriated should be paid out of the county treasury, upon the order of the probate judge of the proper county, as has substantially been the law from 1859 to 1880, relating to the construction of county ditches, and provide therefor the mode of paying compensation, as provided in the township ditch law, or by some other mode, they most clearly failed so to do. It is difficult to explain why this is so, except upon the supposition that the code commissioners failed to include in their revision of the law, the provision of the law of 1859 and of 1871, relating to the payment of compensation for lands appropriated, and that the legislature, failing to detect the omission and restore this vital provision of the law, enacted it as we find it. As well might we claim that the law was constitutional that dispensed with the right of trial by jury in the assessment of the value of lands appropriated in the construction of a county ditch, as to claim the law constitutional that provides no means of paying such assessment in the mode prescribed by the constitution. In the act passed February 27, 1867, (64 O. L., 27) it was provided that land might be appropriated for ditches in certain cases, but made no provision for compensation to the owner, in money, to be assessed by a jury for the land appropriated.

In the case of *Watson v. Township*, 21 O. S., 667, it was held by the Supreme Court that the want of such a provision brought the act in conflict with section 19, article 1, of the constitution, and that the constitution did not enforce itself—believing that the points gone over are well taken; that the constitution recognizes that the appropriation of private property, in the construction of a county ditch, is a public taking, within the meaning of the constitution; that the compensation for lands appropriated in the construction of such ditch must be paid, within the letter and spirit of the constitution, either by a payment in money, or by a deposit in money, before any valid order can be made for the construction of such ditch, and that the law in this respect, to be valid, must be clearly within both the letter and spirit of constitutional requirements—in other words, the law and the constitution must have such a harmonious blending, both in spirit and letter, as to leave but little or no doubt in the mind of the court that the one is supported by the other.

If we examine the only two sections of the county ditch law, that gives to the commissioners the power to raise the necessary means to pay for the location and the construction of a county ditch, we find that the authority given is wholly and entirely inadequate to empower the commissioners to raise and pay compensation for lands appropriated in the mode and manner prescribed by the constitution.

Section 4461 of the amendatory act of the Rev. Stat. of 1881 provides that "the commissioners shall, upon actual view of the premises, fix and allow such compensation for lands appropriated, and assess such damages as will, in their judgment, accrue from the construction of the improvement to each person or corporation making application therefor," etc. The law simply says assess and allow compensation. It does not say against whom, or provide anywhere the mode of raising the money. Section 4481 provides that if the commissioners determine to issue the bonds of the county, to pay for the expenses of constructing any ditch, they shall make an assessment upon all the lots, lands, public or corporate roads, or railroads, benefited by the improvement, in proportion to the apportionment hereinbefore provided for, sufficient to pay the costs of location, and the first year's interest, and including the fees of the surveyor and engineer made after locating, in superintending the construction of the improvement, and order the same to be put on the duplicate for collection. Not a word is said in this section with reference to raising money to be used by the commissioners in paying the value of lands appropriated in the construction of the ditch. The money so raised is to be used simply in the cost of location and construction and the first year's interest, and in the payment of the engineer after the ditch is located. Section 4482 provides that after the bonds are issued that they shall not be sold for less than their par value, and the money arising from such sale shall be used for no other purpose than the construction and expense of said improvement. Not even an intimation in these two sections which, of the entire law, refers to the only means of raising money for any purpose whatever to be used in the location and construction of a county ditch, as provided by section 19 of the Bill of Rights for payment of compensation. No reference whatever of the mode and manner of raising the necessary funds to pay for lands appropriated in the location and construction of a county ditch in the mode and manner prescribed by the constitution.

The Supreme Court, in the case of *Sessions v. Crunkilton*, 20 O. S., 357, "held that the amount of compensation for lands appropriated is no part of the sum which may be certified to the auditor to be placed on the duplicate to be collected in the form of taxes." The very important question then arises, is there any power in the present county ditch law whereby the commissioners can, in conformity with the constitution of the state, raise and pay in money, or secure by a deposit in money, to the claimant the value of lands appropriated by way of compensation or damages?

The court is free to say, that, after a careful and painstaking investigation and examination of every feature of this case, as presented, that it fails to find in the present county ditch law any power enabling the commissioners to raise the means prescribed by section 19, article 1, of the constitution to pay the value of lands appropriated. They cannot raise it by the sale of bonds, because the law does not so provide. They cannot raise it by taxation, or assessments, because that is too slow for the constitutional provision. They cannot pay the same out of the county treasury, upon the order of the probate judge, for that is no longer the law. They cannot assess the compensation, in the construction of a county ditch, from the petitioners, and those who will be benefited thereby, and collect and pay the same before the construction of the ditch, because the law has failed to give them authority so to do. It seems to the court that the present county ditch law is so defective in

this respect as not to confer upon the commissioners sufficient jurisdiction to locate and construct a county ditch where compensation is claimed. That the constitution does not execute itself, in the absence of statutory provisions, giving to it the aid of courts and juries, is a well-settled proposition—one that is sustained in an able opinion by the Supreme Court in 4 O. S., 175.

It seems almost an act of supererogation to argue this question further. Permit me to quote a single paragraph from an able opinion of Judge Miller, of the probate court of Clark county, in a case similar to this. I do this because it expresses my views upon the case in controversy, and upon the right of eminent domain, which every state possesses as an incident to sovereignty, much better than I could express it. He says:

"While the exercise of the power of eminent domain is an incident to the sovereignty of every state, yet, by the constitution of the United States, and those of almost all, if not all, the states, a limitation is placed upon this power by requiring that compensation be made to the owner. The Ohio constitution goes further and provides that this compensation shall first be paid, or secured to be paid, before the land is taken. In this particular the Ohio constitution stands almost alone, and has originated a series of judicial decisions that are peculiar in this, and a few only, of the other states. It was evidently the intention of the framers of our organic law, at a period when public works, and particularly railroads, were being largely projected to provide against evils to which landowners had been subjected in condemnation proceedings, and not leave their compensation for lands taken for public use subject to the uncertainty of payment by railroad companies, or other corporations, whose property was covered with mortgages, to secure bondholders, and it may be added that it certainly was not the intention to leave it to be paid by installments of assessments, paid on the tax duplicates, the payment of which is liable constantly to be enjoined, on account of substantial defects, either of parties or practice in the proceedings through which the lands had been entered upon and occupied for public improvements. The landowner was not to be driven to his remedy at common law, after entry, for damages, nor to bring suit to recover his compensation after it was assessed; nor to defend an injunction proceeding against an assessment placed on the tax duplicate for his benefit. He was to have it in hand, or deposited where he could lay his hands upon it without resort to any legal process in his own behalf to obtain it; and this, too, first, that is, before his land was in any way taken for, or subjected to, a public use."

I take leave of this part of the case by saying that it seems to the court that the legislature has, by its own act, at least, put a temporary legislative injunction over the whole matter of locating and constructing county ditches in the state of Ohio, at least where compensation is claimed and allowed.

Let us now proceed and examine the merits of the motion alleging the incompleteness and insufficiency of the records of the commissioners in the matter of the location and construction of this ditch. By law the auditor of the county is made the clerk of the board of county commissioners. Section 850 of the Rev. Stat., provides that the clerk shall keep a full and complete record of the proceedings of the board in a suitable book provided for that purpose, entering every motion, with the name of the person making the same, on the record, and he shall call

and record the yeas and nays on every motion which involves the levying of taxes, or the appropriation or payment of money, etc.

The location and construction of a county ditch, while to a certain extent it is an advisory proceeding, it is, nevertheless, a proceeding *in rem*. It reaches to and affects the land, and all records made, whether by a board of county commissioners, or by any other tribunal, which affects the title to real estate, or which takes from the landowner his lands and conveys to the public an easement through the same, should be so full and complete, in all its details and general import, as to admit of no doubt or contradiction of its substantial correctness. Where the law is mandatory and directs the mode how a record shall be kept, any other record than that prescribed by the law is insufficient. They should, in fact, answer the definition given by Lord Coke (Burrill's Law Dictionary, page 387), "that they import in themselves such incontrollable verity as to admit no averment plea or proof to the contrary." Where the statute provides that on all questions involving the levying of taxes and the expenditure of money, that a ye and nay vote shall appear on the record, and the record shows a unanimous consent, such a record is not such a one as the law contemplates, and so far is defective, and this defect goes to the jurisdiction of the subject-matter involved. On all matters which affect title, which take the lands of the landowner and convey an easement through the same to the public, or to an individual, the record cannot be too complete. There should be a perfect chain of all the proceedings appearing upon the records in the mode and manner which the law directs.

I come now to examine the question as to whether the resident landowners along the line of this ditch had legal notice of the location and construction of this proposed ditch. The court does not deem it necessary to consider all of the points raised in the general motion, but will confine itself mainly to a consideration of the seventh point, relating to the legality of the notice supposed to have been given to the resident landowners along the line of the proposed county ditch.

I cannot clearly elucidate the subject-matter that I desire to present without quoting entire section 4457 of the amended county ditch law of 1881, which provides, that "upon the filing of the report of the surveyor or engineer, the auditor shall, without delay, fix a day for the hearing of the same; he shall prepare and deliver to the petitioners or any one of them, a notice in writing directed to the resident lot or landowners, and to the authorities of municipal or private corporations, affected by the improvement, setting forth the pending substance and prayer of the petition, together with a statement of the apportionment made to such person or corporation, by the surveyor or engineer in his report, a copy of which notice shall be served upon each lot or landowner, and upon each member of any such public board or authority, and upon an officer or agent of such private corporation, or left at his usual place of residence, at least eight days before the day set for the hearing, and the person who serves the same shall make return on the notice under oath, of the time and manner of service, and file the same with the auditor on or before that day, and the auditor shall at the same time give the like notice to each non-resident lot or landowner by publication in a newspaper printed and of general circulation in the county, for at least two successive weeks before the day set for the hearing, which notice shall be verified by the affidavit of the printer or other person knowing to the fact, and filed with the auditor on or before that day." The whole of

this section is mandatory. There is no evading it, and any proceeding in the matter of the location and construction of a county ditch, to obtain jurisdiction of the same, contrary to the provisions herein set forth, are entirely without authority. The language of the statute is that the auditor shall prepare and deliver to the petitioners or any one of them, a notice, in writing directed to the resident landowners, etc. There is nothing in the transcript of the record to show that the law in this respect was complied with. There is nothing to show that a notice was delivered by the auditor to the petitioners, or any one of them. There is nothing in the record to show that any legal notice was given, and there is nothing now to show that any of these various parties upon which service is claimed to have been had, are legally in court, except these appellants; if they are the record should most clearly show it. On October 18, 1882, the record shows that the commissioners found that proper notice had not been given and an adjournment was had to meet at the auditor's office on the first Monday in May, 1883. With reference to the original paper where notice was thought to have been given, the court has nothing to say, further than that the same was never filed with the auditor as the law directs. From October 18, when the commissioners found that proper notice had not been given, the record is entirely silent, as to whether any other notice having been given or issued, and from the record the court could not determine or even infer that any attempt had been made to obtain service thereafter. There is a paper, which purports to be a return of service, accompanying the transcript, as one of the original papers, but which has neither been sworn to by the person serving the same before any officer authorized to administer oaths, or filed with the auditor as the law directs, and is entirely worthless as proof of the service of notice as the law directs.

The same may be said of the attempt to obtain service by publication, upon non-residents. There is nothing in the record to show that such service was obtained, and the original paper accompanying the transcript purporting to be a notice by publication to non-resident landowners, is neither signed by the proprietor of the paper publishing the same, or sworn to and filed with the auditor as the law directs. These are defects in these proceedings which it is beyond the power of the court to remedy. They go to the jurisdiction of the whole case and are fatal to this proceeding.

The court cannot presume that things were done which the records and the original papers clearly show were not done. The probate court, like the commissioners, is the creature of law, and while it is empowered under the law to cure technical defects in proceedings of this kind, it cannot cure defects in substance which are purely jurisdictional.

In the case of *Sessions v. Crunkilton*, *supra*, the Supreme Court held, "that the filing of a bond with the petition, and the finding by the trustees that the bond has been filed and notice given as required by the statute, are conditions essential and precedent to the right of the trustees to hear and determine the petition. The omissions to file the bond and give written notice to resident owners of land along the route of the proposed ditch, are not merely technical irregularities and defects within the meaning of this proviso (the act of May, 1868, remedial statute). But the filing of such bond, and the giving of such notice are jurisdictional facts, and essential to the right of the trustees to hear and determine the petition."

In the case of *Moore v. Starks*, 1 O. S., 369, 372, the court held, "the legislature have prescribed the means by which the courts shall obtain jurisdiction, and the courts cannot determine that anything short of such means shall give them jurisdiction."

If the commissioners in this case have obtained no jurisdiction for the want of proper service, the court certainly has acquired none. In this case the bond was filed, but the notice, both as to the record and the original papers, is defective, and the commissioners at no time in the progress of this case have had any jurisdiction of the same, except of the subject-matter.

That the commissioners acted according to their best judgment in this proceeding, the court has no doubt. They determined their proceedings according to the best lights they had with an honest intention to secure the public good, and believed the course they pursued to be the proper one and the best, but in the execution of statutes which are mandatory, they are acting under the same fixed rule of conduct, that the courts are bound to obey, if they would have their proceedings valid, and if they do not do this, that there is no power given to the court to remedy them, and the court must pass upon this matter as it finds it. Some of the matters of this record are substantially correct, and the court has only referred in its opinion to such matters relating to service, which the record and original papers does not show was made and which the court deems fatal to the jurisdiction of the commissioners in this case. I affirm, as a safe rule, that in all proceedings *in rem*, whether by sale, foreclosure, or by appropriation for the public welfare, that reaches to and affects lands and compels taxes, that the record of all such proceedings whether before the commissioners or courts, cannot be too full and complete, and it should, in every case, show that the law had been fully complied with. I cannot express my views on this subject so well in any way as to quote briefly from the opinion of one of the ablest law writers of the times. He says: "That that legislative body is the supreme power of the state; and whenever it acts within the pale of its constitutional authority, the judiciary is bound by it, and it is not competent to the latter tribunal to dispense with a regulation or requisition, plainly prescribed by the former, or to say that this mode, that, or the other, is as the one dictated by the legislature, for this, in fact, would be placing the judiciary above the legislature, by enabling the former to nullify the acts of the latter, or to supersede them by substitutes, to which the legislature might not have assented, had the proposition been submitted to it. The intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislature's will, without any regard to their own views as to the wisdom or justice of the particular enactment. There is no more propriety in dispensing with one positive requirement than another; a whole statute may thus be dispensed with when in the way of the caprice or will of a judge. And besides it vests a discretionary power in the ministerial officers of the law, which is dangerous to private rights and the public inconvenience, occasioned by the want of uniformity in the mode of exercising a power, is a strong reason for bridling this discretion. It is dangerous to attempt to be wiser than the law, and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. And courts should adhere to the cardinal rule that the judicial functions are always best discharged, by an

honest and earnest desire to ascertain and carry into effect the intention of the law-making body." The same rule that is here applied to the courts, applies with equal force to any public body of men clothed by the law with power to reach out and appropriate land and levy the tax to contribute to a public improvement. Here we are trenching upon sacred ground. We are invading the domain of private property, and we cannot be too careful and painstaking in our actions and proceedings when we trench upon the private property of the citizen, and take from him his lands and convey the title in them to the public. But I will not argue this matter further. From the many considerations already adduced, the court is of the opinion that there is not any adequate provision in the law, for the payment of money or deposit of money, before the lands are taken possession of for the construction of a county ditch, and that hence the law does not meet the constitutional requirement, and that no valid order can be made under the law in the construction of a county ditch.

Second—That the records in this cause and the original papers filed do not show that any legal service was had upon the resident landowners along the line of this proposed county ditch, and that the commissioners have failed for the first and second cause to obtain any jurisdiction whatever in this case. And as the court is of the opinion that for these reasons no valid final order can be made and that all preliminary proceedings thus far had are of no avail. The order will be therefore, to dismiss the petition upon which this proceeding is founded.

LEGISLATIVE AGENT—NEGLIGENCE.

25

[Hamilton Common Pleas.]

†JOHN DALEY V. BOARD OF PUBLIC WORKS.

1. Unless expressly authorized, an action will not lie against an agent of the legislature, as such agent, for damages sustained by private parties through the negligence of such agent in the performance of the duties imposed by the legislature.
2. Where, under an act of the legislature, a fund is produced by the levy of a tax, to be used and applied to purposes specified, and for no other, such fund cannot be subjected to the payment of consequential damages to private parties, caused by the negligent prosecution of the work.

ROBERTSON, J.

In March, 1882, the plaintiff was working for and under the employment of the board of public works in the capacity of a laborer, shoveling earth from and along a brick embankment in the grading and completing of that portion of Columbia avenue lying within the city limits. As is alleged, by the carelessness and negligence of the superintendent of the work, and without fault of the plaintiff, he was injured and disabled and now brings this suit against the board of public works for \$5,000 damages.

The board of public works is a city board generally, and if grading and completing of Columbia avenue had been a part of the duty of this board for the city, the question presented in this case could not have arisen, but as such city board, the grading and completing of Columbia avenue was no part of its duty, but its duty in that regard was derived directly from the legislature of Ohio. The act of the legislature providing for the opening and completing of Columbia avenue, is set out in full in the plaintiff's petition, and provides that the commissioners of Hamilton county shall assess and collect a certain tax to be applied to the opening, grading and completing of Columbia avenue, and that so much of said tax as shall

†This opinion was affirmed by the district court; see opinion, *post* 000. *Contra*, see also *Johns v. Cincinnati*, 45 O. S., 278.

be expended on that portion of the avenue, situated within the corporate limits of Cincinnati shall be expended by and under the direction of the board of public works, and that Columbia avenue shall be established, opened, graded and completed on such route as may be determined by said board of public works.

The act also provides, that the fund raised by such levy shall not be diverted from the object for which it was authorized, or transferred to the credit or any other fund, or used for any other purpose whatever.

The petition states that the county commissioners did levy the tax and placed the money realized therefrom into the treasury of the county, a large portion of which is still unexpended and on hand, and claims that the plaintiff is entitled to recover his damages out of this unexpended fund which is under the control and direction of the board of public works.

The board of public works answers this state of facts and complaint by saying, that whatever they have done and are now doing in the execution of the trusts conferred upon them by said act, they have done and are now doing as the agents of the state and not otherwise, and further, that the money under their control for Columbia avenue cannot lawfully be applied in the payment of consequential damages, and can only be used in securing the right of way and constructing the avenue.

To the sufficiency of these answers the plaintiff demurs.

In the case of *Scovil v. Geddings*, 7 O., pt. 2, 211, which was an action for damages caused by changing the grade of a street, brought against the officer in charge of the work acting under an order of the town trustees, it was held that the principle of law applied "that where individuals are exercising a power which the law has given them they cannot be made answerable for it in any form of action."

Two years later the case of *Hickox v. City*, 8 O., 543, was decided in the Supreme Court, also a case for damages caused by changing the grade of a street, and under the same act of the legislature as the former case, and differing only from the former case in that the former was against the agent and the latter against the corporation. In this case the court says: "The corporation acted under the authority of an act of the legislature, and no action will lie for what they have done in the execution of that duty unless they exceeded the authority or abused it in carrying it into execution."

In these cases it is proper to notice that the act under which the work was done, contained a provision making compensation for damages caused by prosecuting the work.

In the case of *Commissioners v. Mighels*, 7 O. S., 110, an action for damages for personal injuries sustained through the alleged negligence of the commissioners in constructing the courthouse, the court held, "that the board of commissioners were not liable in their quasi-corporate capacity, either by statute or at common law, to an action for damages for injury resulting to a private party by their negligence in discharge of their official functions," and in the case of *Dunlap v. Knapp*, 14 O. S., 64, which was an action against the supervisors of roads and highways at the suit of an individual for damages for injury by the neglect of the supervisor to keep a bridge in repair, the court says: "Where the duty is imposed by statute upon minor political organizations or quasi-corporations without their consent for purposes of public policy and not for their benefit, but that of the public at large, such omission of duty lays no foundation for the recovery of private damages unless expressly authorized."

Thus at least four analogous actions for consequential damages have been decided by the Supreme Court of Ohio, in each of which cases the special duty performed was in pursuance of direct authority of the legislature and whether as against individual officers, in charge of the work; corporations; quasi-corporations; or supervisors of roads and highways, the action failed on the principle that no action will lie for consequential injury to private parties where the duty is imposed, or the work is being executed under direct authority of the legislature and for public purposes, unless expressly authorized.

It is claimed in this action that the plaintiff seeks only to hold the fund—not the members of the board individually, nor any other fund under their control. That the board is placed in charge of a fund to be expended by them in the prosecution of a public work and as the injury complained of resulted from the execution of such work, the fund should respond in damages, that every wrong should have a remedy, etc., and if the state appoint an agent to perform a public work, such fund in the control of such agent should be held liable for all resulting damages to private parties; but this argument is met as it seems conclusively by the fact that the fund in the hands of the board of public works is placed there

for specified purposes and for no other, and resulting damages or injuries to private parties are not included.

I have examined with care all the authorities cited by learned counsel for plaintiff in this case, and they have earnestly plead the justice and equity of their cause, but I am unable to reconcile the principle contended for by them, with the decisions of our Supreme Court.

The demurrer must be overruled and there will be judgment for the defendant.

McGuffy, Morrill & Strunk, for plaintiff.

Dawson, McGarry & Overbeck, for defendant.

DITCHES—WATER COURSE.

26

[Cuyahoga Common Pleas.]

BURTON V. JENSEN.

1. A ditch made by two adjoining proprietors across their lands, for the purpose of disposing of surface water, and used by them for twenty-two years, does not become a water course under sec. 4500, Rev. Stat., unless a design that it should become so was present in its establishment, which must be shown by convincing proof.
2. When such ditch does run to a creek but merely empties itself on low land, and has to cross the land of another before reaching a creek, it does not have the outlet required by sec. 4448, Rev. Stat., and is not such a ditch as can become a public water course.

BLANDIN, J.

The plaintiff brings this action to enjoin defendant from obstructing or closing up a ditch, which the plaintiff claims to be a *public water course*, and which defendant threatens to and is about to obstruct and close up.

Section 4500 of the Rev. Stat., provides, that "when a ditch has been established and constructed for the public health, convenience or welfare * * * by private agreement between two or more individuals whose real property has been affected thereby * * * and such ditch has been used for the purpose of drainage of private lands or public highways, for seven years or more, without obstruction or interruption, the same shall be and hereby is, declared to be a public water course" with all the characteristics of a natural water course.

In the year 1865 plaintiff owned a strip of land in East Cleveland township lying south of the plank road, and extending back south from the plank road up a gradual slope a distance of several hundred feet to the foot of a hill and up the hillside to the top of the hill, and one Hastings owned a similar strip of land adjoining plaintiff on the west, and which ran back up the same slope and hill.

Plaintiff and Hastings had their dwelling houses on these lands back a short distance from the plank road. Experiencing inconvenience from the surface water coming down this hill toward their houses and into their cellars during heavy rains or the melting of snows, upon consultation and by an agreement between them, the ditch in question was constructed across their lands near the foot of the hill, whereby the surface water coming down the hill was arrested by the ditch and conducted westerly through the ditch from plaintiff's land to that of Hastings, and across the latter's land to a bank where it flowed into a valley west of the land of Hastings, whence it found its way across low lands of Hastings and another to a creek. The ditch did not extend to the creek, but it is claimed by plaintiff that Hastings accepted the water upon

these low lands used for pasture, and claimed that the washings from this hill thus brought down and deposited on these low lands, enriched and benefited the same. Hastings' land extended to within a few feet of the creek, but not to the creek, and no arrangement was made with the proprietor of this intervening land between Hastings and the creek, for the water passing over his land to the creek.

This ditch was used only to catch and conduct away the surface water from the hill, and except in time of rains, or melting snows, was dry. Plaintiff claims that this ditch, thus constructed, was kept open without "obstruction or interruption" for more than seven years, and hence became a public water course under the statute.

In the year 1880 defendant purchased from Hastings the land lying on both sides of this ditch west of the plaintiff's land, and closed the ditch when this action was brought for an injunction, as already stated.

The defendant, by answer, denies that the ditch was constructed for the purposes referred to in the statute; denies that it was kept open for seven years "without obstruction or interruption," or that it became or ever was a public water course, and by way of cross-petition asks that plaintiff be enjoined from entering on his land to open or interfere with the ditch and from flowing upon his land, the surface water coming from plaintiff's land through his end of the ditch.

The plaintiff and Mr. Hastings are the only witnesses upon the question of the agreement to construct the ditch. All the conversation, out of which the contract arose, was had between them when alone, nothing reduced to writing, and comes now to be established by the recollection of these two gentlemen after a lapse of nearly twenty years.

The time, place and occasion of the conversation plaintiff cannot recall. The fact of a conversation he knows, but the conversation, or even the substance of it, he cannot recall, but does distinctly remember the conclusions he drew from it; and this is substantially the evidence and the whole of it, upon which he depends to establish a contract, out of which a public water course is to be established through the land in question.

Mr. Hastings claims to distinctly remember the place and occasion of the conversation and the substance of it, and also that it was expressly agreed that the ditch should not be extended east by plaintiff to the land of the next proprietor, Darius Adams, and that the latter should not be allowed to connect with the ditch and flow through it, surface water from his hillside similarly situated.

Counsel for plaintiff contend that no agreement, or purpose, touching the "public health, convenience or welfare," is necessary under this statute to constitute a ditch a public water course, when constructed and kept open seven years, if in fact it actually proved a public benefit in these regards; and that inasmuch as this ditch arrested surface water coming down the hill from going down over the land of plaintiff and Hastings to the plank road and doing occasional damage by washing out the plank, and from getting into the cellars of plaintiff and defendant, causing dampness and perhaps malaria, that, therefore, it did in fact subserve the "public health, convenience or welfare," and hence without regard to the purpose of the parties in its construction, it did, in spite of them, become, after seven years' use, a public water course. Plaintiff testifies that he had the "public health, welfare and convenience" in these regards in view in the construction of the ditch, but does not know that any conversation to that effect was had with Hastings. Hastings says

he had no purpose in mind but the private accommodation of his own lands, and had constructed his ditch before plaintiff dug his, and simply allowed plaintiff to connect with it on express condition that Adams should not be allowed to connect and extend it east of plaintiff, and on the further condition that plaintiff would pay one-half of the expense thereafter of keeping clear the ditch across Hastings' land. This latter condition plaintiff does not deny, but afterwards acted upon. The agreement to exclude Mr. Adams from any enjoyment of the ditch he does not remember, but cannot distinctly deny.

I cannot agree with counsel for plaintiff, as to the interpretation claimed for this statute. It would deprive adjoining landowners of important draining privileges upon their own land, if by constructing mere private drains, and keeping them open for seven years, they thereby opened public water courses, with all the burdens and servitudes thereof through their private lands. Two neighboring farmers would not dare to build ditches by mutual agreement, that might subserve the public health, welfare or convenience, lest after seven years' use thereof, adjacent farmers would have full right to drain into such ditch as a "public water course." Such an interpretation would have the effect to discourage rather than encourage good husbandry, and would effect a dedication of private lands to public uses, without compensation, and perhaps, as in this case, against the express wish and intention of the party. It seems clear that this result cannot be accomplished, that a ditch constructed by mere private agreement between two landowners cannot ripen into a public water course, by user, unless that design was present and prominent in its establishment and construction. And this ought to be established by clear and convincing proof before a court would be warranted in saying that the public had acquired a right therein against the individual proprietor, without compensation.

Such proof is wanting in this case. On the contrary, I think there is a substantial failure of proof on the subject, on the part of plaintiff, that the ditch was ever designed by Hastings to be more than a private accommodation to himself and plaintiff, which resting wholly in parol, was a mere license, revocable at pleasure.

Again, the statute makes a ditch, established and constructed according to its provisions, a public water course only after seven years' unobstructed and uninterrupted use. If it were necessary to the determination of the case, I should be compelled to find that the evidence failed to establish such unobstructed and uninterrupted use of the ditch. While it was kept comparatively clear by plaintiff on his land, the water that ran from his land to that of Hastings frequently escaped from the ditch on the land of Hastings and flowed down the slope toward the plank road, forming gullies in the earth where it ran, and generally, when the obstruction in the Hastings end of the ditch let the water back upon plaintiff's land, and caused it to overflow plaintiff's ditch, he gave it attention and had it cleaned out on the land of Hastings, so that it could not be said that the ditch was unobstructed or uninterrupted.

Section 4448 provides that no ditch, provided for in the chapter, shall be located unless a "sufficient outlet" is provided.

The ditch in question was not constructed to any water course, and therefore could not itself become a water course under this statute, because it wanted a sufficient outlet. It had no outlet. It emptied upon the land lying alongside the creek, and had to cross the land of another before any outlet was reached.

Terminating a ditch upon a point of land sufficiently elevated to allow the water to escape therefrom, and to be discharged upon dry land used for pasture or agriculture, does not provide the sufficient outlet contemplated by the statute.

The legislature did not intend that "water courses" should be created, the outlet to which would be calculated to destroy valuable lands.

For these reasons I think the ditch in question never became and is not a public water course, and that the injunction sought by plaintiff must be refused and the petition dismissed.

It therefore becomes important to inquire whether or not defendant is entitled to the relief sought by his cross-petition.

As already stated, the water carried in this ditch is surface water only. Its course prior to the construction of the ditch, was uniformly and naturally down the hill in the direction of the plank road, and none of that flowing down plaintiff's hill flowed upon defendant's land. The effect of building the ditch was to collect this water and turn it in a stream upon defendant's land. No right to thus divert his surface water upon defendant's land has been acquired by plaintiff by adverse user, by grant, or in any other way. And without being acquired it does not exist. *Butler v. Peck*, 16 O. S., 335; *Angell on Water Courses*, 7th Ed., sec. 108, J.

The injunction prayed for in the answer will be allowed.

38

PAYMENT—MECHANIC'S LIEN.

[Hamilton District Court, November 6, 1883.]

VICTORIA BUILDING ASSN. NO. 2 v. AARON S. KELSEY ET AL.

1. A promissory note given in payment of a pre-existing debt is not a payment in Ohio unless affirmative evidence is also offered that it was taken in payment.
2. In a controversy between the holder of a mechanic's lien and a mortgagee, a note given before the taking out of a mechanic's lien does not discharge but suspends the lien.

ERROR to the Court of Common Pleas.

SMITH, J.

This is a controversy between the holder of a mechanic's lien and a mortgagee, which is entitled to a certain fund. The bill of exceptions shows that Thomas Morgan, the original plaintiff, furnished lumber to one Albert Stewart for building a house upon a verbal contract. He began to deliver the lumber on August 11, 1882, and continued to deliver it from time to time until November 10 of the same year. The amount furnished was \$812.38. There is a credit of \$162.75, leaving a balance of \$649.63, on which suit was brought, and which it was claimed was secured by a mechanic's lien. After this contract had been entered upon, Stewart borrowed money from time to time of the Victoria Building Association, giving three successive mortgages, one dated August 15, 1882, one September 12th, and the last October 3d, the same year. The closing of the account for lumber seems to have been on October 10th. On October 7th Stewart gave two notes of \$250 each, one payable two months and the other three months after date. The notes were not paid at maturity. They were indorsed to Kelsey, Lawson & Co. by Morgan and taken up by Morgan. Afterwards, on December 29, 1882, within four months from the closing of his account, Morgan took out a mechanic's

lien in conformity with the statute, but there was an error in the description of the property, and on January 20, 1883, also within four months of the completion of the account, he filed an amended mechanic's lien, stating it was to correct a misdescription of the property in the former lien. On January 23, 1883, he filed a petition for the purpose of enforcing that lien, and afterwards assigned his lien to Kelsey, Lawson & Co.

The question raised in the court below and argued here was, whether the taking of these two notes, amounting together to \$500, was a payment *pro tanto* upon the account, and to that extent discharged the lien.

It was claimed on the part of the Victoria Building Association that it was a payment *pro tanto* and to that extent the lien was discharged. The court below held otherwise, and to review that judgment the action is brought in this court. The oral testimony is, that the two notes, of \$250 each, payable in two and three months after date, respectively, were not paid by Stewart when due, but were taken up and paid by Morgan, and that these notes were not taken in payment, but simply as collateral security.

We suppose the law of Ohio is well settled, as appears from the cases of *Merrick v. Boury*, 4 O. S., 60, and *Leach v. Church, Adm.*, 15 O. S., 169, that a promissory note given for a pre-existing debt is not a payment unless affirmative evidence is also offered that it was taken in payment.

Though it was argued that the case of *Crooks v. Finney*, 39 O. S., 57, seems to qualify those decisions, we cannot so understand it. That case came upon demurrer to a petition where it was alleged that a note was taken in payment of a certain debt; and the Supreme Court construing the pleadings according to the code most favorably to the pleader, held that the allegation that the note was taken in *payment* of a debt would be considered as satisfying the requirements of previous decisions that it was a payment, and the demurrer should therefore be overruled.

Numerous decisions from the New England states were cited, where it has been held that a promissory note given in payment of a pre-existing debt is presumed to be a payment, but this presumption may be controlled by the testimony of what took place at the time it was given. The first case, found in 14 Mass., was by Parsons, C. J., and such has uniformly been the ruling of that court from that time and was recognized and followed by the U. S. Circuit Court for that circuit in the case of *Kimball v. Ship, Anne Kimball and cargo*, where a maritime lien on the ship and cargo was claimed and a note was given in payment. It was held by Clifford, J., that following the ruling of the Massachusetts court, that the note was *prima facie* payment of the lien, but he also stated that the ruling was contrary to that of many of the courts of this country, and especially contrary to the ruling of the Supreme Court of the United States.

In the cases of *Hill v. Sloan*, 59 Ind., 181, and *Smith v. Bettinger*, 68 Ind., 265, it has been held that where a note which has been given in payment of a pre-existing debt is governed by the law merchant, such note is *prima facie* payment of the debt. But where the note is not governed by the law merchant and not payable in bank, the courts of that state adopt the rule of Ohio, that it is not presumed to be the payment of a pre-existing debt. The rule of Ohio must prevail in this case, and even if the rule was as claimed by plaintiff in error, it is controlled by the evidence in this case, that the note was not taken in payment of the debt.

Another question raised, was that inasmuch as the note was given before the mechanic's lien was taken out it discharged the lien, but we think it can only suspend the lien, and if before the end of four months from the time the work was completed the note was taken up there was

nothing to prevent Mr. Morgan from taking out his lien. This question was presented in the cases of *Steamboat Charlotte v. Hammond*, 9 Mo., 59, and it was held that a note given and payable at a future day but within the duration of the lien, will not merge the original debt nor extinguish the lien.

Both of the notes given in this case matured within the time required to secure the lien, and both were unpaid before the time expired for taking a lien—and then the lien was taken. Morgan was the owner of the claim—though he had endorsed the note, he was still liable as endorser.

In *Steamboat Charlotte v. Kingsland*, 9 Mo., 67, it was claimed that the endorsement of the note operated as a discharge, but the court say: "The receiving a negotiable note in payment of an account and its transfer by an indorsement in blank and delivery to one who received it on the faith of a lien, do not extinguish the legal right to enforce the lien by the payee in a suit to the use of the holder."

The case of *Smith v. Ward*, 4 Ia., 112, is cited as tending to support a contrary rule, but in that case it was expressly held that the lien was not waived by the acceptance of the note, but it was intended in the opinion that if the holder had parted with the entire possession and ownership, the lien would be lost. Mr. Morgan, in this case, had not assigned the note absolutely, but was liable as endorser, and *Smith v. Ward*, *supra*, refers to another decision by the same court in the same volume, *Hawley v. Warde*, 4 Ia., 86, which holds that where the payee of a note was entitled to a mechanic's lien he does not waive or forfeit his lien by indorsing the note and leaving it for a time with a third party as collateral.

That brings us within the present case. Stewart's notes were not transferred by Morgan absolutely. We think, therefore, that the lien was not extinguished.

Judgment affirmed.

Evans & Roettinger, for plaintiff in error.

T. Cahill, for defendant in error.

39

[Hamilton District Court.]

STATE EX REL. WERK V. JOSEPH BREWSTER, AUDITOR.

For opinion in this case, see 6 Dec. R., 1210 (s. c. 12 Am. Law Rec., 544.)

54

[Hamilton District Court.]

WM. J. FITZGERALD V. LAURA WIGGINS.

For opinion in this case, see 6 Dec. R., 1201 (s. c. 12 Am. Law Rec., 476.)

53

BREACH OF CONTRACT—DAMAGES.

[Superior Court, Cincinnati.]

GOYERT & VOGEL V. R. S. STONER.

The seller of goods deliverable at any time during the year, at his own option, notified the buyer before the expiration of the year that he would not deliver them: *Held*, that in the absence of evidence of election by the buyer to treat such refusal as a breach, he is entitled as damage to the difference between the contract and market prices on the last day of the year; and that mere silence is not evidence of such election.

HARMON, J.

This is an action for damages for breach of contract, whereby the defendant sold to the plaintiff for delivery at any time during the year

1882, at seller's option, one hundred cases of eggs, the contract having been made some time in June. It appears that in September the defendant notified the plaintiff that he would not deliver the eggs. Eggs had continued to advance throughout the year, and on the last business day of the year, the plaintiff duly tendered to the defendant the amount of the purchase price of the eggs, thirteen and a half cents a dozen, and demanded the eggs, and they not being delivered this action was brought.

One of the defenses is that in other transactions between the parties in relation to the sale of eggs, the plaintiff had acted so unreasonably, refusing eggs which were duly inspected and tendered, that the defendant was justified in refusing to deal with him further. It perhaps might be called a defense of the ground of "general meanness;" but it is a defense unknown to the law. If a man breaks one contract it is no excuse for the injured party breaking another. So far as I can see they have no possible relation. If the plaintiff did not receive eggs that he ought to have received let the defendant bring an action for his damages.

But the question which was principally argued, is what is the rule of damages, where there is a contract in which the seller has an option to deliver at any time during the year, and at a time before the expiration of the year he notifies the buyer that he will not deliver—repudiates the contract, in other words.

There seems to be some conflict in the American authorities as to the right of a party not in fault to maintain an action immediately upon the repudiation of a contract by the other, although the weight of authority is that he has the right to do so and this is well settled in England. The leading cases there are *Hochster v. DeLatour*, 2 E. & B., 678, and *Frost v. Knight*, 7 Ex., 111, and this principle is followed in 42 N. Y., 246, and in a number of cases in that state, and also in 86 Ill., 18; 7 Kan., 271; 46 Ia., 285, and in other states. The Supreme Court of Massachusetts, however, in *Daniel v. Nuton*, 114 Mass., 580, denies the general applicability of the principle, although admitting that in cases of breach of promise, where the defendant has disabled himself by marrying some one else or in cases where the defendant has absolutely disqualified himself from carrying the contract into effect the other party may bring suit forthwith.

It is contended here, by the defendant, that inasmuch as plaintiffs had the right to bring an action forthwith, by his repudiation of the contract he fixes that as the time for estimating the damages; while the plaintiffs contend that never having acquiesced in the repudiation, they had the right to demand the eggs, and the time of the delivery being at the option of defendant, they had no right to make demand until the last day of the option. The exact question is, therefore, if a party is in default, can he substitute a right of action for his default, for performance? It would certainly seem a little remarkable that a party should have such right. And the authorities which I have referred to indicate that there is a mere election on the part of the party not in default to treat repudiation of the contract by the other as a breach. This principle is to be found in *Leake's Digest of the Law of Contracts*, 1057-8-9; *Benjamin on the Law of Sales*, sections 860, 1121; 2nd Story on Contracts cited with approval by this court in *Kirland v. Wolf*, 7 Ohio Dec. R., 486. In *Leake*, on page 1059, it is said that the buyer cannot anticipate the time for assessing damages and so avoid the consequence of a falling market by giving notice of his intention not to accept, for such notice is inoperative unless the seller accepts it and elect to treat it as a breach.

In the case of *Brown v. Muller*, L. S. 7 Ex., 319, the contract was for the delivery of five hundred tons of iron in the months of September, October and November; shortly after the contract was made, the seller notified the buyer that he would not deliver, and the damage was held to be the difference between the contract price and the prices on the last days of the respective months. In the case at bar upon this principle the last of the year should be the date of fixing the damages. In the cases of *Leigh v. Peterson*, 8 Taunt., 540; *Phillpotts v. Evans*, 5 M. & W., 475; *Riply v. McClure*, 4 Exch., 345; *Bosvell v. Kilbourn*, 15 Moo. P. C., 309; it was held that where the buyer had brought suit against the seller, being notified before the time of performance of the seller's intention not to perform, and the time of performance had elapsed before trial, the damages were to be assessed as of such time, the court intimating that if the time had not elapsed before trial the jury would have to estimate the damages as best they could. See also 16 Eq., 155, 31 L. T. N. S., 540. The same principle was announced in *Roper v. Johnson*, L. R., 8 C. P., 167, which was a case of a sale by installments; the seller having renounced the contract and the buyer having elected to treat it as a breach and to sue at once, it was held that in the absence of evidence that the plaintiffs could have made their loss good by going into the market, the jury should estimate as well as they could the damages at the various times of delivery. Now, in that case the buyer having elected to treat repudiation as a breach he was bound to protect himself from loss if he could by making a better contract; but the inference is that if the buyer does not so elect but stands upon his rights and waits until the time has expired, and not getting his goods brings his action, his rights are not affected. And that this is a mere election is made very plain by another English case, in which the consequences of not so electing were somewhat remarkable. *Avery v. Bowden*, 5 E. & Bl., 714; in which one of the parties having sent his ship out to Odessa to be loaded with wheat by the other when the ship arrived the other party repudiated the contract. It was admitted by the court, that under the case of *Hochster v. DeLatour*, *supra*, the owner of the ship would have had the right to treat that as a breach of the sale, but instead of doing so he remained there and refused to so treat it and continued to insist upon the performance, and while so doing war was declared, which rendered performance impossible under the contract and released both parties; so it was held that the owner of the ship could not recover, because having refused to consider the contract as repudiated and kept the contract in force, he was entitled to all the advantages and liable to all the disadvantages of so doing. So, in this case, if the plaintiffs, upon being notified by the defendant that he would repudiate the contract, did not accept that as a breach but insisted upon the contract, they would have had to suffer any loss that followed, as if the eggs had afterward gone down to ten cents a dozen. As they had the chance of benefit they would also have to bear the loss.

It seems clear, therefore, the plaintiffs did not lose any rights by the simple notification of defendant's refusal to deliver if they did not assent to treat it as a breach by bringing suit or in some other way. The question is, therefore, did the plaintiffs so assent? It appears very plainly that the parties were on bad terms on account of other transactions. All that appears is, that the defendant sent his bookkeeper around to the plaintiffs to notify them that he would not deliver any more eggs, to which they made no response. The plaintiffs never did anything to indicate assent, unless it was by saying nothing, and I am unable to find

that silence under these circumstances indicated assent. They had a contract by which they had the right to the delivery of a hundred cases of eggs during the year 1882, and in September the defendant said he would not deliver any more eggs; they say no word, do no act indicating that they waive their right to the eggs. I am unable to see that mere silence under such circumstances means anything. I do not know why a man ought to speak when he has a contract and is satisfied with it, and one is estopped by silence only when he ought to speak.

It seems to me, therefore, that the plaintiffs have a right to a judgment, and that the damages should be the difference between the contract price and that on the last day of the year.

Judgment accordingly.

R. D. Jones, for plaintiffs; J. K. Love, for defendant.

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[Hamilton District Court.]

HENRY JOHNSON V. STATE.

For opinion in this case, see 6 Dec. R., 1208 (s. c. 12 Am. Law Rec., 588.)

Leave to file a petition in error in this case was refused by the Supreme Court, see opinion, 142 O. S., 207.

MISTAKE AS TO IDENTITY OF PROPERTY.

56

[Superior Court of Cincinnati.]

FALLIS V. LOUGHHEAD.

Where a purchaser at judicial sale has mistaken the identity of the property to be sold, supposing it to be the next door house, and sends his agent to bid under that supposition, and receives the property, such purchaser has sufficient standing in court to show the fact and will be released from such bid or payment of costs of sale and judicial proceedings.

FORAKER, J.

In this case there was a motion to confirm a sale under a foreclosure decree made by a master commissioner, of property on Richmond street, in this city, and also a motion to vacate the sale filed by Dr. Aub, who was returned by the master as the purchaser of the property. Both motions were heard together.

It was claimed for the purchaser that he never knew that the offered property was for sale, and that the only knowledge he had of any sale of property on that street, was of the house occupied by M. W. Myers, as a residence, with which he was acquainted, and that he did not attend the sale in person, but an agent, for the purpose of buying the residence of Myers, attended, and said agent was limited to \$7,000. He never had his attention called to the house actually offered by the master, and knew nothing, other than that the Myers house was to be sold. The Myers residence was next to that put up for sale, and that circumstance misled Dr. Aub's informant. The agent bid in this property at \$7,150, and discovered the mistake only after the sale was ended and he was on his way from the court house. As soon as Dr. Aub was informed of the mistake made, he repudiated the action of his agent, and declined to take the property. It was claimed for the purchaser that he had a right to appear to resist the confirmation on that ground, and to have the sale set aside, and that this was a case of unauthorized purchase, and even were the purchaser authorized, it was a mistake as to the identity of subject of sale and not as to the character or quality of the property sold or bought, and that the court, in the exercise of its equitable

discretion, would not under the circumstances compel Dr. Aub to take the property. It was also in evidence that Dr. Aub had offered to pay the expenses of the sale. 4 Penn. L. J., 87; 88 Md., 60; 8 Am. Law Record, 391; 112 Mass., 32; 29 O. S., 651.

In support of the sale, it was claimed that a purchaser at a judicial sale can not appear to resist the confirmation because he was not a party to the record, and that the parties to the action were the only persons entitled to a hearing, and that at a judicial sale the rule of *caveat emptor* strictly applies, and that the evidence did not sustain Dr. Aub's claim.

The court held that it clearly appeared that none but the Myers residence was intended to be bought by either Dr. Aub or his agent, and that the agent had no authority to bid on the property in question. The fact of his being limited to \$7,000 did not affect the question. Dr. Aub did not read or see the advertisement until after the sale, and, in fact, knew nothing of this particular property being offered for sale, and the bid was under the impression that it was the Myers residence which was up for sale. Dr. Aub, upon being returned by the master as purchaser, acquired a sufficient standing in court, at least to show the fact of his making no bid, and this appearing, the confirmation ought to be refused and the sale set aside. Upon all the facts the court deemed it right and equitable to set aside the sale upon payment of costs of the sale and these proceedings by Dr. Aub, in accordance with his offer.

The motion to set aside the sale granted.

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HOMESTEAD EXEMPTION.

[Cuyahoga Common Pleas.]

PROSEK V. KUCHTA.

A homestead exemption may be claimed in lands held by a husband as tenant in common with his wife and his conveyance through a third person of his individual share, not exceeding \$1,000 in value to her, is, therefore, not in fraud of creditors.

This is an action in the nature of a creditor's bill, its object being to subject certain real estate to the payment of plaintiff's claim.

The petition sets forth that on or about ———, one Jediska, having been arrested in a bastardy proceeding, the plaintiff, Prosek, and the defendant, Kuchta, became sureties of Jediska on a bond, executed before a justice of the peace, that Jediska would appear in the common pleas court and answer said charge of bastardy; but plaintiff claims that as between himself and the defendant, Kuchta, while they both became sureties on the bond for Jediska, he, the plaintiff, signed merely as surety for his co-surety, Kuchta. It is further averred in the petition, that afterwards, when the said Jediska was called in the common pleas court to answer said charge of bastardy, he came not; whereupon said bond was forfeited, and afterwards a suit was brought thereon against all the signers, Jediska, Kuchta and Prosek, and judgment recovered thereon, which with costs amounted to \$689.50, which, on account of the insolvency of the principal in the bond, Jediska, and the other surety, Kuchta, the plaintiff, Prosek, was compelled to and did pay. He now says that after the bond was thus signed by himself and Kuchta, the defendant, Kuchta, fraudulently transferred certain real property described in the petition to a trustee, who at the same time and without any consideration, with the intent and for the purpose of defrauding, cheating, hindering and delaying

him in collecting his just claim, transferred and conveyed said real estate to the wife of Kuchta. He therefore claims that, as he was merely surety for Kuchta, by virtue of a verbal contract to that effect between them at the time they signed the bond, when he paid the said judgment he paid it for Kuchta, whose debt it was, as between them, by reason of the said verbal contract. He therefore asks to have the conveyance from Kuchta to his wife set aside as fraudulent, and that the real estate may be subjected to the payment of his said claim of \$689.50, and interest.

BLANDIN, J.

To this petition seven several defenses are set forth in the answers of Kuchta and his wife, all of which it will not be necessary to notice, since in the view I take of the case, one will suffice. Without deciding whether before the plaintiff can bring this action to subject the property of the defendant, he must first bring his action at law upon the alleged verbal contract of suretyship between himself and his co-surety, and reduce the same to a judgment, or whether the judgment on the bond against the co-sureties jointly will suffice, as a foundation for this creditor's bill, it is sufficient to say that from the evidence in the case, I find the contract of principal and surety between Kuchta and Prosek is not made out by the plaintiff by a preponderance of proof, but that they were, in fact, as they were in form, co-sureties for Jediska, and as such one having paid the whole judgment on the bond, is entitled to be subrogated to the rights of the judgment creditor, and to have contribution enforced against his co-surety. While the petition does not pray for this, all the facts necessary to be pleaded to entitle plaintiff to subrogation are substantially pleaded, and, if plaintiff desires it, the petition may now be amended so as to permit a decree of subrogation to be entered, entitling plaintiff to contribution against the defendant, Kuchta.

One of the defenses set up in the answer, and the only one of which will be further noticed, consists in the claim that the premises in question constitute the homestead of the defendant.

To this a reply is filed by which the fact is denied. The evidence clearly discloses, in fact, it is not now denied by plaintiff's counsel, that the premises consists of a house and lot, the title and beneficial ownership of which, at the time of the signing of the bond, was in the defendant, Kuchta, and his wife jointly, each then owning an undivided one-half in common therein, and that it then was, and ever since has been and still is, used and occupied by them jointly as a family homestead, and the court finds that at no time since the signing of the bond, was the property worth two thousand dollars.

Upon consideration of the evidence in the case, I have no hesitation in finding that the subsequent transfer by the husband to his wife, through a trustee, of his one-half interest in the house and lot, was made for the express purpose of preventing the enforcement against him of the very liability which his co-surety has paid for him, and that as to him the transaction would be fraudulent and void, if at the time of the transfer that one-half interest was subject to the claims of creditors on execution.

This, therefore, presents the question whether or not when a husband and wife are equal joint owners of a house and lot worth not to exceed \$2,000, and which they occupy as a homestead, any part of the husband's half interest up to \$1,000 is subject to execution.

So far as I am advised, this question has not been decided by the Supreme Court in Ohio, or by the lower courts.

In California, Massachusetts and Wisconsin, and perhaps other states, the courts have held, under their statutes relating to homesteads, that no exemption can be claimed in lands held as a joint tenant or tenant in common.

This doctrine is denied in Vermont, Kansas and Iowa. An examination of the statutes of the respective states will disclose the fact that the decisions holding that no exemption can be claimed where the homestead is owned in common, are founded upon the particular statutes under which the right is claimed; or the exemption is denied because to allow it would work an injury or injustice to the cotenant.

It is uniformly held, at least in Ohio, that the statutes exempting homesteads from execution are to be construed liberally in favor of the debtor, in order to promote the public policy designed to be subserved by them. It would not be denied that if the husband alone owned in severalty a house and lot worth \$1,000, it would be exempt from the demands of creditors. Suppose, then, a husband owns a lot with a little shanty on it, which furnishes a home and is so used, and worth \$1,000. It would be exempt. Now, if the wife, having a separate estate, by a fair contract with her husband, builds a front to their house of the value of \$1,000 more, so that the property thus improved is worth \$2,000, and a deed is made to her of an one-half interest therein, a transaction fair, just, and *bona fide* between them, and which bettered home they now continue to use and enjoy as a homestead, can it be said that thereby the husband has rendered his own interest therein liable to execution when it was not so before? If so, then it ought to be because either the interests of his creditors have been thereby affected, or because the wife is *now* furnishing or providing a homestead, and therefore under the statute he may claim no exemption. Certainly the creditors are not affected by such a transaction; nor does the wife, after the improvement of the property with her separate means, furnish the homestead. It is her property added to his that furnishes the homestead. No part of her interest therein can be subjected to the payment of her husband's debt, and when her interest is withdrawn, the husband has no more invested in the homestead than is allowed to be exempt. The statute provides that neither husband or wife can make the demand if the other has a homestead. If, then, the husband's interest in the case supposed may be subjected to the claims of creditors, because the wife has a homestead, then equally her interest might share the same fate for her debt, and thus the whole be taken because of the simple fact that they had invested together all their means to improve their home, neither having more than would, if separated, be exempt. I think the fair meaning of the statute is, that where the wife with her separate estate and means has provided a homestead, then other property of the husband, not used as a homestead, is subject to execution. But when the husband's whole estate is impressed with the character of a homestead, it is wholly exempt from execution, unless it exceeds in value the sum of \$1,000, although beyond this sum his wife may own with him and in common, and equal, or even a greater interest in the same property. Her interest not being subject to his debt at all, can not be taken in execution against her husband, and unless she has furnished a "homestead" not an undivided interest in common in one, with her husband, his property actually in use as such homestead, to the amount

of \$1,000, will be exempt. It can not be said in this case that the "wife has a homestead," any more than it can be said the "husband has a homestead." If the husband has a homestead, that, to the amount of \$1,000, in value, is beyond the reach of creditors; that being so, to take any part of it for the payment of the husband's debt must take either what is his and exempt from execution, or it must take what belongs to the wife for her husband's debt. Certainly neither can be done. The husband only loses his right to demand his exemption when the wife "has a homestead."

I do not think she can be said to have a homestead when she has only joined her property to his to make their home better, or that she has thereby exposed his homestead to the demands of creditors.

The duty rests primarily on the husband to provide the homestead, and when he has one that is protected by law from sale on execution, no injury or injustice results to any one by the fact that the wife adds her own property thereto. There is still no interest of the husband then that was ever liable to execution, and I do not see any ground upon which he should be precluded from claiming the exemption still.

Willson & Sykora, for plaintiff.

Smith & Nowak, for defendant.

EXECUTORS.

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[Cuyahoga Common Pleas.]

LILIA S. HICKS V. GEORGE H. STONE.

1. A legacy of all the residue of the estate, but further directing that interests in a certain corporation to remain as they are, so long as a certain person continues its manager, gives the legatee an absolute interest and then seeks to control disposition, such restriction is repugnant, and void.
2. An approval by the court of an executor's sale of stock, privately, without an order or a minimum price, is equivalent to such previous order; and where all the debts of the estate are paid and no one is interested except the executor, as restricting legatee, his successor as administrator *de bonis non* cannot attack the sale.
3. The sale of shares, of stock belonging to an estate by an executor to his confidential friend and advisor, who has just resigned as co-executor of the same estate, is valid, if for full value, without fraud, and no one else could be found who would give as much for the stock and the sale was not of the seeking of the purchaser.
4. That executors sold shares of stock belonging to the estate in payment of a debt and *bona fide*, and on the same day one of the executors became purchaser of them from the buyer, the other executor being residuary legatee, and as such the person most interested, such sale being at a proper price and designed as a means of transferring the stock to such executor, the sale is valid.

BLANDIN, J.

The importance of this case, from the extensive interests involved and the difficult questions of law and fact presented, has challenged for it the careful and patient consideration of the court, in which very great aid has been afforded by the elaborate and able presentation of the respective claims of the parties by distinguished counsel, who have conducted the trial. Whether or not I shall be able to enforce the conclusions to which I have arrived by reasons sufficiently cogent to command the approval of the parties, still they are such as rise out of a just application

of the principles of law to the facts of the case, as I understand both to exist.

The following facts appear by the pleadings, and are not controverted:

That on February 24, 1871, one George B. Hicks made his last will, in which he provided for the payment of his debts out of his estate. He then gave to each of his two sons \$5,000, to be paid to them when they arrived at twenty-one years of age respectively, and gave the residue of his estate to his wife, Lelia S. Hicks. He further "directed" that his "interests in the Forest City Varnish, Oil and Naphtha Co., shall be and remain as they are until such time as George H. Stone shall cease to be the business manager of that company," in which event his executors were to sell the same in such manner as they should deem most "beneficial and expedient for the interests of his heirs." He then named Lelia S. Hicks and the defendant, George H. Stone, executors.

These are substantially the provisions of the entire will.

The testator's "interests" in the Forest City Varnish, Oil and Naphtha Co., is the property here in controversy.

Prior to the execution of this will, testator and George H. Stone had been intimate and confidential social and business associates, and this relation continued until testator's death.

Defendant during all the time, was a stockholder and the principal business manager of the Forest City Varnish, Oil and Naphtha Co., which was a corporation organized under the laws of Ohio.

The testator, George B. Hicks, died May 2, 1873, leaving Lelia S. Hicks and two sons, the present plaintiff, then aged fourteen years, and a younger son, then aged eleven years, surviving.

The will was admitted to probate May 12, 1873, and Lelia S. Hicks and George H. Stone qualified as executors, and entered upon the discharge of their duties as such.

The number of shares of stock owned by Mr. Hicks at his death is not agreed upon in the pleadings, but was more than 250 shares, and this will be noticed further on among the controverted claims in the pleadings.

The stock was substantially all the valuable assets of the estate.

Two hundred and forty-eight shares of this stock have been pledged by Mr. Hicks in his lifetime as collateral to his notes to the Second National Bank, James Lawrence and J. B. Sprague, aggregating between \$9,000 and \$10,000, which notes were past due at the time of the death of Mr. Hicks.

Mrs. Hicks held policies of insurance on the life of her husband, upon which, at his death, she received about \$15,000, and with this money, which was her own separate means, she did, by the advice of Mr. Stone, purchase and take up the debts and notes, to secure which the 248 shares of stock were pledged, and until disposed of as stated below, she held these shares to secure herself for the sum thus advanced to take them up.

That on or about April 1, 1874, a fire occurred by which the F. C. V. Co., suffered a loss.

On July 6, 1874, defendant filed his final account as executor, which was approved by the probate court, and he resigned as executor on July 7, 1874, after which Lelia S. Hicks continued to act as sole executrix of said estate.

On July 13, 1874, still being executrix, Lelia S. Hicks transferred 234 shares of stock to defendant, and he paid her therefor \$105 per share

which was by her applied to repay herself for the money used in paying off the debts for which the stock had been pledged, and charged herself as such executrix with the sum thus received and credited herself with the amounts paid out upon said debts, and on November 13, 1874, she filed an account showing the same with the probate court, and the same was approved. This transfer was made without any appraisal of the stock or order from the probate court to sell the same.

The defendant continued to hold the stock, and very large dividends were afterward declared thereon by the company and paid to defendant, and in 1878 the stock was increased by dividends 150 per cent., and thereafter dividends were declared on both the original and the additional stock.

Lelia S. Hicks continued to reside in the city of Cleveland, where the Forest City Varnish Co. had its place of business and offices, and where defendant resided, and on December 6, 1881, filed her final account as executrix and resigned, whereupon George M. Hicks, her eldest son, was appointed administrator *de bonis non*, with the will annexed of George B. Hicks, and as such brings this action.

Controverted allegations: In addition to these admitted facts the plaintiff alleges the following, which are denied by the answer.

That while acting as co-executor with defendant, said Lelia S. Hicks, because of her inexperience in business matters and the high degree of confidence reposed by George B. Hicks in his lifetime in George H. Stone, relied wholly upon the suggestions and advice of defendant in regard to matters and business of the estate, and acquiesced in and followed his suggestions therein for its management and settlement.

That twenty-one shares of stock belonging to George H. Hicks at his death came to the hands of the defendant and have not been accounted for by him, and that twelve other shares were taken by the defendant while executor in February, 1874, for which he paid a debt of the estate to the Rubber Paint Co., of \$1,447.77, and are still held by him.

That "from the date of the fire at the works of the F. C. V. Co.," defendant began to make suggestions to the said Lelia S. Hicks, that the loss was so great by the fire that said company would not be able to make its usual dividend, or any dividend in July, 1874, and that defendant thought it doubtful if it would make any dividend soon again, with a design to create doubt and distrust in the mind of said Lelia S. Hicks as to the value of said stock, and with a view to get the same at less than its fair value, and that the defendant withholding much information he had in regard to the established character of the business of said F. C. V. Co., and what he knew as to the fire that it would cause no substantial or serious embarrassment to the business of said company, and that the amount of loss thereby was not nearly so large as he represented and when he well knew the value of said stock to be as it really was much greater than \$105 per share, and while he was acting as such executor, his resignation on July 7, 1874, being made solely for the purpose of enabling him to become a purchaser of the stock, advised and induced the said Lelia S. Hicks to agree and transfer to said defendant "the 234 shares of stock at \$105 per share; and, that imposed upon by the said contrivance and fraud of the defendant, she transferred the same to him" and he paid her therefor the sum of \$105 per share; the same was worth much more as the defendant well knew, and he said that defendant has

ever since held and still holds said stock in trust for said estate, together with the dividends declared and paid him thereon.

He says further, that knowledge of said deceit and fraud only recently came to the knowledge of this plaintiff or said Lelia S. Hicks.

He asks that defendant be required to turn over to him all this stock, together with the increase thereof of 150 shares upon each 100, together with all the dividends thereon, that have been paid to defendant while he has so held the same, with interest, after deducting the amount already paid by him for the stock with interest thereon.

By his answer, defendant, in addition to the general denials as indicated above, specially denies all fraud or fraudulent intention, and all false representations of the suppression from said Lelia S. Hicks of any fact touching the stock or its value, or said F. C. V. Co., or said fire.

He avers that the twenty-one shares were sold by the deceased in his lifetime to one Phillip Roeder, from whom he purchased the same and paid therefor July 8, 1873.

He says as to the twelve shares, that said Lelia S. Hicks and himself as executor, in February, 1874, agreed to transfer these twelve shares to one N. C. Brewer in payment of a debt from the estate to the Rubber Paint Co., of which company N. C. Brewer was president or manager, and they were so sold and transferred for their full value, and that defendant bought them from said N. C. Brewer. He denies that he was executor when the 234 shares were transferred to him, and says he had in good faith resigned on July 7, 1874, one week before the transfer. He says this transfer was made to him at the instance and request of said Lelia S. Hicks, as executrix, and individually as residuary legatee, after fruitless efforts made in good faith to secure others to become purchasers thereof, in good faith on the part of both, and for the full value of the stock.

He denies that the plaintiff or said Lelia S. Hicks have recently discovered the alleged fraud, and says that they have had full opportunity to know all they now know as to the value of said stock and the condition of said company ever since said transfer, and that said Lelia S. Hicks has fully ratified said sale, and as residuary legatee is the sole beneficiary for whose benefit this action is prosecuted.

To these issues presented by the pleadings the testimony in the case has been addressed, and the controverted fact as found by the court to be established by the evidence will be stated as I proceed.

First, in relation to the twenty-one shares.

On January 1, 1873, these shares of stock stood on the books of the F. C. V. Co., as owned by George B. Hicks, and the dividend thereon was paid to him. Mr. Hicks died in May, 1873, and in July following the two certificates, one for twenty shares, the other for one share, endorsed in blank with the signature of George B. Hicks, were according to the testimony of Mr. Stone, found in the hands of Philip Roeder, as the owner of the shares, and were by him sold to the defendant for full value. If this is true it is difficult to see why defendant should now surrender them to the plaintiff.

The only evidence in the case of their belonging to the estate of Mr. Hicks is the fact that at that date, January 1, 1873, they stood in his name on the books and the dividend was paid to him. These shares were assignable and transferable by such endorsement and delivery, and, there is simply no evidence whatever that such transfer and sales was

not made by Mr. Hicks before his death. W. F. Roeder, the son of Dr. Philip Roeder, testifies that he does not believe his father bought them without consulting him about the matter. Dr Roeder bought 100 shares of this stock in July, 1873, from Thorp, about which he did consult his son, but about this purchase of twenty-one shares he says he was not consulted and does not think his father would have bought them without his advice. His is the only testimony tending to negative a sale of this stock by Mr. Hicks to Mr. Roeder, from whom defendant says he bought them. Much stress is laid upon defendant's failure to produce further evidence of the purchase of and payment for this stock and the mistaken account he gave of a \$2,500 check which he supposed he gave for them, but which, was in fact given to Mrs. Hicks as part of her insurance money he had collected. While it has not been shown by defendant how and when he paid Dr. Roeder for this stock, there is no evidence to show that he did not in fact buy it from him, while it was in his hands, and the certificate bearing the endorsement of Mr. Hicks in his lifetime. This transaction took place ten years ago, at a time when the defendant was business manager of a large concern, where large amounts of money were passing through his hands daily, and the details of which he would not be expected to retain in memory. It seems to me that the court would not be warranted in disturbing transactions and the ownership of property upon such a state of the evidence as to the facts. There is another circumstance that should not be forgotten as throwing some light upon this matter. While Mrs. Hicks and Stone were co-executors, she nor he kept possession of the certificates of stock belonging to the estate. When the twelve shares were negotiated to Brewer she had possession of the stock certificates and brought them down to be delivered. So with the sales to Shannon, and when she took up the pledged stock she kept the certificates in her possession. If these twenty-one shares do not belong to the defendant by purchase, as he says in his testimony, and if they belong to the estate of George B. Hicks, then the defendant must have stolen them and committed perjury here to conceal the theft. There is no evidence to warrant such finding by the court.

I will next consider the twelve shares sold or transferred to N. C. Brewer. This transaction occurred in February, 1874, while both Lelia S. Hicks and defendant were executors of the estate of George B. Hicks.

Mr. Hicks in his lifetime had become surety to the Rubber Paint Co., for one Anderson, whereby the estate became liable to pay to the Rubber Paint Co., \$1,447.19. There was no available assets of the estate in the hands of the executors with which to pay the debt, except the stock of the Forest City Varnish Co., and upon consultation between the executors it was decided to turn over to Mr. Brewer, representing the Rubber Paint Co., twelve shares of this stock as payment and satisfaction of the debt. Mrs. Hicks brought down the certificates for that purpose and the negotiations were conducted with Mr. Brewer by Mr. Stone on behalf of the estate. The stock, at the highest price it had sold for at that time was a fair equivalent for this debt. At least, it was not worth more if antecedent sales of the stock, both before and after the death of Mr. Hicks can be relied upon as fixing its value. Indeed, it is not now denied that there was any unfairness in this transaction. Mr. Brewer finally agreed to take the twelve shares of stock in payment of the debt, and it was transferred to him, and certificates of stock issued to him therefor, and receipt was taken releasing the estate from the debt. Brewer then endorsed the stock to defendant, who gave his notes therefor at twelve

and eighteen months for the amount Brewer had allowed for it, and the stock was held by Brewer as collateral to defendant's notes until they were paid by him at maturity, which he did. This transaction was wholly completed, the debt of the estate paid, the stock transferred to Mr. Brewer and assigned to Mr. Stone, and his notes executed therefor, and the stock delivered to Mr. Brewer in pledge as collateral on the same day and in the same negotiation. But there is nothing to show that it was designed by Mr. Stone as a means of thus indirectly possessing himself of the stock. It is most probable to my mind, from his testimony, that the stock was resold to Mr. Stone by Mr. Brewer, and that Stone was badgered to take it by Mr. Brewer's appealing to Stone's good faith in claiming to him that it was valuable, and saying to Stone, if you have such faith in its value, why don't you take it yourself, and upon Stone's statement that he had no money to invest in it Brewer proposed to give him time to pay for it, and in this way he became its purchaser from Mr. Brewer. The actual conversation, and the order in which it took place, are difficult to exactly deduce from the only account we have of it through the testimony of Mr. Stone. There is no apparent effort to withhold the statement of the matter by Mr. Stone, but he gives candidly all he can now recall, as he says, of the transaction. He does not remember distinctly whether or not he communicated to Mrs. Hicks that he had bought the stock; but from her own testimony on the subject, I am of opinion he did make known to her that he had purchased the stock from Mr. Brewer, and given his own notes therefor, and until this suit was brought its fairness and propriety had not been questioned. She testifies that she understood that Mr. Stone had given his notes to Mr. Brewer, and that the stock was held by Mr. Brewer as collateral. She never afterwards thought she was to pay the debt and get back the stock and never offered to do so. From this, in connection with the other facts and evidence on the subject, I am satisfied, although Mr. Stone does not remember it, that Mrs. Hicks knew all about Stone's purchase of the stock from Brewer, and that he did not conceal or attempt to conceal it from her.

Notwithstanding this, it is now claimed by plaintiff that no title ever passed to Mr. Stone by this transaction, and that he ought now to account to the plaintiff therefor, with its increase and dividends.

First, it is urged that because of the provision in the will of Mr. Hicks, restraining the alienation of the stock, it could not be sold by the executors, and the attempted sale was therefore void for that reason.

The provisions of the will bearing upon the question are as follows :

It provides first: "All my just debts and funeral charges shall, by my executors hereinafter named, be paid out of my estate as soon after my decease as shall by them be found practicable."

Next he gives a legacy of \$5,000 to each of his two sons, to be paid to them respectively on attaining their majority, and then provides as follows :

"I give and bequeath to my dear and well-beloved wife, Lelia Sophia Hicks, all the residue of my estate, of whatever kind and nature. I further direct that my interests in the Forest City Varnish, Oil & Naphtha Co., in The Cleveland Gas Improving & Saving Co., shall be and remain as they are until such time as Mr. George H. Stone shall cease or sever his connection with said companies, as business manager thereof, and so much longer as my executors shall deem necessary or expedient for the best interest of my estate. In the event of Mr. George H. Stone ceas-

ing or severing his connection with the above companies as business manager thereof, I desire that my executors sell and dispose of all my interests in said companies to the best possible advantage, and invest the same in such manner as shall seem most beneficial and expedient for the interests of my heirs."

The only remaining clause of the will is the following: "Lastly, I do nominate and appoint Mr. George H. Stone and Mrs. Lelia Sophia Hicks to be the executors of this my last will and testament." Then follows the attestation.

This will clearly gave to Mrs. Hicks an absolute and perfect interest in the property of the testator. It then seeks by a subsequent clause to restrict its alienation, and to control its disposition and enjoyment. Can this be done? I have not deemed it necessary to go beyond our own Supreme Court reports for authority that it cannot.

The case of *Anderson v. Carey*, 36 O. S., 506, seems to be conclusive of the question in Ohio. The will in that case provides as follows: "I give and bequeath the farm on which I now live, of 285 acres, to my two sons, Thomas and Lincoln, upon the following conditions: First—I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another; nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatever, except in the sale to one another as aforesaid."

Judge McIlvaine, announcing the opinion of the court, says: "But by these conditions (so nominated) we do not understand that the testator intended a forfeiture upon breach; there is no limitation over in favor of any one; and if a forfeiture for the benefit of his heirs was intended, the devisee being two of his heirs would each have inherited a third part; so that as heir of the testator, Thomas C. had full power to charge one-third of the land by mortgage to the plaintiff. But there is no indication in the will, or in the circumstances of the testator, that he intended, in any event, to die intestate as to this property; while, on the other hand, it seems clear to us that the testator intended, in all events, that his sons should take this farm, subject to the rights given to their mother, to have and to hold the same to them, and their heirs forever. Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherence of alienability, for a limited period, or to incapacitate his devisees, although *sui juris*, from disposing of their property for the same limited period, to-wit: until the younger should arrive at thirty-one years of age—each and both of which purposes are repugnant in the nature of the estate devised. * * * The attempt here was to fasten upon the estate devised a limitation repugnant to the estate, which limitation, and not the devise, must, for that reason, be declared void. * * * The case before us is the devise of an absolute fee, with a clause restraining the alienation and encumbering of the estate, for a limited period, intended, no doubt, for the protection of the devisees who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate, and is void as against the public policy, which, in this state, in the interest of trade and commerce, gives to every absolute owner of property, who is *sui juris*, the power to control and dispose of such property, and subjects the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others, however, support the view

we have taken, and I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principles and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. We fully admit that he may retain or limit its enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple."

In view of this decision, there can be no doubt what the Supreme Court would say, if called upon, as to the clause in the will of Mr. Hicks restricting the alienation, for a limited time, of the stock which by the will was given absolutely to Mrs. Hicks, subject to the payment of his debts and the two legacies to the sons. That restriction was repugnant to the estate bequeathed, and the limitation, and not the bequest, was void.

It is contended, in the next place, that this sale was void, because not made by the executors in conformity to the statute prescribing the manner in which "stock" shall be sold by administrator or executor.

The statute then in force upon the subject will be found in S. and S., page 357, and provides as follows: "The executor or administrator of any deceased person, or guardian, within this state, may sell, either at public or private sale, any railroad or other stocks which may have come into his hands as such executor, administrator or guardian, under the order of the probate court of the proper county; and if sold at private sale, at a sum not less than shall be fixed by order of said court."

No order of the probate court was obtained to authorize the executors to sell this stock, nor was any sum fixed by the court at which it should thus be sold at private sale.

This stock was part of the stock that had been pledged by Mr. Hicks in his lifetime to secure the notes which Mrs. Hicks had taken up prior to this sale, and at that time held in her own right to secure herself as assignee of these unpaid notes of her husband. She was also residuary legatee, and as such owned the entire interest in the stock, subject to the payment of the debts and legacies.

On July 7, 1874, the executors filed their account in the probate court, showing the sale of this stock to Brewer for \$1,447.79, and duly charging themselves with that sum and credited themselves with a like amount as having been paid to the Rubber Paint Co., which account in all respects was approved by the probate court.

On November 13, 1874, Mrs. Hicks, as sole executrix, filed another account in the probate court, showing the sale of the 234 shares of the stock, and duly charging herself with the proceeds of that sale, and crediting herself with such payments as she had made on account of the estate, including reimbursement to herself for the debts she had taken up, and for which the stock had been pledged, and showing a balance of cash in her hands of \$11,388.38, which account was also duly approved by the probate court.

Subsequently, on April 17, 1875, upon being cited to appear and show cause why an order of distribution should not be made in relation to the assets in her hands as such executrix, as shown by her account, a hearing was had, whereupon an order for the distribution thereof was made by the court.

On October 20, 1875, she filed her final account as executrix as follows:

"November 13, 1874. Balance due estate, \$11,388.38.

"The above sum is the balance of assets in the hands of Lelia S. Hicks, the executrix and trustee for her two minor sons, and she holds the above sum for the benefit of her said two sons, and by the terms of the will of the said George B. Hicks, deceased, she is to pay to each of her said sons, on their arriving at the age of majority, the sum of \$5,000, and the balance of the above sum, and the interest on the same, she retains as residuary legatee. And she further says that the estate of her deceased husband, the said George B. Hicks, is now fully settled," which was also approved by the court.

On December 6, 1881, she filed what she styles a supplemental final account, showing a payment from this balance of \$5,000 to George M. Hicks, the present plaintiff, being his legacy under the will of his father, and showing also a payment to him, as administrator *de bonis non*, of \$5,000, the legacy to the other son, and that she had retained the balance, \$1,388.38, as residuary legatee under the will.

The question, therefore, arises whether this plaintiff, under these circumstances, has a right to have these twelve shares of stock turned over to him by the defendant, together with the dividends thereon and the increase thereof.

For several reasons I think this question must be answered in the negative.

The failure to procure the order of sale from the probate court does not render the sale of personal property absolutely void.

The title to personal property of a deceased person, when not otherwise specifically bequeathed by will, vests in the personal representative. The statute directing that it may be sold under direction and orders of the probate court, does not divest this title of the representative. What liabilities may attach to him personally or arise upon his bond if he sells without the direction and order of the court, behind which the statute is designed to furnish him protection if he will avail himself thereof, we need not now inquire. It cannot be the failing of the law to embarrass executors and administrators in making sales of the personal property of their decedents, by exposing purchasers from them to liability thereafter of being called on to account for the property purchased and paid for, because of some failure of the executor to follow the prescribed statutory steps in the sale. If this were so, no one could safely deal with an administrator or executor in the purchase of any of the personal estate, without first assuring himself that all these preliminary steps had been carefully followed, as prescribed. Such a rule of law, rendering such sales wholly void for failure to follow the statutory forms by the executor, would render either public or private sales, if not practically impossible, at least extremely difficult and disadvantageous to the estate.

Schouler's Executors and Administrators, section 316, after citing statutes in several states, that the probate court shall grant orders to the executors or admit to sell personal property, and that such sales shall be made under judicial direction, says: "Personal property of the deceased, notwithstanding such statutes, is commonly sold by executors and administrators at their own direction, without any order of court; and, if the representative acts in good faith and sound discretion, the interests of no person concerned can be injuriously affected. The subsequent approval of the court, moreover, appears practically equivalent to a previous order," citing 2 Bay (s. c.), 321; 10 Vt., 121; 42 N. Y., 146. I find this sale of the twelve shares of stock to have been made by the executors to Brewer in

good faith by both the executors and Brewer, without fraud and for full value, the sale duly reported to the probate court and approved, the proceeds of the sale faithfully applied to the payment of the testator's debt, and I can see no ground upon which a court of equity should now interfere and avoid the sale.

But there are other reasons tending to the same conclusion.

Mrs. Hicks, subject only to the debts and legacies mentioned, was, as the residuary legatee, the owner of this stock. She consented to and participated in the sale. What title she had she could sell, and did sell. This was the entire title, except such claims as legatees or creditors might have in it to secure the payment of their claims. 2 Williams on Executors, 1004, and cases there cited. These have been satisfied in full, and there is no one interested in the attempt to set the sale aside, except herself. Her interest having been designedly and in good faith sold, she could not now ask to reclaim it, nor can the plaintiff be allowed to do for her what she could not do for herself.

Again, this plaintiff, as administrator *de bonis non*, can maintain this action only for the purpose of recovering in specie the unadministered assets. He may also maintain a suit against his predecessor, who has resigned on the administration bond for maladministration.

The *bona fide* sale of this stock to Brewer for the payment of a debt, was certainly an administration of the property, and, this being so, an administrator *de bonis non* cannot maintain an action therefor. The remedy exists in such case, if at all, to the heir, legatee or auditor who may be interested in the property. 25 Ill., 602; 16 Wall., 538; 5 Rand., 51; Blizard v. Filler, 20 O., 479; Tracy v. Card, 2 O. S., 431; 6 Black., 120; 15 Mo., 98.

I come now to the sale of the 234 shares of stock by Mrs. Hicks, as sole executrix to the defendant, on July 13, 1874.

In addition to the reasons urged by plaintiff for setting aside the sale of the twelve shares, it is insisted as to these shares that the sale was made to Mr. Stone while he was still executor, and that he procured the sale to be made to him by fraud practiced upon Mrs. Hicks.

I shall but briefly consider the voluminous evidence offered upon these important propositions, and which have been carefully and elaborately discussed in argument.

Mr. Stone, as already stated, filed his final account as administrator July 7, 1874, and on that day formally resigned in the probate court, and his resignation was accepted by the court. Plaintiff claims this resignation was merely formal and was part of the plan adopted by Mr. Stone to effectuate the contemplated fraud upon Mrs. Hicks.

I do not think this proposition is established by the evidence. Mrs. Hicks and Stone agree that there was no suggestion made by either of them that Stone should become a purchaser until about this date. Either the sixth or seventh of July Mrs. Hicks says Stone said he would have to resign to become a purchaser, and therefore did resign, and that they went together to the probate judge to consult with him about it, and that the judge informed them that Stone might purchase it. This is not so remembered by Mr. Stone.

Mr. Stone gives altogether a different reason for resigning. He says the important matters of the estate had been settled substantially, and the assets were all in this stock, which was in the hands of Mrs. Hicks, to whom, as residuary legatee, it belonged, after paying the outstanding debts, most of which were due to herself, and the two \$5,000 legacies

to her sons, and that therefore it was not necessary that he should longer be charged with the responsibility or care of the matter of the estate. He says he was at the head of the varnish company, which was a large concern doing a large business, and the country was passing through the panic, and that he was anxious to give his entire energies to the business that so much needed it.

Mrs. Hicks says that at this time she had resolved in her own mind to sell enough of the stock to pay the debts, including herself, and keep the rest and take her chances with it. But that this resolution of her own she did not communicate to Mr. Stone until after the meeting of the directors of the company, July 7th, when she learned that no dividend would then be paid on the stock. So by the testimony of both I am led to the conclusion that the resignation was not made simply to enable Stone to purchase the stock. Mrs. Hicks had not then concluded to sell it. She had not communicated to Mr. Stone any purpose she had formed regarding it, and no offer had been made by Stone for the stock.

When it was known to Mrs. Hicks that there was to be no dividend in July, 1874, she talked to Mr. Stone about selling it, and he went to see two parties with a view to have them become purchasers; and it was after this also that Mrs. Hicks says that it was finally suggested that Stone become the purchaser. Then she sent for Mr. Sprague, her brother-in-law, who came up and talked with her and Stone, and it was after this that on the twelfth and thirteenth of July she finally accepted his offer of \$105 per share. All these circumstances tend very strongly to negative the claims that the resignation was made on the seventh to enable Stone to become a purchaser. I think the contrary is clearly established, and that the talk about the actual purchase was subsequent and had no connection with the resignation when it was made. The difficulty arises from the danger of viewing the transaction in the light of subsequent events, instead of seeing it as it was at the time the parties acted.

If I am correct about this matter of fact, then at the time of the purchase, there was no legal objection why Stone might not buy the stock, if his purchase was fair and not fraudulent.

The fraud alleged consists of false statements made by Stone to Mrs. Hicks, and the withholding of material facts, affecting the value of the stock. The false statements charged in the petition are that immediately after the fire, Stone "began to make suggestions to Mrs. Hicks that the loss was so great by the fire that said company would not be able to make its usual dividend in July, 1874." She states in her testimony that Mr. Stone stated to her that he could not tell the extent of the loss of the fire, until the inventory was taken on July 1st, and this is Mr. Stone's testimony on the subject also. She does, however, state further that Mr. Stone told her that the loss was \$25,000 and the insurance \$8,000. This is denied by Mr. Stone, who says he did not tell her and did not know the amount of the loss, and that the insurance was, in fact, \$4,500. If Stone was endeavoring to deceive her in regard to the extent of the loss, it is difficult to understand why he should tell her the insurance was greater than it actually was. The plaintiff testifies to a conversation with defendant in which he says defendant told him the loss was "\$15,000 net;" which the defendant denies. I think this charge of false representation is not made out by the evidence. That no dividend could or would not be made in July, 1874, was not known to anybody until July 7th, when the directors met and so decided.

The next charge is that "defendant thought it doubtful if the company would make any dividend soon again."

This was mere opinion, if stated, and I do not think it was.

The next charge is that defendant, with the fraudulent intent complained of "withheld much information he had in regard to the established character of the business of said company." There is no evidence that he did. Mrs. Hicks does not pretend that any question she asked relating to the business or its affairs or condition was not freely and fully and truly answered. If there was any withholding of information it arose from a failure on the part of Mr. Stone to volunteer information unasked which he had and which Mrs. Hicks had not. This is not seriously claimed, except as it is claimed that Stone misled Mrs. Hicks by falsely claiming to her that the stock was only worth \$105 per share, when he knew it to be worth more. It comes, then, to the matter of inadequacy of consideration in the purchase as constituting evidence of the fraud.

I can do but little more than state some of the leading facts in the case that lead me to conclude that this inadequacy did not exist.

In 1869 the company paid its first dividend upon its \$100,000.00 capital stock of 5 per cent.

In 1870, 572 shares of stock were bought by the company and paid for out of the company funds, and in 1871 it was divided to the remaining stockholders *pro rata*.

In 1872 a dividend of 5 per cent was paid.

In 1873 dividends amounting to 15 per cent. and January 1, 1874, a dividend of 5 per cent. was paid, all of which was known to Mrs. Hicks.

At this time the net assets, at their nominal value, as shown by the books, were \$116,995.11 above the capital stock. In other words, the surplus was nominally this sum above the capital stock and all liabilities. With these assets shown, in connection with the growth and prosperity of the business, the highest price at which the stock had ever sold, so far as the evidence discloses, was \$125 per share. From this it is evident that the assets were never considered to be worth more than 57 per cent. of their face, as fixing the value to the stock, and sales of stock were made to and by business men upon that estimate, when the company was paying good dividends regularly.

The business of the company was at this time largely the refining of crude gasoline. It was an extremely hazardous business for various reasons. The gasoline was highly inflammable, endangering the works and stock on hand continually, and insurance rates were so high as to be almost wholly unavailable. The manufactured products were outlawed for illuminating purposes, to which use they were then largely devoted, and hence were sold to irresponsible parties to a considerable extent, whereby great risks of bad debts was constantly incurred. The supplies of crude gasoline were drawn almost wholly from the Standard Oil Co., which controlled them, and which might be denied at any time, and which that company refused to contract to the defendant's company for any definite time, having the entire business of the company at the mercy of the Standard, which might any day assume the trade to the exclusion of any competition. Under such circumstances it is easy to understand that the stock of the company should sell at a much lower price than the nominal assets would indicate to be its value. Nothing but large returns by way of dividends could tempt capital to invest in its stock. It was, certainly, as both Mr. Terrell, the attorney of the parties, and

Mr. Stone advised Mrs. Hicks, a precarious property for a woman to hold as her only property.

While this was the situation of the company and its business up to January, 1874, the change from steady profits to one of actual loss then occurred, as shown by the books on July 1, 1874. Instead of any profits there was a loss of upwards of \$10,000 during this six months, part of which was due to the fire, but most of which was due to the effect of the panic upon the business. All the other features of the business continued as before. There was the same hazard from fire, bad debts, and the possibility of the failure of supplies of crude gasoline. Sales had fallen off from \$495,000 in 1872, to \$432,000 in 1873, and for the first six months of 1874 still further down to \$148,000 and an actual loss in the six months of over \$10,000, and in this condition of the business, and with this showing, and no ability to declare a dividend, the panic still disturbing the business of the country, Mrs. Hicks throws 234 shares of the stock on the market. Mr. Stone made application to two parties to become purchasers for it without success. He then bought it and paid \$105 per share for it, or 51 per cent. of the nominal value of the assets of the company, when 57 per cent. had been deemed a fair rate at a time when its past had been one of uninterrupted prosperity. He says it was all he deemed the stock worth. It was more than he could get any one to give for it for her, and he told her so and she sold it. It seems clear to me that we need aid from the years following in which prosperity returned from with dividends, to see any fraud or inadequacy of consideration in this transaction. It is difficult, perhaps, to get back beyond the intervening success of the company to see the situation as it appeared to these parties July 13, 1874. But this is the duty of the court, and to pronounce upon the transaction in the light of the then existing facts, uninfluenced by what followed. This I have endeavored to do, and such are my conclusions, upon the correctness of which, after careful deliberation, I entertain no doubt.

Believing this sale, then to be without fraud in fact and for full value at the time of the sale to one who at the time held no trust relation to the property sold, the principles of law already stated as being applicable to the twelve shares are alike applicable to this sale, and it will not at the suit of this plaintiff be disturbed.

Interesting and important questions arise out of the trust relation of Mr. Stone to the property, and the confidence reposed in him as a trusted friend and adviser by the testator in his lifetime, and by Mrs. Hicks after his death, have been urged with much vigor and ability by plaintiff's counsel, and have not been overlooked by the court in weighing the evidence, and reaching these conclusions as to the facts in the case, but which could not change the result if I have correctly apprehended the actual facts in the case.

Courts of equity ought not to be industrious to brand the transactions of confidential friends as fraudulent and void, which have lain undisturbed for years, where one, by bearing, meanwhile, all the perils of a hazardous business, has prospered, and which prosperity has furnished the only material evidence of faithlessness.

Upon careful consideration of the whole case, I do not see upon what equitable grounds the prayer of the petition should be granted, and the bill will be dismissed.

CONTRIBUTORY NEGLIGENCE.

[Hamilton District Court, November 20, 1883.]

TAUSKY COM. YEAST CO: v. P. C. & St. L. Ry.

Where a vehicle is driven along a public highway with no evidence of want of ordinary care and prudence in its management, and is run over by a train passing along the same highway at a high rate of speed, in an action to recover damages for the collision, plaintiff is not obliged to prove that he was cautious, and prudent, and it is error to non-suit the plaintiff on the assumption of a positive rule of law requiring him to show affirmatively that the accident did not happen in part through his fault.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

On or about November 18, 1882, while a wagon and horse belonging to the Tausky Com. Yeast Co. was being driven along the east side of Eggleston avenue between Third and Pearl streets in the city of Cincinnati, and upon which avenue the P. C. & St. L. Ry. Co. own and operate a railway track, the wagon collided with a passing freight train and was destroyed, together with certain articles of merchandise, contents of the wagon, the value of all which the Yeast Co. seeks to recover of the railroad company.

In the court below at the close of plaintiff's testimony and upon motion of defendant the court arrested the case from the jury and gave judgment for defendant, to which plaintiff excepted and filed his petition in this court.

The driver of the wagon was killed, and the witnesses who were in the immediate locality at the time of the occurrence had a very imperfect view of the railroad track or anything as to the conduct of the driver. All that is known, is, that the time was about 5 o'clock A. M.; that the wagon passed down the east side of the avenue from Third street, east side of railway track; that the train was running northerly at a rapid rate of speed from the curve at Pearl street, and when about half way between Pearl and Third streets and about 200 feet from where the train could first be seen coming upon the avenue the train struck the wagon. (There were two or three witnesses who were stationed at the time upon Third street, one at the corner of Third street, east of Eggleston avenue and another near the corner upon the south side of Third street. The one standing on the corner east of Eggleston avenue had but a very imperfect view, but he had knowledge of the fact that a train was approaching from the south. A watchman of a coal company standing near the avenue a short distance from Third street, and who had a view of the avenue and of the top of the train as it approached, said he could see the top of the wagon as it came in contact with the passing railway train.)

It appears from the evidence of witnesses who examined the ground immediately after the occurrence, that the dust in the avenue was still moist and the imprint of the horse's feet showed that the horse had suddenly turned upon the railway track, whether by the control of the driver or otherwise, there is no one to say.

The court below in its opinion, on motion and on suit to arrest the cause from the jury, attached to the bill of exceptions, seems to have held that the evidence showed that the affair was an accident.

It seems to us that the proper question for the court then, was, whether there was any testimony tending to show that the railroad company was negligent in the management of its machinery. The train was running at a rapid rate of speed, greater than the usual rate which under certain circumstances may be considered negligence, and in the absence of any evidence to the contrary the wagon must be presumed to have been on the track by right.

It is a well established rule that a court cannot say as a matter of law that running a train with more than the average speed is negligence. But where the facts show that a vehicle being driven along a public highway with no evidence of want of ordinary care and prudence in its management, is run over by a train passing on the same highway at a high rate of speed, the true course seems to be, to find the proximate cause of the injury. Was the railway company negligent?

In *West Chester R. R. v. McElmer*, 67 Pa. St., 313, the court say : "The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary care. In such cases the measure of duty is not fixed but variable; under some circumstances a higher degree of care is demanded than under others, and when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury to determine what it is and whether it has been complied with."

It is allowable under certain circumstances to run a train at a rapid rate of speed and not under others. Whether allowable or not depends upon the surrounding circumstances or the positive provisions of law, if any exists, and from the facts different men of equal intelligence might draw different conclusions. It does not appear that there is a statute in this state regulating the speed of railway trains. The question, therefore, should have been submitted to persons who from the facts might draw different conclusions. 100 Mass., 208; *Pac. R. R. Co. v. Honts*, 12 Kan., 328; *Sullivan v. Phil. & Reading R. R. Co.*, 30 Pa. St., 231.

It is insisted, on behalf of the defendant, that the injury must be shown not to have been the result of its negligence; or to entitle the plaintiff to recover, it must first be shown affirmatively that the conduct of the driver of the wagon on the occasion of the injury was cautious and prudent. It would certainly be an unjust rule that where a case was so situated that the precise circumstances could not be shown, that the plaintiff be non-suited on the assumption of a positive rule of law requiring him to show affirmatively that the accident did not happen in part through his fault. In *Johnson v. R. R. Co.*, 20 N. Y., 69, the court states the rule very plainly as follows:

"It is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare and a person is run over he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instincts of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would

be required." The true rule in the opinion of the court on page 78 is this: "The jury must eventually be satisfied that the plaintiff did not by any negligence of his own contribute to the injury."

Wasner v. Del. L. & W. R. R. Co., 80 N. Y., 212; Penn. R. R. Co. v. Conlan, 101 Ill., 106.

The court erred in assuming that the evidence did not tend to show that the conduct of the railway company amounted to negligence and was the primary cause of the injury.

Judgment reversed.

Campbell, Bates & Bettman, for plaintiff in error.

Ramsey & Matthews, for defendant in error.

REISSUE OF STOCK.

[Superior Court, Cincinnati.]

†CITIZENS' NATIONAL BANK V. C., N. O. & T. P. RY. CO.

In an action brought against a corporation, by the holder of a certificate of stock issued to the secretary of the corporation, for the repudiation of such certificate, two causes of action are stated. In the first, the certificate is averred to be genuine and valid. In the second, it is stated that if the certificate is, as claimed by the defendant, an overissue, it was such by the fraud and neglect of the corporation. *Held*:

- 1 The plaintiff may attempt to sustain either or both said causes of action.
2. No particular fraud being charged, the second cause of action alleges no fraud against the defendant other than that the overissue, if there were such, was the act of the corporation.
3. Such certificate may be made by the corporation by accident, or mistake, without wilful wrong; but it could hardly be made without wilful wrong by the unauthorized act of the secretary, who not only signs certificates, but has charge of the stock books, receives, surrenders and makes transfers.
4. The general presumption is against wilful wrong. Hence, when no evidence upon the point is offered but the production of the certificate in regular form, signed by the genuine signatures of the president and secretary and attested by the seal of the corporation, the presumption is that the certificate was issued by the corporation even if it be an overissue.
5. A certificate of stock is not a negotiable instrument. Still, the defendant may in such case be liable, because a certificate of stock issued by a corporation is a representation by the corporation to every person who proposes to purchase the certificate, that he to whom the certificate is issued has upon the books of the corporation the shares of stock named in the certificate.

FORCE, J.

There are two motions; the first motion is to strike out the whole of the conversations of June 9th and June 17th. As to the motion to strike out the whole of the conversation of June 9th that is granted. As to the motion to strike out the whole of the conversation of June 17th that is granted so far as the conversation relates to the value and the validity of the stock. It is overruled so far as the conversation relates to the indebtedness of Doughty, and the transferring it from one bank to another.

The other motion is a motion for either a direction to the jury to find a verdict for the defendant on the second count, or for a non-suit or dismissal on the second count. In the trial of an action you cannot have two verdicts; there must be one verdict. At this stage of the case perhaps the second count can be taken from the jury, and the judgment of dismissal without prejudice as to it granted. The question presented is, supposing that to be the correct practice, is there a case made out now for such dismissal?

†For a former opinion, see 8 Ohio Dec. R., 788. Some parts of the holding above were overruled by the circuit court, in Ry. Co. v. Bank of Urbana. See opinion and notes, 1 Ohio Circ. Dec., 109.

So far as the mode of pleading here is concerned, the first cause of action being an action for valid stock, and the second cause of action being an allegation that the stock was valid as in the first count, with the additional statement that if it was as claimed by the defendant an overissue, such overissue was the fraudulent act of the defendant and its officers, the president and secretary—so far as that mode of pleading is concerned, I have nothing more to say about that now; that has been disposed of upon motion, and I can only recur to what was then said as to the propriety of that mode of pleading.

The question is, then, has the plaintiff made out a *prima facie* case upon the second cause of action. That presents its case in the alternative. The simplest form of pleading in the alternative is the one in the 29 O. S., where one being sued on a promissory note says: "I did not sign that note," then: "If I did sign that note my signature was obtained by fraud." Now if a party should undertake to maintain both these defenses—for a party has a right to plead several defenses and attempt to make out one—if in that case the party attempted to make out both defenses, one would be a discussion as to the signature, and the other would be a presentation of facts showing that the signature, if given, was obtained by fraud. Now, in this case, what sort of evidence is it that the plaintiff would be required to offer? Not evidence that the certificate was an overissue, which it claims it was not; but evidence that if it was an overissue it was the fraud of the defendant itself; and as no fraud is alleged other than the fact of the overissue, it would be evidence tending to show that the overissue was the act of the defendant itself, the corporation. Now has the plaintiff offered any evidence tending to show that this certificate, in case it were an overissue, was the act of the defendant corporation, or was an overissue such that the defendant corporation would be liable for it?

Supposing it to be an overissue the question first presented in the matter is, suppose it to be originally invalid, how can an assignee of an invalid chose in action have a right of action upon it against the maker. A certificate of stock in Ohio is certainly not negotiable, although it is transferable; and if the court of appeals of Maryland, *Tome v. Parkersburg R. R. Co.*, 39 Md., 36, in attempting to distinguish certificates of stock from bills of lading, warehouse receipts and such, separated them so widely as to obliterate the distinction between certificates of stock and negotiable paper, all I can say is that in Ohio certificates of stock, although freely assignable are not negotiable. If then it is not negotiable, the question is presented and has been discussed, how is it that an assignee could have a right of action if the paper was invalid in the hands of the original holder. It seems to me the question is settled in England, at all events, so far as the English rule is concerned, in the case of *Bahia and San Francisco Railway Co.*, L. R., 3 Q. B., 3, where it was held that a certificate of stock containing a statement that the stock represented by the certificate will be transferred fully only by surrender of the certificate and entry of transfer upon the books, and delivery of the new certificate, that that representation in a certificate is a representation made not only to the person to whom the stock is issued, but to all persons who deal with the holder of the certificate for a transfer and sale of it, and that the person who is induced by that representation to act has a right of action in whatever form it may be, against the corporation, if he sustains a loss by reason of being induced by that representation.

That decision has been several times affirmed in England by the House of Lords as well as by other courts. *Simm v. Anglo-American Tel. Co.*, L. R., 5, Q. B. Div., 188; *Hart v. Frontino, etc.*, L. R., 5, Exch., 111; *Shropshire, etc., Co. v. The Queen*, L. R., 7, H. of L., 509, 513. That rule, in that form, at all events, has not, as far as I know, been declared in any state court in the United States. The Supreme Court of the United States, however, has, in one class of cases, made substantially the same ruling. In the class of cases, many of which have been disposed of in the Supreme Court of the United States, where the legislature of a state authorizes a municipal corporation to issue its bonds upon the performance of certain precedent conditions, if the bond contains a recital that those precedent conditions were performed, the corporation cannot declare they were not performed, or offer evidence of their not being performed, as against any *bona fide* holder. Now it is true that the bond, the obligation to pay, is negotiable; but a recital, a statement of facts, is not negotiable; and hence the ruling is that this recital is a representation which is made directly by the corporation to every person who deals with those bonds when once issued. And that court has explicitly declared the English ruling in *Bank v. Lanier*, 11 Wall., 369. The question has not been specifically discussed, so far as I know, in our Supreme Court. The form of certificate must then be regarded. Now the form of the certificate is that "This is to certify —" to whom? "This is to certify that George F. Doughty is entitled to 250 shares of one hundred dollars

each of the capital stock " and so forth, "transferable on the books of the company in person or by attorney, on the surrender of this certificate." For whose benefit is the statement made that this is transferable on the books of the company in person or by attorney, on surrender of the certificate? It is of no consequence to Doughty; it is not to advise him how he can get rid of his property; it is of consequence to purchasers, to advise them of the steps necessary to acquire legal title to the stock. So that I take it that the rule, which is entirely established in England, and which is supported by analagous rulings by the Supreme Court of the United States, if not specifically announced by our Supreme Court, I take to be the law in Ohio; that is, that the representation in a certificate of stock of this form is a representation to all persons who deal for the purchase of such shares of stock.

The question, then, that remains, is, by whom this representation is made in this case. The certificate having the genuine signatures of the president and secretary and the genuine seal of the corporation is *prima facie* valid, and of course purports to be made by the corporation. The question presented by this motion is, is it in this case in fact made by the corporation, if it turns out as a fact to be true that the certificate was an overissue, and invalid as a representative of stock.

Now the question whether or not this is a representation by the corporation brings up as the next question one which has been largely discussed by counsel: How is it that a corporation becomes liable? The whole body of a corporation seldom acts; the body of shareholders seldom act directly, except in the election of officers. The corporation must act through agents or through agencies; and as is said by one of the ablest of the Justices of the Supreme Court of the United States, Miller, J., in Pollard v. Vinton, 105 U. S., 12, while it is true that in some cases the person who acts for a corporation is a mere agent, yet in some cases the person or body who acts for a corporation really, is *pro tanto* the actual corporation itself in law. For such purposes some officers or bodies may be the organs of the corporations, as the voice, the hand of a person in action may be taken to be the person himself. Though it is true that an agent when acting binds the corporation, or that an officer or board is for the time being the corporation itself, that is so only when the agent, officer, or board or other authority is acting in the business of the corporation, is carrying on the affairs of the corporation. Of course, a man who is an officer or director, while transacting his own business, is not the corporation.

Then, having arrived at the point that this certificate may contain a representation made by the corporation, and that such representation, being the representation of the corporation, may have been made by some board or perhaps by some officer or agent, the question is, how does the case stand upon the evidence now submitted in this case. In approaching that we have to consider the question, when does a certificate of stock which is invalid, being issued by fraud, or being an overissue, when does such a certificate of stock bind a corporation, make it responsible, either to receive it as stock or responsible for it in damages.

An overissue made directly by a corporation, may be made either guiltily or innocently, that is, in good faith, by accident and mistake. If the board of directors should wilfully resolve to issue stock in excess of the amount allowed by charter, and it should be so done, that undoubtedly would be the act of the corporation. If certificates, irregular, unlawful or spurious, were fraudulently issued by an officer of a corporation, if the corporation should afterwards ratify that act, it would be liable; and it has been held that it is so ratified when the corporation, either actually knowing, or acting under such circumstances that it ought to know, and is held to be bound to know, the mode of issue, should receive the profits arising from such issue and put it upon the book of the corporation as representing genuine stock. That I take to be the ruling in the Schuyler case, in 34 N. Y. And there may be an overissue of certificates without being an actual overissue of stock; that is, where several certificates are issued intending to represent the same stock, as in the case of the Bahia and San Francisco Railway Co., where the question was as to who was the real owner of particular stock; or, as in the case in Cleveland and Mahoning R. R. Co. v. Admsrs. of Fassett, 35 O. S., 483, where there were two actual outstanding certificates in the hands of different holders, and the question was who was the proper owner of the stock represented by these two separate certificates. In such cases it is held, the corporation may be liable, although acting in good faith.

There may be overissues which do not bind the corporation; that is, stock may get into circulation in such a way that it does not bind the corporation. Suppose a certificate is made out complete, executed and filled, but not delivered by the corporation; if that should be stolen by a stranger or a stockholder, or an officer excepting for the present officers whose duty it is to sign certificates, and put upon the market fraudulently, that would certainly not be an issue by the corporation and would not bind the corporation. Or if an incomplete certificate should be so pur-

loined by such persons as I have named and after being purloined be filled out and completed, that would not be an issue of stock by the corporation; it would be an act of forgery by the person who so filled it up, and would not bind the company.

Now, suppose that such an act were done by, say the secretary of a company; such an act is supposable, as it appears by the books that such a thing has been done. Suppose the secretary, whose business it is to sign the stock, should improperly make out and fill, without being authorized to do so, and without paying therefor, a certificate to himself, and having so filled it should pledge it to secure a debt of his own; pledging the paper to secure a debt of his own would not be an act of the corporation. The act of the corporation must be found in the issuing of the stock to the secretary himself. What are the acts which constitute such placing of a certificate in the hands of the secretary? It would be the secretary taking a blank which is the property of the corporation, and either appropriating that blank and afterwards completing it, or completing it as secretary, and afterwards appropriating it himself without right. In that transaction there are two parties, the corporation and the secretary. The transaction is the secretary's improperly appropriating to himself the property of the corporation. Now, where there are two persons, and one is purloining the property of the other, can it be said that he is carrying on the business of that other? It seems to have been held so at least in two cases; I think that is the holding in the 39 Md., in the Tome case, and it appears to me to be the holding in the 61 New York, in the Titus case. The contrary is held in the 13 New York, the case of Kyle, and in Wright's Appeal in 99 Penn. The 34 New York, the Schuyler case, I think does not cover this case; it covers the case where the corporation was held by the court to have ratified the acts of the agent by receiving the benefit of his acts under circumstances when it was bound to know the character of his acts, by omitting for five or six years to read the record which he made of his acts legibly, and also from the fact that certificates having been surrendered, were so blended with genuine stock in new certificates that it was impossible for the corporation to say of any particular certificate, this certificate is invalid. The cases being divided, I am at least inclined to say for the present, that where the secretary in that way fraudulently attempts to create in his own favor a baseless claim against the corporation, his act does not appear to me to be an act done by him in the course of his business as an employee of that corporation. If he appropriates a blank certificate and after appropriating it, fills and signs it, that appropriation may not be under our statute an embezzlement; or where he as secretary fills before appropriating, that may not be under our statute a forgery. But if he does, in so first filling and completing the certificate, act as secretary, so as to make a complete certificate, then his appropriating it to himself after completion would be under our statute embezzlement. *Rex v. Metcalf*, 1 Moody, C. C., 433; *Heath's case*, 2 Moody, C. C., 33; overruling *Walsh's case*, *Russ v. Ry.*, C. C., 215, and *Phipoe's case*, 2 East, P. C., 599. Or, if it should be held that he appropriated the blank unexecuted paper, and after he had taken it away from the corporation and appropriated it to his own use, and sign, he should then undertake to fill it up, and sign it as secretary, and pass it off as genuine, my impression is that would be an act of forgery under our law. So that as at present advised it seems to me that such a paper would scarcely get into circulation under such circumstances without the commission of a technical crime as well as a wilful wrong by the party. Nor would that be affected by the mere fact that the certificate has already had the valid signature of the president annexed to it and left in the hands of the secretary for the purpose of lawful use. It perhaps has been held otherwise in New York and Maryland; but the great bulk of authority it seems to me is explicit, that, where there is an act of negligence by one, which act of negligence cannot injure another unless there is interposed a crime committed by a third party, that negligence is not held to be the approximate cause of the injury, and the party is not answerable. And it has been held in the United States circuit court of this district, in an action much like the present, that it is immaterial whether or not it is negligence for a president of a company to leave his name to a certificate to be completed subsequently by the secretary when occasion arises. *Bank of Ireland v. Trustees*, 5 H. of L. C., 389; *Baxendale v. Bennett*, L. R., 3, Q. B. Div., 525.

I have been so far simply discussing the ways in which a certificate may or may not be presumed to be the act of a corporation in case it is an overissue, and I have been led by the exceedingly able arguments on both sides to go into this to a greater extent than is called for at this stage of the case. The result of this statement, and all I propose to rule at present is, simply this: That such a certificate, if an overissue, may be under some circumstances the act of the corporation; it may be also under certain circumstances not the act of the corporation. If it is

the act of the corporation, it may be a case of wilful fault, or it may be the result of an innocent mistake or accident; it may be wilfully wrongful, or may not be wilfully wrongful. If it is an overissue, for which the company is not liable, it is hard to see how that can be unless it is produced by either the crime, or at least by the wilful wrong of some one. What then is the presumption in this case? What is the evidence in this case? There is no oral evidence, no statement of witnesses as to how it was done. But oral evidence of witnesses does not constitute the whole of evidence. Written instruments are evidence. Presumptions are evidence; sometimes cases are decided by presumptions. In the case of contributory negligence, if nothing appears in the plaintiff's case to show negligence on the part of the plaintiff, the presumption is that he was not guilty of negligence, and that presumption supports the either expressed or implied allegation that he was free of negligence. In an indictment for larceny, the defendant may be convicted without there being any direct evidence that he committed a larceny, upon evidence that the goods disappeared without explanation, and were shortly afterwards found in his possession without his being able to account for his getting them. The presumption that he stole them is a presumption which would convict in the absence of other evidence.

Presumption, then, is an instrument of evidence as well as oral statements. What is the presumption upon the case as it now stands, whether or not this, suppose it should turn out to be an overissue, would be an act of the corporation or not an act of the corporation. It comes, in my mind, to this narrow point; if the overissue is held to be the act of the corporation, it may be wilfully wrongful. If it is not the act of the corporation, there is necessarily at least wilful wrong somewhere; and the presumption being always in favor of innocence, in the absence of any specific evidence as to how the paper got out in case it was an overissue, the presumption would be that it got out in some way which does not require us to attach wrong to it.

The motion will be overruled, and the evidence of the defendant be heard.

John W. Warrington and E. W. Kittredge, for plaintiff.

Edgar M. Johnson and Wm. M. Ramsey, for defendant.

JUDGMENT ON PARTIAL DEFENSE—CORRECTION OF ACCOUNT.

102

[Hamilton District Court, February 5, 1884.]

Avery, Maxwell and Buchwalter, JJ.

A. C. DEWEY ET AL. V. SLOAN, CAMPBELL & CO.

Where on overruling demurrer to a petition for work and labor, time was given to answer, and after the expiration of the time upon motion of the plaintiffs for judgment, time was given to a further day to prepare and submit an answer and ask leave to file it, and on that day an answer in proper form making a defense to part of the amount claimed and by way of setoff praying damages was submitted for filing, but leave was refused by the court except on condition of payment of the difference between the claim as made by the petition and the partial defense and setoff pleaded by the answer: *Held*, the refusal was error.

Where upon inquiry of damages by the court as upon a default, the only evidence offered by the plaintiffs consisted of a written paper signed by the defendants after the suit had been brought, to the effect that it was agreed by them that a certain amount was owing to the plaintiffs, and the court thereupon rendered judgment for that amount, refusing to permit the defendants to show that they had signed the paper under a mistake of facts relying upon the plaintiffs' representations that they had done a certain quantity of work that was at the time of signing overflowed by water and could not then be inspected, and of which mistake, when the truth was discovered a few days afterward, the plaintiffs were notified by the defendants with notice at the same time that the paper would not be regarded binding: *Held*, the refusal was error.

ERROR to the Court of Common Pleas.

AVERY J.

Opinion citing 44 N. Y., 653, 656; 28 Minn., 301; 22 Minn., 413; 129 Mass., 50; 1 J. R., 42; 4 B. & C., 715; 8 M. & W., 140.

TRANSFER OF STOCK.

103

[Hamilton District Court, February 5, 1884.]

†**STATE OF OHIO EX REL. FREON V. ENTERPRISE CARRIAGE CO. ET AL.**

A purchaser of stock of a corporation by assignment from a shareholder refused by the company a transfer of his stock on the books of the company has as a general rule an adequate remedy in an action for the value of the shares of stock at such time of refusal of transfer, and if such stock have any peculiar elements of value making it by reason of its value incapable of compensation in damages, then the proper remedy is by suit in equity for a decree transferring the same. Mandamus to compel the company to place his name on the books of the company as a shareholder, is not, therefore, the proper remedy.

BUCHWALTER, J.

This case was heard on an application for an alternative writ of mandamus. The relator claims to be the owner of one paid-up share of the capital stock of the defendant corporation of the par value of \$100, obtained by purchase from the former owner thereof, as evidenced by a certificate of stock therefor duly transferred to him on the back thereof for value by him paid.

He avers that he made demand on the company and secretary to transfer said share of stock on the books of the company and place his name on the roll of members and shareholders; that the defendant company was organized for the manufacture of carriages, that it has been successful in business, and that within the last few years had accumulated estates of both real and personal property of great value; that defendant's good will of the business was of great value, and that its future earning prospectively large. He says that the value of a share as based upon the present assets of the company cannot be estimated with certainty, nor can he estimate the good will of the business nor its prospective earnings, but avers that it is of great value. The question is whether upon these facts as averred, the plaintiff is entitled to the writ of mandamus to compel such transfer to place his name upon the books of the company as a stockholder and to entitle him to participate in the business as a member and vote at the election of its officers. By section 6741, Rev. Stat., it is provided: "Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." And by section 6744, Rev. Stat.: "The writ must not be issued where there is a plain and adequate remedy in the ordinary course of the law; it may issue on the information of the party beneficially interested." The statute substantially embodies the common law rule. *Shelby v. Hoffman*, 7 O. S., 451, 455. The remedy by mandamus cannot be invoked; if a judgment in damages be an inadequate compensation, then the remedy may be complete and adequate by a specific decree in equity for the transfer of the shares of stock as held in *Cushman v. Thayer Manufacturing Co.*, 76 N. Y., 365, and cases cited, and see 133 Mass., 515.

Where there is a controversy as to the title to the shares of stock or the same are held by legal title in one and the equitable in another, and it appears that the corporation has cause to refuse transfer on the demand of either holder, the remedy is by action in equity and a proper decree therein determining the rights of all the parties therein, if need be, the sale of the stock. *Bank v. R. R.*, 21 O. S., 221; *Bank v. Bank*, 37 O. S., 208; and where demand has been made for a transfer, the rightful owner is entitled to recover damages for the value of the shares of stock at such time, and he may in the same action ask a decree for the transfer of stock conditioned that in default thereof he have judgment for the value. *Railroad v. Robbins*, 35 O. S., 483.

The equitable remedy, however, can only be had where the peculiar nature of the stock or business condition of the corporation make it impossible to give just compensation in damages; and the general rule is as founded upon the weight of authority that the purchaser of shares of stock has an adequate remedy against the corporation in damages for the value thereof at the time of the refusal to transfer the same, and that therefore the writ of mandamus must be refused. See *High on Extraordinary Legal Remedies*, section 15; *Stackpole v. Seymour*, 127 Mass., 104; 97 Penn. St., 72; *Bank v. Harrison*, 66 Ga., 696; *Shipley v. Bank*, 10 Johns., 177;

†A similar decision was rendered in this case by the Supreme Court; see opinion, 42 O. S., 30.

Ex parte Ins. Co., 6 Hill, 243; Kimball v. Water Co., 44 Cal., 173; State v. Guerrero, 12 Nev., 105; Rex v. Bank, Doug., 524; State v. Building Association, 43 N. J. L., 389.

The latter case was one wherein the relator had purchased twenty-five shares of stock in a building association, and being refused a transfer on its books, claimed he had no adequate remedy at law, because he could only approximately determine their value, and in the nature of the business of the corporation that value could only be approximately ascertained by estimating the value of the present securities and prospective profits or losses on future loans. The court held that, "unless this case is of such an exceptional character that damages recoverable in a suit at law will not adequately compensate the relator the writ must be denied. There are some features peculiar to these associations, but they do not render it impracticable to estimate fairly the value of these shares of stock and remunerate the owner in damages for their loss, nor do these peculiarities furnish a sufficient reason for engrafting an exception upon a well-settled rule of law."

In State v. Guerreo, 12 Nev., 105, where an estimate of the value of shares of stock in a mining company supposed to be of fluctuating value was required, the court refused a mandamus because their fair value was ascertainable.

There are some decisions to the contrary, as 2 S. C., 25; 9 Cal., 112; 45 Ind., 1; but the case of 9 Cal., 112, is wholly inconsistent with that of Kimball v. Water Co., 44 Cal., 173, and the case of 45 Ind., 1, is founded on and cites those of 9 Cal., 112, and 2 S. C., 25.

The averments in relator's petition in this case are, that the value of the share of stock, as based upon the present assets of the company, cannot be estimated with certainty, and that its future prospects are great and its good will valuable.

We are of the opinion that, from the facts averred, there is nothing to show that the relator cannot in an action at law recover the fair and just value of his stock, based upon all the elements of property therein, including the good will, as well as the value of the present assets, and it is not necessary that the value be fixed with certainty; but if this stock has any peculiar elements of value rendering it incapable of a fair estimate, then the relator has his remedy in a suit in equity for the transfer of the specific shares.

The writ will, therefore, be dismissed at the costs of the relator.

Milton Sater and Adam Kramer, for relator.

Edward Colston, for defendant.

Edward Colston, for defendant:

We claim that the writ of mandamus will not lie to compel the transfer of a share of stock in the present case, because Mr. Freon has an adequate remedy by civil action under the laws of Ohio. We cite the following authorities to sustain this proposition:

Rex v. Bank of England, Doug., 524; Shipley v. Mechanics' Bank, 10 John., 177; State v. Romlauer, 46 Mo., 155; *Ex parte* Farmers' Ins. Co. v. Hill, 243; Wilkinson v. Providence Bank, 3 R. I., 22; Murray v. Stevens, 110 Mass., 95; People v. Parker Vein Coal Co., 10 How. Pr. Rep., 543; Asylum v. Phoenix Bank, 4 Conn., 173; Stackpole v. Seymour, 127 Mass., 104; Rex v. London Assn. Co., 5 Barnwell & Alderson, 899; State v. Guerrero, 12 Nevada, 105; State v. Warren Founder, 32 N. J. Law., 439; High on Extraordinary Legal Remedies, section 15; Shelby v. Hoffman, 7 O. S., 455; section 6744, Rev. Stat.; Richardson v. Grand View Mining Co., 7 Dec. R., 140; Bank v. Bank, 37 O. S., 208, 215; 92 Penn. St., 72; 43 N. J. L., 389; 66 Ga., 696.

The following cases claimed to be contrary to the above authorities are reconcilable therewith:

People v. Crockett, 9 Cal., 112; Transportation Co. v. Bulla, 45 Ind., 1; Townsend v. McIver, 2 S. C., 25; Cooper v. Canal Co., 2 Murphy, 195.

A full and complete remedy is afforded the plaintiff by the laws of Ohio without resorting to mandamus; the remedy is by a civil action against the corporation praying for a decree that it be directed to transfer the stock. Such action may be in the alternative, and plaintiff may recover money in case the transfer cannot be made. Such was held the common practice in the courts here. An instance of it may be found in Railroad Co. v. Robbins, Admr., 35 O. S., 483, see pp. 488, 500.

[Hamilton District Court.]

†THOS. F. CLARK v. BENTEL, MARGEDANT & CO.

For opinion in this case, see opinion, 6 Dec. R., 1205. (a. c., 12 Am. Law Rec., 534.)

ARBITRATION—WAIVER OF STATUTORY REQUIREMENTS.

[Hamilton District Court, February 5, 1884.]

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† E. P. BRADSTREET, EXR., v. MARY PROSS.

1. Under section 6093, Revised Statutes, providing for the arbitration of doubtful claims by executors and administrators, it is not necessary that an action be brought on the award, but the court may enter judgment on the award when made.
2. The parties may waive an objection to the manner of swearing the arbitrators. Where the statute provided that the oath to the arbitrators and witnesses must be administered by a judge or justice of the peace of the county, and such oath was administered by a notary public, but the defendant, an attorney at law, was present when the oath was administered, and made no objection to the proceeding: *Held*, that defendant had waived the objection to the manner of swearing the arbitrators.
3. Where the alleged misconduct of one of the arbitrators is not shown to have influenced his decision or prejudiced the interests of defendant, and defendant moreover with knowledge of the facts made no objection at the time: *Held*, such misconduct was not sufficient to set aside the award.
4. Where the action was originally brought in the Superior Court, and afterwards by the terms of arbitration became an action in the court of common pleas, and the facts showed that it was the intention of the parties to discontinue the suit in the superior court, it was not error on the part of the lower court to find that such suit in said court had been abandoned.
5. To sustain the objection to the introduction of certain evidence admitted with the consent of a party, but subject to his objection, a motion must be afterwards made to rule out such testimony.
6. The fact that an executor has rejected a claim on which suit had been brought, does not estop him from submitting it to arbitration. As part of the claim may have been good and the executor could not be compelled to separate the good from the bad, but might reject it *in toto*.
7. Notwithstanding the parties to a statutory arbitration may have agreed that the award of the arbitrators upon questions of fact, should be final and conclusive upon both parties, such an agreement cannot deprive the court of jurisdiction to order a remittitur, where, in the opinion of the court, the sum awarded by the arbitrators was excessive.

ERROR to the Court of Common Pleas.

MAXWELL, J.

Caleb Jeffers died January 27, 1881. Shortly after that the defendant in error, Mary Pross, presented her claim to the executor for services as housekeeper, nurse, etc., to deceased, beginning June 8, 1873, and continuing until the time of his death. The claim was rejected by the executor, and thereupon she brought suit in the superior court. The executor filed an answer denying that the claim was a just one, that any such amount as she claimed was due, and also setting up affirmatively that some time in July, 1878, a settlement had been made between her and Caleb Jeffers, the deceased, and that if she was entitled to recover anything it could only be from that time until his death. The executor afterwards filed an amended answer, in which he plead the statute of limitations—that is, that plaintiff could only recover for services from March, 1875, until the time of the death of Caleb Jeffers. After the issues were made up in the superior court, the parties entered into an agreement to arbitrate the differences between them. The agreement to arbitrate was put in writing and signed by both parties. That agree-

† For common pleas decision, see 8 Ohio Dec. R., 731.

ment the defendant, the executor, took to the probate court and applied to that court for its approval of the agreement, as provided by section 6098, Rev. Stat. The probate court having approved of the agreement and of the selection of the arbitrators, the agreement to arbitrate and the order of the probate court were then filed in the court of common pleas, as provided by statute, and a rule was issued by the court of common pleas directing the arbitrators to proceed to take testimony and return their award. The arbitrators heard the testimony submitted by both parties on the issues presented, and found that there was due to the plaintiff \$4,350. Their award was regularly made, signed and returned to the court of common pleas, and such proceedings were had thereon that the court of common pleas confirmed the award and entered judgment for the amount found to be due by the arbitrators. The plaintiff in error then filed his petition in error in this court, assigning as errors the matters herein considered. The first error assigned is that the court found that the submission was under section 6093, Rev. Stat.

So far back as No. 29 of the annual laws of our state, provision was made by the legislature generally for arbitration. After providing for the manner in which the submission should be made and in which the arbitrators should proceed, it is provided that the court, at the next term thereof after the award is filed and no legal exceptions be made or taken to the award, and the award is for the payment of money, shall enter judgment thereon as on the verdict of a jury between the parties and issue execution thereon as in other cases immediately after the amount stated is due and payable. It will be observed that by this provision of the legislature, an award of arbitrators is to be treated as the verdict of a jury. In section 6093, and sections following, it is provided that "if the executor or administrator doubt the justice of any claim presented and verified as aforesaid, he may enter into an agreement in writing with the claimant to refer the matter in controversy to three disinterested persons, who, if the claim does not exceed \$100, shall be approved of by a justice of the peace of the county in which the letters were issued; or if the claim exceeds \$100, shall be approved of by the probate judge of said county." Section 6095 further provides "if the claim so referred to arbitration exceed \$100, upon the filing the agreement of reference and the approval of the judge with the clerk of the court of common pleas of the county in which the letters were issued, the said clerk shall docket the cause, and enter a rule, whether in vacation or in term, referring the matter in controversy to the persons so selected." These provisions with regard to allowing executors and administrators to arbitrate claims, were not passed by the legislature until some time after the passage of the provision for general arbitration, and in the original section from which section 6096 is compiled, it was provided that the reference should proceed in the same manner as is provided in the general provisions for arbitration. It is provided here, section 6096, that "the referees shall thereupon proceed and determine the matter, and make their report thereon to the said court; and the same proceedings be had before said referees in all respects; the referee shall have the same power, be entitled to the same compensation as if the reference were made under the provisions made for arbitrations under rule of the court of common pleas.

The right existed at common law to submit matters to arbitration and was frequently exercised, but when the arbitrators had arrived at their conclusions and made their award, it was necessary then to bring

an action on that award. In other words, there was no provision upon which the court might enter a judgment summarily upon the award. So we may suppose this exception to the finding of the court below is taken upon the theory that if this were a common law arbitration and not an arbitration under section 6093, then the court erred in entering judgment upon it and not leaving the parties to bring their action on the award.

But if we look into the proceedings we find that the executor followed exactly the provisions incorporated in our statute relating to the submission of doubtful claims. The claim was over the amount of \$100. The executor submitted the agreement to arbitrate to the probate court. The probate court approved of it, and it, with the order of approval of the probate court, was filed in the court of common pleas and a rule was issued for the arbitrators to proceed to take testimony and return their award. In short, he conformed in all respects to the provisions of the statute. It was not error, therefore, we think, for the court below to find that the arbitration was under section 6093.

The second error assigned is that the court found that the defendant had waived the objection to the manner of swearing the arbitrators. There is no provision in the statute permitting executors or administrators to submit claims to arbitration, providing expressly for the manner in which arbitrators shall proceed, but, as it appeared in the original statute, they were to proceed as in cases of ordinary arbitration, and that statute provided that "all arbitrators and witnesses examined by an umpire or arbitrators shall be under oath to be administered by any judge or justices of the peace of the county. In the case under consideration there is no dispute but that the oath to the arbitrators and witnesses was administered by a notary public, and it is assigned as error that the oath was so administered. The court below found that the defendant had waived that provision of the statute. Whether or not there was a waiver of the statute was of course a mixed question of law and fact. First, as to the fact. We have the affidavits of the notary who swore the arbitrators, of the stenographer who was employed to take down the testimony, and of the three arbitrators, that the defendant himself, an attorney of experience, was present at the swearing of the arbitrators, that he was aware of the fact that the notary who swore the arbitrators was only a notary; and, as against that we have only the defendant's statement that he does not recollect being present. We must conclude, therefore, upon the facts that he was present, and we may assume that he was acquainted with the law, because, as it appears from the proceedings, all the papers having reference to submission to arbitration were drawn up in his handwriting, and assuming that he was familiar with the law on this point he must have known that the notary in swearing the arbitrators and witnesses was proceeding contrary to the statute. The question then is whether or not, knowing the facts and the law, standing by and offering no objection, as appears by the testimony, he waived the provision of the statute, and whether it was such a provision as could be waived by him. The authorities are somewhat at variance in the different states, for the different states have different statutes upon this matter of arbitration, but in general, as it seems to us, the authorities are to the effect that such a provision as this may be waived. It is true that jurisdiction cannot be given by consent, that a jurisdictional provision cannot be waived. We think this is not a jurisdictional provision. It is simply one of the details of procedure. Upon general principles, aside

from the authorities, we think it might be waived. In New York, where it is provided by statute that parties to an arbitration may agree that judgment of any designated court shall be entered on the award, it is held the oath to the arbitrators may be waived. *Browning v. Wheeler*, 24 Wend., 258; *Kelsey v. Darrow*, 22 Hun., 125. The reason there given is that the submission confers jurisdiction on the arbitrators and omitting to swear them is an irregularity merely. In Wisconsin, under a statute like that of New York, there is a similar holding. *Hill v. Taylor*, 15 Wis., 190. It is so held in *Woodrow v. O'Connor*, 28 Vt., 776. In *R. v. Alfred*, 4 Brad., 511, a decision by one of the district appellate courts of Illinois, although not necessary to the case, it is held that the parties may waive the provision of the statute. Many examples might be instanced of similar cases in the procedure of our courts where the express provisions of the statutes with regard to some details of procedure had been waived and yet the parties have been held bound. A familiar example of this is the custom of proceeding to trial with eleven jurors. Eleven jurors do not constitute a jury, yet, if the parties agreed to proceed with eleven they will be bound by the verdict. Many other instances might be cited bearing upon this question to the effect that such details of procedure may be waived. We think there was no error in the court below finding that the defendant had waived the objection to the manner of swearing the arbitrators.

The next error assigned is that the court found that the defendant had waived the alleged misconduct of one of the arbitrators. In the proceedings in the court below by defendant to set aside the arbitration it was alleged that one of the arbitrators had been guilty of misconduct. The alleged misconduct consisted in his talking with defendant in error and some of her witnesses during the hearing. It is not shown that anything important was said or that there was any conduct which tended in any way to influence his decision or opinion. The most that could be shown was a familiarity which might be considered in bad taste considering the relation the arbitrators occupied. But the defendant was cognizant of that; he stood by and saw it, made no objection, and proceeded afterwards with the same arbitrators, and, as the court below said, his reliance may have been such in the firmness and capacity of the other arbitrators that he was content to abide by their decision, notwithstanding he suspected this arbitrator of favor toward the defendant in error. We cannot find that the court erred in that respect.

The next error assigned is that the court found that the submission discontinued the suit in the superior court. A suit, it will be observed, was brought in the superior court and afterwards by the terms of arbitration became an action in the common pleas court. Whether or not the case was discontinued in the superior court, was, to a large extent, a question of fact. What was the intention of the parties? Did they intend to discontinue or abandon the proceedings in the superior court? There have been different rulings on this point, but the majority of the cases are those where there was an attempt to revive proceedings in the court and have some action taken while the case was still before the arbitrators, thus having two cases pending at the same time. There is no question that any one having an action pending in the superior court may, for reasons that seem best to him, without dismissing the action in the superior court, bring his action here.

In this case, after the submission to arbitration there was no further attempt to do anything in the superior court. The parties seemed satis-

fied to proceed under the submission to arbitration. There was no attempt to go on under the proceeding in the superior court. We think, from the facts as they appear here, it is sufficiently clear that it was the intention of the parties to abandon or discontinue the suit in the superior court and resort to their remedy by arbitration under the rule of the court of common pleas, and that the court below did not err in so finding.

The next error assigned is that the court below found that the defendant had not taken proper means to secure the exclusion of what was called improper evidence. Upon the hearing below, the defendant objected to the introduction of certain evidence and sought to have it excluded. In the hearing before the arbitrators it is true there was certain testimony admitted subject to the objection of the parties, but there was no motion afterwards made to rule that testimony out, and under the authority of *Thayer v. Luce*, 22 O. S., 62, it seems to us clear that the testimony remained just as it was. We think the court did not err in that respect. Other objections were urged by counsel in the argument, though not assigned in the petition in error, such as that the executor had no power in the first place to submit to arbitration. It was urged that the executor had wholly rejected this claim, that suit was brought in the superior court and that that fact put it out of his power to submit it to arbitration. Granting that the executor did reject the claim and that suit was brought in the superior court, we think he might afterward have submitted it to arbitration because some part of the claim may have been good, some part would have been allowed. When a claim is presented in the form that this was, an executor would not stop to separate the good from the bad, but would reject the claim *in toto*. The last objection made was that the award of the arbitrators was against the weight of the evidence. We have had more difficulty in passing upon this objection than upon any of the others. The testimony was very voluminous, a great number of witnesses were examined and the testimony was taken down in shorthand and literally transcribed as given. Without reviewing the testimony at great length, however, we are convinced that the arbitrators in the consideration of the case allowed themselves to be diverted from one of the main issues of the case as presented to them. There were two issues presented to the arbitrators upon which to base their conclusion. One was whether or not Caleb Jeffers was, during the time the plaintiff lived with him as his housekeeper and nurse, in a position physically to require the services of a nurse in the ordinary sense of the word. It was not disputed that she performed her duties as housekeeper and servant to his satisfaction. But the question was, whether in addition to this she was obliged to perform such duties as those of a professional nurse. The other question was, what those services were worth, as she performed them. We are convinced that the arbitrators to a large extent confined their consideration to the one question as to what those services were worth, without considering the question whether he was in a position to require those services. We are convinced that he was not in a condition a large part of the time to require the services of a professional nurse. We have therefore come to the conclusion that the amount of the award of the arbitrators should be reduced to the sum of \$3,500. If the plaintiff is willing to remit a sufficient amount to reduce the judgment to the sum of \$3,500, then the judgment of the court below will be affirmed, otherwise it will be reversed.

A question being suggested as to the power of the court to reduce the amount of the award, as the parties had bound themselves in the agreement to arbitrate, to abide by the award of the arbitrators as to all questions of fact, the court said: "We have considered that question. Our opinion is that as the arbitration was a statutory one, and as under section 5609, Revised Statutes, the award of the arbitrators is to be treated as the verdict of a jury, we have the power to compel a remittitur. The parties cannot, by their agreement, either give jurisdiction to the court or take it away from the court."

A. J. Cunningham and E. P. Bradstreet, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

EXEMPLARY DAMAGES.

[Hamilton District Court, Saturday, December 1, 1883.]

AUGUST KUCHENMEISTER V. WILLIAM O'CONNOR.

1. Whether in any case of negligence, however gross, the jury are warranted in giving exemplary damages, may be in dispute in this state.
2. The trial court charged, "that if his (defendant's) negligence was so gross as to show a reckless indifference to the rights and safety of other persons, regardless of all social duty, and it was wilful, the jury are authorized, in addition to the damages that would be a compensation for the injury, to give exemplary damages." Without passing upon the question whether or not the charge should have been given, there was evidence sufficient to show that the jury were not misled by it.

ERROR to the Superior Court of Cincinnati.

SMITH, J.

The action below was brought by William O'Connor, a minor, for damages sustained whilst Kuchenmeister was tearing down a building on the corner of Sycamore and Abigail streets, part of the Gambrinus brewery. It is claimed on the part of the plaintiff below, and denied by the defendant, that the injury was caused by the negligence of defendant, the plaintiff not contributing thereto. The cause was submitted to a jury, and a verdict for \$500 found for plaintiff.

The injury was quite severe. The boy testified, and there is testimony tending to corroborate his statement, that he was walking along Sycamore street with considerable haste, that there was no guard or barricade to prevent him from going on the sidewalk in front of the building, and while walking, a brick fell from above and struck him and knocked him down, and whilst down another brick fell and struck him in the eye; and he was badly hurt.

The defendant denied negligence on his part, and considerable testimony was offered on both sides tending to show whether there was negligence or not on the part of the defendant. The jury found a verdict for the plaintiff, assessing his damages at \$500. The alleged error is, that in charging the jury, the court used this language, "that if his (defendant's) negligence was so gross as to show a reckless indifference to the rights and safety of other persons, regardless of all social duty and it was wilful, the jury are authorized, in addition to the damages that would be a compensation for the injury, to give exemplary damages."

This charge was excepted to by defendant, and it was urged that upon the evidence as presented to the jury, it was not a case warranting exemplary damages.

Whether or not in any case of negligence, however gross, the jury are warranted in giving exemplary damages is possibly in this state somewhat in dispute. Our Supreme Court, in the case of *Roberts v. Mason*, 10 O. S., 278, state that in an action of tort, where the ingredients of fraud, malice or insult enter into the case, then the jury would be authorized, in addition to compensatory damages, to add exemplary damages.

And in one or two recent cases, in commenting upon cases proper for exemplary damages, the court has used the term, fraud, malice or insult.

But the weight of authority in a majority of the states is, that, in case of gross negligence where it is so gross as to show a reckless indifference to the rights and safety of other persons, following the language in this charge, then the jury are warranted in giving exemplary damages. In *Sedwick on Damages*, 321, citing 20 Wis., 358, it is said that, "exemplary damages in cases of this nature can only proceed from gross and criminal negligence—such negligence as evinces, on the part of defendant, a wanton disregard of the safety of others, and which in law is equivalent to malice."

Whether the evidence in this case warranted this part of the charge, it is not necessary to determine, for by comparing the amount of the verdict rendered by the jury with the nature of the injury received by the plaintiff, it is apparent that the jury were not misled by it.

Following the intimations of the court, in the cases of *Railroad v. Slusser*, 19 O. S., 157, and *French v. Millard*, 2 O. S., 44, we are unwilling to disturb their verdict of \$500, for such an injury, and without passing upon the question whether or not as an abstract principle the charge should have been given, we are satisfied the jury were not misled by it.

Judgment affirmed.

D. Humphreys, for plaintiff in error.

Hagans & Broadwell, for defendant in error.

UNLAWFUL AGREEMENT.

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[Superior Court, Cincinnati.]

JOHN T. CRAWFORD, BY NEXT FRIEND, v. ROBERT GORDON, *EXR.*

Where one of the considerations for an agreement by the father of a bastard to its mother to pay money for its support and education, was the promise of the mother to continue to cohabit with the father, such agreement is void whatever the other considerations were.

HARMON, J.

This is a somewhat remarkable case in its facts. It has been tried upon the merits; the defendant submitting the case upon the plaintiff's testimony, by motion for judgment.

The plaintiff alleges in the petition that he is a minor of the age of twelve years, and that he is the illegitimate son of John T. Crawford, whose executor is defendant; that John T. Crawford died in 1880, dis-

posing of all his estate otherwise than for plaintiff's benefit; that he was never married and left no legitimate issue; that plaintiff's mother, Carrie W. Kimball, being about to institute proceedings for maintenance and bastardy, he, the said Crawford, to induce her to forbear such proceedings, promised and agreed with her that if she would so forbear and aid him as though she were his wife in the care and nursing of plaintiff, he would, in consideration thereof and the further consideration that she had given him at divers times various sums of money for his business, provide for plaintiff until he should arrive at the age of twenty-one years, and that the sums given toward such aid were to amount to \$10,000, to be paid by him for said use and purpose when plaintiff's mother might demand it, and if she should not make such demand during his life he would make provision for plaintiff in his will.

He further avers that his mother never made demand for the money so to be paid, and decedent never paid it or provided for its payment nor any part thereof.

The answer is a general denial.

A large number of witnesses were called on behalf of the plaintiff to prove the apparent relations of Crawford to plaintiff's mother; to prove their real relations; to prove what Crawford had said about this child, showing that he had recognized it as his child, and that if he had not, the resemblance was so strong that other testimony was unnecessary; and showing that the mother of the plaintiff was at the time of the connection between her and Crawford, which resulted in the birth of the plaintiff, and ever since has been, and still is, a married woman—part of the time living with her husband and part of the time apart from him, but at the time plaintiff was begotten, living with her husband.

The only witness to the contract referred to in the petition is the mother herself, who testifies that the promise sued upon was in writing, but that some time after it was delivered, she gave it back to him for safe-keeping, since which time it has been destroyed. She, in her testimony, professed to give the exact language of the contract, as follows:

"I, John T. Crawford, promise to give Carrie W. Kimball for my son, John T. Crawford, \$10,000, for his use and education.

JOHN T. CRAWFORD."

One question discussed upon the trial was as to who is the proper person to maintain an action upon this agreement. The promise is to Carrie W. Kimball, although for the benefit of John T. Crawford. There may, perhaps, be some question upon the authorities which hold that a third person, although a stranger, may sue upon the promise made to another for his benefit, whether that rule applies to a case where the promise is in terms to one of the contracting parties although for the benefit of another, or whether it only applies to cases in which the promise is in terms to a third party. In this case the promise is to pay her for his benefit, and the promise is of necessity for the benefit also of Carrie W. Kimball, because it is well settled, the authorities may be found in 2 Kent., 215, that the mother of an illegitimate child is responsible for its maintenance and support, although the father in the absence of a statute is not. But it may be conceded for the purposes of this case that this being a promise for the benefit of the plaintiff he must maintain an action upon it.

The question then arises as to the validity of the promise. It does not upon its face express any consideration, nor does it acknowledge the receipt of any. It is a simple naked promise. It is competent, however,

in cases of this sort, to prove by parol what the actual consideration was. The only consideration alleged in the petition is the promise to forbear to prosecute Crawford for bastardy and the advancing by the mother to him of certain sums of money, to both of which she testified upon the trial, as well as to the agreement made at the time the writing was given, to which I shall presently allude.

So far as the bastardy proceedings are concerned, by the plain terms of our statute, as well as by the decision of the Supreme Court, the right to maintain such proceeding is limited to unmarried women, it being plainly against the policy of the law to permit a married woman to prosecute such proceedings, certainly while living with her husband. Section 5614, Rev. Stat.; *Haworth v. Gill*, 80 O. S., 627. And the plaintiff having no right to maintain such proceedings, even on paper, the promise to forbear to prosecute such a proceeding is no consideration whatever. Where parties settle a disputed right, the court will not afterward inquire whether if the right had been prosecuted, it could have been maintained or not. But there must be some color of right. Where there is no shadow of right as in this case, there is nothing to forbear. *Pollock Prin. of Contracts*, 166; *Leake*, 626.

As to the money advanced, it appears that it had been paid years before the promise and had no relation whatever to it, that nothing was said about it when the promise was made, and no release has ever been given of the mother's right to recover it. For aught that appears she may maintain an action therefor without regard to the result of this.

There was then no consideration for the promise, unless the mere fact of paternity furnishes one. There certainly is a strong moral obligation resting upon a man to provide for the unfortunate and innocent being he has been the means of so inauspiciously bringing into the world, if not to provide for his partner in sin. In equity the weight of authority seems to be in favor of aiding defective attempts to make such provision, though there has been strong dissent. *Kruze v. Moore*, 1 Sim. & Stu., 61; *Marchioness of Annadale v. Harris*, 2 P. Wms., 432; *Bunn v. Winthrop*, 1 Johns. Ch., 338; *Pratt v. Flomer*, 5 Harr. & J., 10; *Fursaker v. Robinson*, 1 Finch's Ch., 475.

But there is no authority for holding such obligation a legal consideration to support a mere promise. In every one of the cases cited for plaintiff the consideration was forbearance, the mother being competent to maintain proceedings. *Burger v. Straugham*, 7, J. J. Marsh, 583; *Clarke v. McFarland*, 5 Dana, 47; 9 *Watts & S.*, 69; 16 *Ind.*, 416.

But conceding this to be a sufficient consideration, plaintiff cannot recover. The mother's testimony is undisputed that at the time the promise was made she agreed with Crawford as part of the consideration therefor that she would continue to cohabit with him. While past cohabitation is merely, like all things past, no consideration at all, an agreement for future cohabitation is not only void but unlawful and taints with leprosy every transaction into which it enters so as not to be separable, as here. *Pollock Prin. of Cont.*, 267, 318; *Leake Dig. Law of Cont.*, 409, 760-1.

The witness seemed to repeat and dwell upon this agreement as one of the mainstays of the case. It make no difference that she in fact did not afterwards cohabit with Crawford. It is the making as well as the performance of such agreement, that the law abhors.

Judgment for defendant.

E. W. Hawkins and J. B. Foraker, for plaintiff.

I. M. Jordan, for defendant.

INJURY TO INFANT.

[Hamilton District Court, February 19, 1884.]

Avery, Maxwell and Buchwalter, JJ.

CHARLIE THEAL, BY NEXT FRIEND, V. STONE LAKE ICE CO.

In an action for negligently driving upon a street of a city against the plaintiff, a child of two or of two and a half years of age, there was testimony tending to show that the driver at the time had his horses on a run, and the child had come out from the sidewalk and had stopped near the middle of the roadway of the roadway of the street, which for four hundred feet furnished an unobstructed view, and was looking towards the horses: *Held*, That it was error to arrest the testimony from the jury and render judgment for the defendant, notwithstanding that, by the same witness it was testified the child came out immediately as the horses were coming along, and "all happened in an instant,"—this being a question which the age of the child and the distance from the sidewalk to the middle of the roadway left open to inquiry, and it being the province of the jury in the first instance at least to compare the testimony.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

Opinion citing *Ellis v. Ins. Co.*, 4 O. S., 628, 646; 17 Mich., 54; 40 Mich., 157; 44 Mich., 382; *Dick v. Railroad Co.*, 38 O. S., 389, 392; 21 Wend., 618; Whart. Negligence, sec. 820*b*, sec. 313; *Railroad v. Snyder*, 18 O. S., 399; *Railroad v. Manson*, 80 O. S., 451, 456. Reversed.

NEW TRIAL—NOTICE.

[Hamilton District Court, February 19, 1884.]

Avery, Maxwell and Buchwalter, JJ.

C. H. CARLE AND J. W. BRADFORD V. H. BECKMAN.

The setting of cases for trial in the court of common pleas of Hamilton county is governed, not by section 5132, Rev. Stat., but by rules of court prescribed under section 464, Revised Statutes. Such rules requiring that application for the setting be made to the court prior to the beginning of the term, upon notice to opposite counsel, it was not error, where a case was set and tried in the absence of such counsel, to overrule a motion for a new trial, the fact of notice not being denied and the only question being as to a conversation between counsel, by which it was claimed by counsel on the one side that he was misled into believing the case was not set for trial, but on the other side, the conversation itself was denied. Where in an action before a justice of the peace against two defendants, judgment was rendered only against one, and the other was dismissed, and the cause was appealed by the one to the court of common pleas; where, petition being filed against the two, both answered without objection: *Held*, it was too late after judgment to except to the jurisdiction of the court of common pleas.

ERROR to the Court of Common Pleas.

AVERY, J.

Opinion citing *Lockwood v. Krum*, 84 O. S., 8; *Maholm v. Marshall* 29 O. S., 611; *Evans v. Iles*, 7 O. S., 238.
Affirmed.

PROMISSORY NOTES.

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[Hamilton District Court, February 19, 1884.]

Avery, Maxwell and Buchwalter, JJ.

DIERINGER v. KLEKAMP ET AL.

In an action on promissory notes given in payment for labor and material furnished, the defense was, that since said notes were given, defendant discovered that the material and labor were not worth as much as the notes called for, but a much smaller sum, for which defendant offered to confess judgment: *Held*, in the absence of any statement of misrepresentation, fraud or imposition inducing the giving the notes, a demurrer to the answer was properly sustained.

ERROR to the Superior Court of Cincinnati.**MAXWELL, J.****PUBLIC AUCTION.**

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[Hamilton District Court, February 19, 1884.]

Avery, Maxwell and Buchwalter, JJ.

NEWMAN v. VONDERHEIDE ET AL.

Where property offered at public auction for sale is withdrawn before the acceptance of a bid, there is no contract of sale, and the highest bidder cannot compel a conveyance by an action for specific performance, or obtain damages for refusal to convey.

MAXWELL, J., citing Bateman on Auctions, section 80.**CRIMINAL LAW.**

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[Hamilton District Court, February 19, 1884.]

Avery, Maxwell and Buchwalter, JJ.

J. J. BAILEY v. STATE OF OHIO.

1. On an indictment under section 6820, Revised Statutes, for maliciously stabbing with intent to kill, the prisoner cannot be convicted of maliciously stabbing with intent to wound. *Barber v. State*, followed 39 O. S., 660.
2. Where the verdict of the jury was: "We the jury find the defendant guilty of stabbing with intent to wound, and not guilty of stabbing with intent to kill, as charged in the indictment," and the indictment was for maliciously stabbing with intent to kill, the verdict is a nullity, and the prisoner is entitled to a discharge.

ERROR to the Court of Common Pleas.**MAXWELL, J.**

LIMITATION OF GRANT BY ORDINANCE.

[Hamilton District Court, February 5, 1884.]

†STATE OF OHIO EX REL. SILSBEE V. E. C. BOYCE ET AL.

A grant by ordinance, under proper legislative authority, of the privilege of laying steam-heating pipes in the streets of a city, was conditioned that the work should begin within one year from the taking effect of the ordinance, otherwise to be void. Before commencing the work it was required by the ordinance, that a bond should be given to be approved by the city solicitor and board of public works, and that no street should be broken up for laying the pipes without a permit from such board. Upon bond presented to the board and the solicitor for their approval, the work not having been begun within a year, and more than three years having elapsed, they refused to act: *Held*, mandamus would not lie, notwithstanding that, upon passage of the ordinance suit had been brought by the solicitor, on behalf of taxpayers, to enjoin relator and the city from taking action under it; and the bond had been presented for approval before the expiration of one year from final dismissal of that suit.

AVERY, J.

Mandamus is prayed against the members of the board of public works of the city of Cincinnati, and city solicitor, to compel them to act upon the bond of relator, under section 9 of an ordinance of the common council granting him permission to lay steam-heating pipes, in the streets, avenues, alleys and public places of the city. Section 9 provides: "That before commencing the work of laying said pipes said Samuel Silsbee, his associates or assigns, shall execute and deliver to said city of Cincinnati a good and satisfactory bond, to be approved by the board of city commissioners or its successors, and the city solicitor, in the sum of \$50,000, conditioned," etc.

The question arising is under sec. 10: "That the said Silsbee, his associates, their heirs, successors or assigns, shall begin the work of laying said steam pipes under the privilege hereby granted, within one year from the taking effect of this ordinance, and within three years shall have laid one mile of main pipes, otherwise this ordinance shall become void and of no effect."

The pleadings admit, that the ordinance took effect February 10, 1880, and that the work of laying the pipes has not yet begun. The bond, upon which it is prayed the defendants shall take action, was presented to them October 16, 1883; and the petition herein was filed November 10, 1883. But the pleadings also admit that, upon passage of the ordinance, the city solicitor, as such, brought suit in the court of common pleas against the relator and the city, to enjoin them from taking any steps under it, and obtained a temporary restraining order which continued in force until June, 1880, when the suit was dismissed by the court; whereupon an appeal was taken to the district court, which, in January, 1881, also dismissed the suit, and a petition in error was filed in the Supreme Court, where a final judgment of affirmance was not had until November 7, 1882.

The contention of the relator is that the condition, prescribed by section 10, was thus made impossible of performance, and if not wholly dispensed with, that at least, by equitable construction, the time began to run only from the final judgment of the Supreme Court.

The privilege of laying pipes, in the streets, granted by the ordinance, was a franchise emanating indirectly from the legislature of the state. *State ex rel., etc. v. Cincinnati Gas Light and Coke Co.*, 18 O. S., 262; *Kumler v. Silsbee*, 38 O. S., 445, 447.

The condition, that the works should begin within one year from the taking effect of the ordinance, was not merely directory; for the language is, "otherwise this ordinance shall become void and of no effect."

Whether it was a condition precedent, or subsequent, is not necessary to inquire, for although left to be imposed by the common council it was the condition of a legislative grant.

An estate in such a franchise and an estate in land rest, it is said, upon the same principle. 3 Kent, 458. But there is this difference. "Whenever any forfeiture is provided for by a statute to be incurred on the doing or not doing some specified

†This judgment was reversed by the Supreme Court; see opinion, 43 O. S., 46.

act, equity can afford no relief from it." *Pomeroy's Eq.*, 458; *Sedgwick Stat. Construct.*, 83; *Keating v. Sparrow*, 1 Ball. & B., 367, 374. Again, an estate in land to be divested upon condition requires some act or entry to take advantage of the condition. But a franchise subject to forfeiture, upon a condition declared by the sovereign power in making the grant, becomes void by force of the legislative declaration itself, at least as against officers of the public. *R. R. Co. v. R. R. Co.*, 45 Cal., 365.

The stress, however, of the argument for relator is that all proceedings under the ordinance were enjoined. This requires that the relations of the parties to the controversy be ascertained.

It is a general rule, in conditions, that if the party himself be the cause of disablement so as the condition cannot be performed, he shall not take advantage of it. *Vin. Abr. Tit. Condition (N. c.)* 25. But if a stranger interrupt, that does not excuse performance. *Com. Dig. Tit. L.*, 14.

The party, in this sense, to the condition was the public, represented by the common council. The suit by the city solicitor was not under resolution, or at the instance in any way of the common council. Section 1774, *Rev. Stat.*, provides: "The solicitor shall, whenever required so to do by resolution of the council, prosecute or defend, as the case may be, for and in behalf of the corporation," etc. But the suit in question was not brought by him on behalf of the corporation; on the contrary the corporation was itself defendant.

Section 1777, *Rev. Stat.*, provides, that the solicitor "shall apply to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers," etc. In this capacity, however, the solicitor represents not the public body, but the taxpayers of the city.

For the purposes of the suit, brought by the solicitor against the city and relator, he was a stranger to the public body in whose behalf the condition prescribed by the ordinance was imposed. With respect to the injunction obtained, the case does not seem to differ in principle from *Wilkinson v. Insurance Co.*, 72 N. Y., 499, 503, where the one year's limitation of a policy of insurance was sustained, notwithstanding action upon the policy had been enjoined by a third person; or, *Tucker v. Shade*, 25 O. S., 355, where the statutory duration of a judgment lien, as against a purchaser from the judgment debtor, was held not to be prolonged by reason of a suit to which he was not a party, enjoining execution of the judgment.

It does not help the argument to say, that upon the ground of the pendency of the suit the defendants, or their predecessors in office, refused to act on a former bond, presented for approval within a year from the taking effect of the ordinance; or that the permit of the board of public works, to break up the streets for laying the pipes, which was made a prerequisite by the ordinance, was also refused. The question is not with the defendants personally, but as officers of the public. It is a matter of no importance to the relator, that they should approve the bond, unless the ordinance continues in force. "Mandamus will not be issued unless the duty itself sought to be enforced is a legal duty clear and free from doubt, nor unless the remedy will be effectual, and the result sought to be obtained is of more than mere trifling consequence or importance." *Wood on Mandamus*, 75.

The writ is dismissed.

Oliver, Benedict & Bruhl; Stallo, Kittredge & Wilby and Noyes & Fitzgerald, or relator.

Dawson, McGarry & Overbeck, City Solicitors.

Follet, Hyman & Kelley and P. H. Kumler, contra.

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BLACKMAIL.

[Hamilton District Court.]

CLEMENT L. ENGLISH v. BELLE ENGLISH.

1. To constitute the offense of blackmail, it matters not whether the charge is true or false; it must be made for the purpose of extorting money.
2. In determining whether the words spoken are actionable *per se*, they are to be taken in the sense in which they would naturally be understood by those who heard them, and it is for the jury to decide what meaning is truly ascribed to them.
3. Whether the language will bear the meaning ascribed to it by innuendo, it is the duty of the court to determine; and if it will, then the question whether such meaning was intended must be submitted to the jury.

ERROR to the Superior Court of Cincinnati.

MOORE, J.

This is an action for damages, for speaking of and concerning the defendant in error, who was the plaintiff below, the words: "Belle English (meaning the plaintiff) was neither his (defendant's) child, nor his wife's; she is a blackmailer, attempting to extort money from me."

There was a verdict for the plaintiff. The cause comes into this court on error to reverse the judgment of the court below.

The plaintiff claims that she is the daughter of the defendant and his wife; that she was born in Clinton county, in this state, brought up by persons other than her parents, and, until recently, was ignorant of the circumstances of her birth, and of the fact that defendant was her father; that she but recently learned that defendant was her father, and upon making herself known to him he refused to recognize her as his daughter, or to have anything to do with her, and that the defamatory words were spoken of her by the defendant after she had demanded of him the support and protection due from a parent to a child, and after she had caused her claims to be given some publicity, by newspaper publication, and in which statements were made which had a tendency to show the plaintiff was the daughter of the defendant and his wife, and born about four months after marriage.

The errors of the court below, relied upon by the plaintiff in error, are in the admission of testimony tending to prove parentage of the defendant in error, and in rendering judgment contrary to the law.

The defendant below filed an answer, by way of general denial, and upon trial of the cause, testimony was introduced to show that the relation of parent and child existed between the parties, obviously with the intention of showing that the charge of blackmailing, as made by the defendant, was without reason or foundation.

The defendant sought to show that the plaintiff was not his daughter, but an impostor, who sought to extort money from him by unfair means and practices, and denied using the alleged slanderous words, leaving to the jury the issue of the fact as to whether the words were used as charged, and whether the plaintiff was in fact the daughter of the defendant.

The defendant claims that if he did use the word "blackmailer" to describe the plaintiff, in her act of claiming to be his daughter, and demanding money of him, that such act does not on her part, as described,

constitute the crime of blackmailing under the Revised Statutes, and hence the word was not used in a slanderous sense.

Section 6830 provides, "Whoever, either verbally, or by any letter or writing, or written or printed communication, sent or delivered by him, demands of any person, with menaces, any chattel, money or valuable security, or accuses, or knowingly sends or delivers any letter or writing, or any written or printed communication, with or without a name, or with any letter, mark or any designation accusing, or threatening to accuse, any person of a crime punishable by law, or of any immoral conduct which, if true, would tend to degrade and disgrace such person, or expose or publish any of his infirmities or failings, or in any way to subject him to the ridicule or contempt of society, or to do an injury to the person, or property of a person, with intent to extort or gain from such person any chattel, money or valuable security, or any pecuniary advantage whatsoever, or with intent to compel the person threatened to do any act against his will, with the intent aforesaid, shall be imprisoned in the penitentiary not more than five years nor less than one year, and may be fined not more than one thousand dollars.

It would certainly be considered immoral conduct on the part of a parent to refuse to recognize or support his or her legitimate child, and it became a question of fact whether the plaintiff was entitled to assume the relation of daughter to the defendant, and it was for the jury to decide what was meant by the plaintiff when she made her demand for recognition—whether she intended to extort money by accusing the defendant with immoral conduct, and whether she was in fact the daughter of the plaintiff or not, and her claim by that relation to his support suggests the right or denial of the right, of the defendant to use the words, and then only when the circumstance and accusations to extort money were such as to place him before the community in the light of an immoral person, or hold him up to ridicule and contempt of society. 67 Ill., 406; 11 Met., 473.

But it matters not whether the charge or accusation is true or false. To make the offense blackmail it must be made for the purpose of extorting money. *Elliot v. State*, 36 O. S., 318.

If these words were spoken by the defendant he is liable for the interpretation his hearers might most reasonably put upon them, and in determining whether such words are actionable *per se*, they are to be taken in the sense in which they would naturally be understood by those who heard them, and it is for the jury to decide what meaning is truly ascribed to them. 108 Mass., 87; 54 Wis., 90. The true rule in this state is announced in *State v. Smiley*, 37 O. S., 80. Mr. Starke states it to be the duty of the court to determine whether the language will bear the meaning ascribed to it by innuendo, and if it will, then the question whether such meaning was intended must be submitted to the jury.

The record of the proceedings below present the questions in rather an unsatisfactory shape, yet, upon the record as a whole, we are of the opinion that there is no error in the judgment of the court below.

Judgment affirmed.

M. F. Wilson, for plaintiff in error.

D. Thew Wright and L. T. Cotton, for defendant in error.

HUSBAND AND WIFE—NOTE.

[Hamilton Common Pleas.]

†MANSFIELD SAVINGS BANK V. FLOWERS AND WIFE.

1. When in the purchase of a chattel by the husband, one of the conditions of the sale is, that the wife, who is the owner of a separate estate in land in Ohio upon which she resides, shall become the husband's security upon the deferred payments, and the sale is made upon the faith and credit of such security and estate, and the note is signed in fact in Ohio, although dated and payable in Indiana, in a suit here upon such note: *Held*, the wife is liable thereon, and a personal judgment may be taken against her.
2. Where such note recites upon its face "that the title to the chattel shall remain in the vendor (payee) until the note is fully paid," the note being payable to the order of vendor at a time certain and for a sum named, the note reciting "that if such sum is *paid in full* when due a discount is to be made from the amount then due," naming a sum certain, and such note also recites upon its face, "that it is payable and *negotiable without offset*," at a given bank in Indiana: *Held*, such instrument is a negotiable promissory note, and an innocent indorsee, before maturity and for value will be protected against all offsets or counter-claims existing at the time of indorsement to him, between the original parties.

This action was submitted to the court upon the testimony, based upon two notes in form as follows : (1st note.)

Dated at Aurora, Ind., on June 29, 1881.

On or before the first day of October, 1882, for value received, we or either of us, of Cleves Post-office, county of Hamilton, state of Ohio, promise to pay to The Aultman & Taylor Company (a corporation duly organized under the laws of Ohio), or order, one hundred and twenty dollars, payable and negotiable, without offset, at the office of First National Bank, Aurora, Ind., with interest at eight per cent. per annum from date until paid, without relief from the appraisement, stay or exemption laws. We also expressly covenant and agree that the ownership and title to The Aultman & Taylor threshing machine and engine for which this note is given, shall remain in the Aultman & Taylor Company until this note is fully paid. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

If this note is paid in full when due, a discount of six dollars is to be made from the amount then due.

NARCISSA FLOWERS,
R. C. FLOWERS.

They are endorsed to plaintiff without conditions. It is averred and was shown by the testimony that Narcissa Flowers was the wife of R. C., and that she was the owner of separate estate in land, near Cleves in this county, at the time the notes were given, and while the consideration was the sale to her husband of a threshing machine, it was upon the understanding that she was to go upon the notes, and upon the faith and credit of her separate estate that the sale was made, the machine delivered to her husband, and notes received therefor. The defendants denied any liability, relying for defense chiefly if not altogether upon a failure of the machine to work or perform as specially warranted by the payee and of which breach and failure of consideration they aver plaintiff had notice at the time of receiving said notes. This was denied by plaintiff, and it averred that it purchased the notes before maturity for full value.

† See also opinion in *Mansfield Savings Bank v. Aultman*, 1 Ohio Circ. Dec., 383.

JOHNSTON, J.

It is clear from the evidence that the machine did not do as warranted, and that the agent of the company agreed to take it back or repay or allow a credit on the notes.

It is also clear that plaintiff purchased the note before maturity for full value and without notice of any defenses existing between the original parties to the paper. The contest centered around the question, whether in law the notes were negotiable, defendants claiming that they were not. 1st. For the reason there was no promise to pay a sum certain, and second, that there was no promise to pay unconditionally, citing *Longworth Ex'rs v. Askren et al.*, 15 O. S., 370, and *Sloan v. McCarty*, 134 Mass., 245, as quite conclusive of these questions. While one of the defenses was coverture on the part of Mrs. Flowers, that was not to any great extent relied upon. Under the decisions she is bound for the notes. While the evidence disclosed that she lived in Ohio and her separate estate was there, the notes are dated and payable in Indiana. No purpose was disclosed in the evidence why they were so drawn, and it is not to be presumed that the very object to be attained, *i. e.*, security through her property, was purposely to be defeated by making it an Indiana transaction. The agent making the sale resided at Aurora, Ind., but the evidence disclosing that the notes were in fact signed in Ohio, the makers both residing there, the property of the wife being there, and her property looked to as security, and the fact that a married woman in such a transaction could not charge her separate estate in Indiana, the intention of the parties, it seems clear, was, to be governed in the performance of the contract by the laws of this state. In *Pritchard v. Norton*, 106 U. S., 124, upon a bond of indemnity executed in New York against a liability, undertaken in Louisiana, which bond had no sufficient consideration by the laws of New York, but was sufficient by the laws of Louisiana, it was held: "It is presumed in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated," and to the same effect are *Scott v. Perlee*, 39 O. S., 63; *Bell v. Packard*, 69 Me., 105, and *Hill v. Myers*, *ante*, 000, (Hamilton district court,) and *Shillito et al. v. Reineking*, 37 N. Y. S. C., 345; and that a personal judgment may be taken in the action against her, the case of *Patrick v. Littell*, 85 O. S., 79, is authority therefor. Are the notes open to the objection that they are not negotiable and the defenses of the purchaser and maker, R. C. Flowers, to be let in? The statute law of this state, for here the remedy is sought, defines what shall constitute a negotiable promissory note in this language, section 3171, Revised Statutes: "All bonds, promissory notes, etc., for a sum certain and payable to any person or order shall be negotiable by endorsement thereon," etc., and section 3174 defines who is an innocent holder or purchaser of such negotiable paper.

The statute law of Indiana upon the same subject is as follows: Section 1. "That all promissory notes, bills of exchange, etc., signed by any person who promises to pay money, etc., shall be negotiable by endorsement thereon so as to vest the property thereof in each endorsee successively.

"Section 6. Notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange and payees and endorsees thereof may recover as in case of such bills." 2 G. & H., 658.

Testing these notes by the statute of either state, they would seem to combine the essential requisites of both. They are made payable to

order at all events, and in my judgment in sums certain. It is claimed that the clause, "if this note is paid in full when due, a discount of \$6.00 is to be made from the amount then due" renders the amount to be paid as not absolute or certain but uncertain. It will be observed that the language is, that "if this note *is paid in full when due*" then a discount of \$6.00 is to be allowed. The whole sum then is *first* to be paid or the party is to be prepared to pay when due the whole sum called for by the note, and *then* for his promptness the holder gives to him the \$6.00 by way of discount.

But its negotiability it is claimed is further destroyed by reason of the agreement in the body of the notes "that the title to the machine sold shall remain in the payee until they are fully paid," citing the Massachusetts case, *supra*, as conclusive of the question. At first it would seem to make for the defendants all that is claimed for it, but upon a comparison of the note in that case with those in this case there is, in my judgment, an essential and important difference. The note or instrument in that case is as follows:

\$85.00.

RUTLAND, April 5, 1874.

Received of T. S. Sloan this day, roan horse, for which I promise to pay T. S. Sloan or order \$85 one month from date at the Leicester—, said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me.

His

DANIEL X MCCARTY.

Mark.

Witness:

GEO. NEEDEHAM.

That court, after stating that the mere recital of the consideration does not affect the character of the contract, says: "That the whole contract describes the conditional sale of a horse. If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale, and the defendant then would have no right to the horse, and would no longer be liable to pay the note. * * * The contract contemplates that the payment of the money by the defendant and the transfer of the title to the horse from the plaintiff should be simultaneous acts, and if the horse should die, for example, within the month without fault on the part of the defendant, the plaintiff would be disabled from transferring the title, and could not maintain an action on the contract."

It may in the first place be said, that that case was between the original parties, and hence the question, what would have been the rights and liabilities of the various parties if the note had been negotiated for value before maturity, and the suit had been by that indorsee, is not decided.

In the case at bar the notes contain after the usual words "or order" to give them negotiability, this significant language "payable and *negotiable without offset*, at the office of the First Nat. Bank, Aurora, Ind." The authorities are not in accord as to the effect of adding conditions as to the passing of the title, payment of attorney's fees for collection, and the like. Many such cases are to be found reported in the western states. In Michigan and Nebraska such notes are held to be negotiable, while in Kansas and Minnesota the decisions are the other way.

Lamb v. Story, 55 Mich., 488; 10 Neb., 284; 11 Bush., 180; 8 Neb., 10; 54 Ind., 164; 64 Me., 87, 5 Duer, 207; 27 Minn., 240, 530; 26 Kas., 310, and 127 Mass., 293, present the question in both aspects. In none of the various cases do I find the instrument in question containing the

particular language hereinbefore indicated. It is sufficient to constitute a negotiable note in this state, that the instrument contain an absolute promise to pay a sum of money certain, to some person or order or bearer. In Indiana, as will be seen, *supra*, less formality is observed as to what shall constitute a promissory note, but to protect an endorsee the note must be payable at some bank within the state, and to order or bearer.

Now the notes in this case fill the measure required by the statutes of either state. The sum to be paid is certain, the time is certain, and by force of the particular language noted, the payment is to be made absolutely. "Payable and negotiable *without offset*" would seem to indicate taking all that appears upon the face of the notes together, and all must be considered, that beyond question the notes should be negotiable, and that they might possess all the attributes of negotiability and protect *bona fide* purchasers thereof, they are assured that when negotiated no offset shall be interposed. It is not always that apt language is used to express negotiability. It may be gathered from the intent appearing in the language used in the instrument. "Any words in a bill from whence it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that person." Chitty on Bills, 218 (Amer. Ed., 1839).

"Some equivalent words should be used." Story on Bills, sec. 60.

A more informal instrument than the notes in question was held years ago by our Supreme Court to be a promissory note. *Ring v. Foster*, 6 O., 279. It contained several conditions.

The intention, in these notes of Flowers and wife, seems to have been, that the company holding the legal title to the machine until the notes were fully paid, that they obligated themselves to pay them absolutely and without any offset, if negotiated, when they should fall due; for any offset or counterclaims growing out of a breach of warranty (and a lengthy contract of warranty in writing accompanied the sale of the machine), Flowers was to look to the vendor, the payee. If negotiated they were to be fully paid at all events, and for any damages sustained by breach of the contract or warranty, they were not to be recouped or offsetted against the notes, but recourse for indemnity was to be had to the contract of warranty, which seems by the parties not to have been made a condition in the sale of the machine, but an undertaking collateral thereto. Benjamin on Sales, secs. 600, 887. Such fairly being the intention gathered from the face of the notes, in the language of Ch. Justice Marshall, in *Mandeville v. Union Bank*, 9 Cranch, "it would be a fraud against the holder, to set up offsets against this note in consequence of any transactions between the parties;" this in a case where the note was on its face made negotiable only at the bank of plaintiff and was negotiated there.

The cases in 8 and 10 Neb., 45 Mich., and 64 Me., *supra*, are directly against the Massachusetts case cited. The case of *Longworth v. Askren*, *supra*, does not decide a question of negotiability, but the record in that case showing that \$800 was the price to be paid in fact for the lot, and not \$1,000, the \$200 was regarded in the light of penalty, the court intimating that if the evidence had shown \$1,000 to have been in fact the purchase price, that would have been the amount definitely to have been paid. In the conflict of authorities existing relative to promissory notes partaking of the character of those in suit save in the distinction noted, I do not desire to be understood as expressing an opinion. I simply hold that the notes here sued upon do not by force of their

express terms and provisions fall within any of the cases cited or examined, but are distinguishable.

The note being negotiable, and the plaintiff, according to the evidence, having purchased the same before maturity for full value and without notice of defendants' defences, judgment will be entered in its favor for the full amount.

Cox & Cox, for Bank.

Goss & Cohen, *contra*.

[Hamilton Common Pleas, January 29, 1884.]

CHARLES W. MANNING V. MARTHA S. MANNING.

In proceedings in aid of execution, the court has power to order the examination of other witnesses than the judgment debtor when satisfied on application of a party that additional witnesses should be examined.

CONNOR, J.

In this case application has been made to the court for an order permitting the examination of certain witnesses other than judgment debtor. An application was heretofore filed, under secs. 5472 and 5473 of the Code, for the examination of the judgment debtor, it being alleged that one execution had been issued and returned and exhausted, and a new execution was now out, and that the judgment debtor had property which had been unjustly refused to be applied to the satisfaction of the judgment obtained by the plaintiff.

An examination has been held before a referee of the judgment debtor, and, as one result of that examination, it is claimed that certain other persons should be examined in order to fully develop, as counsel for Mrs. Manning claims, the matter of alleged transfer of certain property by the judgment debtor.

It is claimed by counsel for judgment debtor that this court has no power to order the examination of any other witness than the judgment debtor himself, unless, at least, a new affidavit is filed, or new proceedings are commenced.

Counsel for both parties seem to rely upon a law of New York, admitting that our laws with respect to proceedings in aid of execution are directly drawn from the New York statute.

There have been many decisions in New York, bearing upon this subject, but the current of authorities there is undoubtedly that, not alone may the judgment debtor be examined, but that other witnesses may also be examined; such witnesses as the court shall designate.

In this state I have been able to find but a single decision—a decision which counsel, I believe, on either side, have not quoted to me, and which, perhaps, escaped their attention. It is not a decision of the Supreme Court of the state. It is simply a decision of the court of common pleas, but that decision, rendered by Judge Prentiss, of the Cuyahoga court of common pleas. It is the case of *Harman v. Waller*, 4 Dec. R., 97., (s. c., 1 Clev. Law Rep., 26) and is so comprehensive, and the reasoning seems to me to be so good, and he goes so fully into the relation that exists between our statute and the New York statute, and ana-

lyzes and passes fully upon the New York statute in the decision, that I shall simply refer counsel to that decision for an expression of an opinion upon the law better than I can give it myself. Suffice it to say that Judge Prentiss, after a full examination of the authorities, concluded, and so held, that under our law, which is drawn directly from the New York law, the same power exists for the examination of witnesses as has been held to exist under the New York statute. The analogy of the New York statute and the comparison with our own statute will show that secs. 5472, 5473 and 5474 of our statute are sec. 484 (I think that is the number) of the code of New York. There is no doubt that under sec. 5474 of our statute there is a direct power to examine other witnesses than the judgment debtor. There is no doubt at all that under secs. 5472 and 5473 of our code that power is not specifically granted; but Judge Prentiss holds that the three sections of our law being the one section of New York, the specific authority for the examination of witnesses is not intended to be confined to section 5474, but is applicable to all the sections, when the examination of the judgment debtor reveals such a state of affairs as would, in the mind of the judge, authorize the examination of additional witnesses. Judge Prentiss also lays down the doctrine that the court is the one who must designate the witnesses to be examined, and not the referee; and the court must, by specific order, name the parties directed to be examined. And I suppose, inferentially from that opinion, that if any additional witnesses were desired to be called, parties seeking to call such witnesses have again to apply to the court for such additional order.

I simply hold, now, referring counsel to this opinion for an examination of the authorities, and the analysis of them, that the judgment debtor is not the only one who may be examined under our proceedings to aid execution; that a party may apply for the examination of additional witnesses, if he satisfies the court that such additional witnesses should be examined.

Now, I have examined very carefully the testimony given before the referee in this case, and I am satisfied, after the examination of the judgment debtor, that there ought to be a further examination of other witnesses than himself. An order will be made authorizing the examination of Guy Manning and Ophelia M. Dille and Olive B. Manning.

As at present advised, from the examination of the judgment debtor, I see no reason for examining Edward Edwards, or any other witnesses than those above mentioned. But if, at any time, counsel should deem it best to make an application to the court, I will hear it.

This is a question of practice which it seems to me is remarkable in its not having been decided in this court before. But I do find upon investigation, that in this county this same practice has been held by two of the probate judges. I understand that Judge Hoeffler, after a very exhaustive argument, and thorough examination of the authorities by himself, in an elaborate opinion, held that the court had the power, under these two sections of the code, to examine witnesses other than the judgment debtor. I am also informed that Judge Woodruff, when judge of the probate court, made the same ruling. I also am informed by Judge Tilden that when he was upon the circuit in the northern part of the state, he held the same. But none of these cases are reported; the only reported decision, so far as I can learn, being the one I have referred to, by Judge Prentiss,

and I have determined to follow that opinion, and the district court can review the matter and determine the practice.

I will change the order, striking out Edward Edwards and the other witnesses than those specifically named by me.

Mallon & Coffee and E. Edwards, for plaintiff.

Batemen & Harper, for defendant.

[Hamilton District Court, February 26, 1884.]

EDWARD SARGENT, EXR., ETC., v. JAMES W. SIBLEY.

For opinion in this case, see 6 Dec. R., 1219. (a. c., 13 Am. Law Rec., 83.)

SIDEWALKS—CHANGE OF GRADE.

[Hamilton District Court, February, 1884.]

CINCINNATI (CITY) v. SARAH E. GAY.

ERROR to the Superior Court of Cincinnati.

Avery, J.

Where, the grade of a street being established, a brick sidewalk was laid by the city authorities, the expense of which was assessed upon the abutting lots; and afterward, while the sidewalk was still in good condition, the grade of the street was changed, without a petition from a majority of the owners, and the street improved to grade covering up and destroying the sidewalk; and, things being left in that situation for a number of years, a new sidewalk was then laid by the city authorities, and the assessment sought to be collected from abutting owners: *Held*, such assessment was to be regarded as "occasioned by a change of grade," within section 2301, Revised Statutes, notwithstanding time enough had passed for the old sidewalk to have worn out by use if it had not been destroyed; and that the present owners were exempt, no matter who may have been owner when the old assessment was made.

Affirmed.

Bateman & Harper, for plaintiff in error.

Lloyd & Taft, for defendant in error.

REPLEVIN.

[Hamilton District Court, February, 1884.]

WM. J. SANDERSON v. HARRISON PULLMAN.

ERROR to the Court of Common Pleas.

1. In an action in replevin before a justice of the peace no bill of particulars need be filed. The first step is the making and filing of the statutory affidavit.
2. When a jury is waived and the cause is submitted to the justice, he must give judgment within four days of the trial and submission; but a judgment given subsequent to that time is not absolutely void; it is an irregularity which may be waived by consent of parties.

Buchwalter, J., citing 4 O. S., 594. Affirmed.

Blackburn & Ermston, for plaintiff in error.

Evans & Roettinger, for defendant in error.

ROAD ASSESSMENTS.

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[Superior Court of Cincinnati.]

E. G. MUCHMORE ET AL. V. CHARLES MILLER, TREAS., ET AL.

1. To maintain an action to enjoin the collection of an assessment for a road improvement under the "Two-Mile Act," sec. 4829, *et seq.*, Rev. Stat., it is not sufficient to show irregularities or errors, if there be no defect in the proceedings in respect to matters upon which it was the intention of the legislature to make the power of the county commissioners depend.
2. The fact that one of the viewers owned lands liable to be assessed is not of itself such defect; nor the fact that the notice required by sec. 4843 was not given; nor the fact that the commissioners made the contract instead of the engineer; nor the fact that it was not let in sections.
3. The surveyor is not required to find or report as to the necessity of the improvement.
4. There is no presumption that the owner of land reported by the viewers for assessment lived thereon or in the county.
5. In the absence of fraud or collusion the approval of the work by the commissioners and engineer is conclusive.

HARMON, J.

Three cases have been tried together. They are to enjoin the collection of an assessment for the improvement of the "Camargo Road" under the two-mile assessment act. Section 4829, Rev. Stat.

The plaintiffs in each case occupy somewhat different relations to the improvement; in one case they signed a petition for the road and afterwards signed remonstrances; in another they signed a petition and did not sign a remonstrance; in the third they did not sign either, or at any rate did not sign the petition.

As usual in such cases, the proceedings of the county commissioners and the other bodies which have resulted in this improvement, have been scrutinized much more closely than they usually are while in progress, and a great number of objections have been raised by the testimony and the argument. It seems to me clear upon all the authorities without stopping to review them, that in all this class of cases there are two sorts of defects. One sort consists of defects in matters which are properly termed jurisdictional; the other of defects in what may be called technical or formal matter.

It is settled by repeated adjudication in Ohio, that the county commissioners, being a body of limited jurisdiction and vested with extraordinary power, viz.: to take the property of a citizen without his consent by assessment, the facts upon which their jurisdiction is made to depend must exist or their action is utterly void; whereas, the rule to be applied to the other class of defects is the ordinary one, which all courts apply to the proceedings of inferior tribunals, viz., that their proceedings are to be looked at with a somewhat indulgent eye. In addition to that general principle, the law itself, sections 4863-4, provides that no person shall be permitted to take advantage of an error unless he be affected thereby. Therefore, the important question always in these cases is, do the facts appear upon which depends the jurisdiction of the county commissioners to proceed in the matter of all.

It is not contended here that there was any error with regard to the original petition and notice. The commissioners thereupon appointed viewers and a surveyor, and they met, acted and reported. The commis-

sloners had no authority to order the making of the improvement, until a majority of the resident landowners of the county whose lands were reported as benefited (that is, by the viewers) should have subscribed the petition, and certain rules are prescribed to be observed in determining the majority, sec. 4836, Rev. Stat. The question, therefore, which is vital here, is, whether or not when the commissioners ordered this improvement such majority had signed the petition. If not, then it is not even contended that the assessment is valid.

A great deal of time was spent in an investigation of the facts bearing upon this question. It appears that the viewers reported one hundred and forty-nine persons as owners of lots and lands which ought to be assessed, and while this statute, unlike some prior ones, does not direct the viewers to report the names of the owners, yet as one mode of describing a lot is by naming the owner, there is nothing improper in their reporting the owners' names with the descriptions of the property. At any rate, there is no evidence as to who the owners were, except that report. The petition appears to be signed by seventy-nine of the one hundred and forty-nine persons so reported, besides others, and much evidence was produced to show that out of these seventy-nine persons some had never in fact signed the petition, that some did not then own the land, that some were non-residents, that some did not hold the land by such tenure as made them landholders, and that others afterwards signed remonstrances. It is made to appear, taking as true the testimony with relation to non-residents, remonstrances and ownership of land, that only sixty-six persons signed the petition, whereas one hundred and forty nine were reported as benefited. If, therefore, the majority required by this section, was a majority of the number of persons reported, the plaintiffs would have made out their case in this regard. But the body, a majority of which is to sign the petition, is the resident landholders of the county whose lands are reported as benefited, and there is no evidence showing as to the persons so reported, who were or were not residents of the county; so that so far as direct proof is concerned the court is not advised as to what number would constitute such majority. The only ones as to whom there is direct proof are six, who are shown to have been non-residents. These at least must be deducted from the one hundred and forty-nine. The case in this regard must therefore turn upon the presumption.

Now, in the first place, I am aware of no rule of law which raises any presumption as to where the owner of land lives. But a series of cases, beginning with *Anderson v. Commissioners*, 12 O. S., 635, imply very plainly to my mind, that, while jurisdictional facts are always open to inquiry, the presumption is always in favor of their existence. Finally, in *Corry v. Gaynor*, 22 O. S., 584, it was decided expressly, that while the question, whether a majority of the landowners had signed the petition may always be inquired into, the finding of the board is *prima facie* evidence. The record here shows that the commissioners found that a majority of the resident landholders who were reported as benefited had signed the petition, and as I said, the evidence does not show that finding incorrect.

It is therefore necessary to consider some of the other objections.

The one that the description of the kind of improvement prayed for under sec. 4831 was not specific enough, is too far-fetched; the petition did say that the improvement desired was by grading, graveling and

macadamizing. The objection to the oath administered to the viewers is not well taken. They were sworn to discharge their duties, and while the order issued to them does not fully define their duties, the law defines them, and there is no showing of prejudice to any of the plaintiffs.

Another objection is that two of the viewers were not "disinterested freeholders." The allegation as to Mr. White, that he was not a freeholder at all, is not sustained; and he certainly was disinterested. This is a narrower word than unprejudiced. Interest refers to direct pecuniary loss or benefit. The mere fact that he had relatives who owned land there, did not make him "interested" although it might make him "prejudiced." But, Wm. Beard, it appears, did own land within the limits of this road, and while it is not very clear just what the law intended by "disinterested freeholders," I should be inclined to hold that a man who owned land within the boundaries of the road was not disinterested. Whether his interest would be to have the road built or to prevent its being built, would depend upon the character of the man; but there is no doubt in my mind that Wm. Beard was not a disinterested freeholder within the meaning of the statute; but I fail to see in it, either expressed or implied, any provision that the failure of the county commissioners in this regard shall deprive them of all power and jurisdiction; on the contrary, it is apparent from the statute that there are many means of rectifying any injustice which may have resulted to any one. It was within the power of the county commissioners, under sec. 4838, to remedy any error and right any wrong in the report of the viewers. Nobody objected to this man acting as viewer, and no one ever claimed either to the commissioners or this court that he in any respect acted improperly, and I think secs. 4863-4 apply to such defect.

In so far as the viewers did not make an actual view of all the land concerned, I do not regard this as a matter which the court can make a cause for overthrowing an assessment. The viewers are as much officers of the law as the court, for they are appointed by a body having lawful authority to appoint them, and unless it appear that they wantonly acted in disregard to their duty, so as to deprive their conduct of any right to be considered as the sworn action of viewers under the law, it seems to me that the court cannot interfere. The petition alleges fraud and conspiracy, that the findings, report and all the proceedings were prearranged, that these viewers were mere puppets worked by unseen hands to get the road through and to assess certain persons only. If this were established the court would of course enjoin the assessment. But those allegations were not made out; the proof does not even raise a suspicion of fraud. While it appears the viewers were mistaken about the assessability of village property, it was within the power of the commissioners to correct it. If the viewers erred in including or excluding property, that is not for the court to correct; the court is not a viewer; if they acted in good faith, and they did so far as appears, it is not for the court to interfere. Actions like these are not proceedings in error.

Again, it is objected that the surveyor did not join the viewers in their report, but filed a separate one saying nothing as to the necessity of the improvement, but merely giving plats, etc. Undoubtedly the preliminary report that the road is a public necessity, is just as jurisdictional as the finding of the county commissioners, for the object of the law is to protect the county treasury on the one hand from being invaded for useless improvements, and the taxpayers on the other from unjust

burdens, by requiring a double finding of such public necessity. But while the statute provides that the viewers and surveyors shall make a report showing the public necessity of the contemplated improvement, etc., I do not understand that the surveyor and the viewers form a single body for this purpose, or two separate ones from which concurrent findings are required. Section 4831 provides for three disinterested freeholders of the county as viewers, and a competent surveyor, and it seems to me the legislature intended the viewers to do certain things and the surveyor certain others. It is provided in sec. 4833, that the viewers and surveyors shall take to their assistance chain carriers and a marker, and proceed to view, examine, lay out, or straighten such road as in their opinion public utility and convenience require, and assess damages, but it seems clear that the maxim "*singula singulis reddenda*" is to be applied. It will then appear that the surveyor is provided because of his technical knowledge and skill in order to advise and aid the viewers in their deliberations and then mark out the results of those deliberations upon the ground and on paper, but that to the viewers alone is confided the duty of judging and deciding as to the requirements of public necessity, the best means of meeting them by the location and construction of the road, etc. They are required to be "disinterested." The surveyor to be merely "competent," section 4831. And while the surveyor is required to report, it is only as to the matters so assigned to him. The viewers here reported that public necessity required the construction of the road. The surveyor's report supplies the plats, etc., necessary to enable the commissioners and citizens to properly understand and judge the viewers' report. This I think is all intended by the statute.

Another objection is, that the engineer appointed to superintend the work, under sec. 4841, did not make the contract for the work. As the contract can only be made with the approval of the commissioners, I do not see how the fact that they made it, instead of the engineer, could be a substantial defect, if defect at all. It was never intended to make the validity of the assessment depend upon the engineer's making the contract, but merely to authorize him to do so.

As to the objection that the law provides that the improvement shall be let in sections of not less than a half a mile, whereas, this being a road five miles long, was let all together, it is not valid. Letting the entire road is not forbidden. Only the minimum is fixed. The manifest object was to provide against cutting up the improvement into such small portions that the advantage of a division of labor, and other manifest advantages, would be lost in the building of the road.

I do not grasp the argument that the assessment should be limited to the preliminary estimate. The object of the preliminary estimate is to advise the commissioners whether they had better undertake the work, whether the state of the public funds is such as to justify them in the payment of the portion to be paid by the county, and also, to enable the first assessing committee to show the probable amount of property to be taxed and the probable amount of tax. It is impossible for anybody to tell in advance the exact amount the work would cost. And certainly the provision that after the work is completed, the county auditor shall add or deduct from the estimate as it shall be found more or less than the actual cost, shows that no such intention existed in the minds of the legislature. And this duty is merely clerical. The auditor is to add or deduct; but this does not mean that he is the one to ascertain and deter-

mine how much the cost exceeds or falls below the estimate. This is to be ascertained and certified to him by the body in charge of the work.

As to the objection that no notice appears to have been given under sec. 4843, if the fact be admitted there is no showing that any of these plaintiffs were prejudiced, and I do not consider the giving of such notice jurisdictional. Its only object is to enable taxpayers to complain of the assessment before it is finally made. Not one of the plaintiffs shows that he lost his opportunity for want of the notice. On the contrary it is quite evident that everybody was fully advised and on the alert, ready at all times to appear, protest and suggest in person and by counsel, individually and collectively.

All the other objections made are technical ones that come within the curative sections of the act, and it does not appear that any of plaintiffs have been prejudiced by any of them.

I neglected to say anything about the evidence tending to show that the road was not built according to the contract. In *Tone v. Columbus*, 39 O. S., 281, the Supreme Court cite, apparently with approval, two cases from New Jersey, 24 N. J. Eq., 200; 25 N. J. Eq., 295; in which objections were made to assessments on the ground that the work was not done according to the contract, and the court refused to interfere. The reasons which led to that conclusion exist here. The same observation which enabled witnesses to testify here enabled them to call the attention of the commissioners or engineer to the inferiority of the work. They owed a duty to the public of which they are members, the neglect of which prevents their obtaining the aid of a court of equity.

Moreover, the law and the contract require the work to be done to the satisfaction of the commissioners. The court cannot substitute its judgment for theirs when they have exercised it in good faith. If the manner in which they discharge their duty is not satisfactory, the remedy, in the absence of fraud, is to be sought at the polls, not in the court room.

The injunctions are refused and the petitions dismissed at the costs of plaintiffs.

A. J. Cunningham and J. T. DeMar, for plaintiffs.

O. J. Cosgrave, for defendants.

WAREHOUSE RECEIPT—VENDOR'S LIEN.

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[Superior Court, Cincinnati.]

†A. J. ENSEL v. JAMES LEVY ET AL.

1. A warehouse receipt is not a negotiable instrument, but the delivery of such a receipt by the vendor to the vendee of property described in it, will transfer the possession of the property to the latter.
2. A warehouse receipt can only be issued by a person having actual custody of the property, and the delivery of an instrument in the form of a warehouse receipt, but which shows on its face that the property is in the actual possession of a person other than the one issuing the same, is not a symbolic delivery of the property described in it.
3. A vendor's lien upon chattels can only exist while he retains them actually or constructively in his possession, but the vendor having possession, may assert such lien, even in case of a sale upon credit, where the vendee becomes insolvent without having paid for the goods.

† This judgment was reversed in part by the Supreme Court. See opinion, 46 O. S., 255.

PECK, J.

The defendants, wholesale liquor dealers doing business in Cincinnati, were the owners of seventy-five barrels of whisky stored in the bonded warehouse of Thomas B. Ripy's distillery at Lawrenceburg, Ky., and for which they held fifteen warehouse receipts, each receipt being for five barrels, issued to them by Ripy. Defendants sold the whiskey to Baum & Co., of Memphis, Tenn., on a credit of four months, and wrote the latter requesting them to sign certain promissory notes having the said receipts attached to them, as security for the payment of the purchase money, but this Baum & Co. refused to do. Defendants then forwarded to Baum & Co., fifteen other documents, very similar to the receipts issued by the distiller, of one of which the following is a copy:

DISTILLERY WAREHOUSE RECEIPT.

CINCINNATI, September 8, 1881.

Received in the bonded warehouse of Thos. B. Ripy's distillery No. 112, Fifth District of Kentucky, the whisky herein below described. To be held for account of and subject to the order of G. Baum & Co., deliverable only on return of this receipt to us properly indorsed, and on payment of U. S. Government tax and charges on same, storage on said whisky at the rate of five cents per barrel per month, from September 8, 1881. Loss or damage by fire, the elements, shrinkage or natural decay, at owner's risk.

Marks and serial numbers: Distiller, Thos. B. Ripy. Fifth District of Kentucky. Serial Nos. 22214 to 22218, inclusive. Inspection, July, 1881. Wine, Gals. 223.2. Proof Gals. 223.50.

(On the face of the paper, at the left side is printed what purports to be a copy of an act of the General Assembly of Kentucky, "relating to Warehousemen and Warehouse Receipts.")

Number and descriptions of packages: Five (5) barrels, Hand-made, Sour Mash Whisky in bond.

NOTICE—In order to insure prompt withdrawal, send this warehouse receipt with your order. No whisky will be unbonded unless the warehouse receipt accompanies the order, for credit of the quantity withdrawn,

JAMES LEVY & BRO.

These instruments were satisfactory to Baum & Co., and upon receipt of them, they accepted three drafts for the purchase money payable at the end of the stipulated period. Shortly afterwards Baum & Co., pledged the papers given them by defendants with Walker Sons & Co., collateral security for advances made to them by the latter, and soon after that became insolvent, whereupon the whisky in so far as represented by the fifteen papers was by agreement between Baum & Co. and Walker Sons & Co., sold to the plaintiff, who appears to have been a *bona fide* purchaser. The instruments were delivered to plaintiff, each endorsed by Baum & Co. and Walker Sons & Co. Soon after this last transaction the drafts fell due and were not paid because of the insolvency of Baum & Co., and they are still held by defendants—together with the original receipts issued by the distiller.

Plaintiff, as holder of the documents above mentioned, claims that he is entitled to the whisky, and brings this suit to recover the value thereof, alleging that he has tendered said papers, with the taxes and charges on the whisky, to the defendants, and that they, refusing to deliver the same, have converted it to their own use.

The defendants answer that they have not been paid anything for the whisky, that they have never parted with the possession thereof, and claim that by reason of these facts, together with the insolvency of Baum & Co., they are entitled to assert a vendor's lien upon it for the amount of the purchase money.

The case was tried at special term, and resulted in a verdict for the plaintiff. The motion for a new trial was reserved for the consideration of the general term, and the questions arising thereon we are now called upon to determine.

In support of plaintiff's claims it has been suggested that this is a warehouse receipt, and as such is a negotiable instrument, and that as plaintiff is a *bona fide* holder for value, without notice of defendant's claims, he is entitled to be treated as he would be if he were the holder of a bill of exchange, acquired under like circumstances. But such is not the law in Ohio—a warehouse receipt is not negotiable, in the sense that it confers upon a holder, who has taken it *bona fide* for value in the usual course of trade and without notice of existing defenses, any greater rights than had the first taker. The second or third purchaser of such receipt must stand in the shoes of the first. Second National Bank v. Walbridge, 19 O. S., 419.

But it is argued that in any event a warehouse receipt will stand as a symbol of the property, and when the latter is sold the delivery of the receipt is a delivery of the property. See *Bank v. Walbridge*, above cited, and also *Gibson v. Chillicothe Bank*, 11 O. S., 311, and *Gibson v. Stevens*, 8 How., 384. That proposition of law cannot be denied, and if applicable to this case will be decisive of it in plaintiff's favor. If these documents are warehouse receipts, their delivery to Baum & Co. gave them constructive possession in addition to the title to the goods which they had already acquired, and if defendants parted with the possession they can assert no lien upon the property. A vendor's lien upon chattels only exists while the vendor retains them actually or constructively in his possession. *Lupin v. Marie*, 6 Wend., 77; *Elkin v. Harvey*, 20 L. A., Am., 545; *Barnet v. Mason*, 7 Ark., 253; *Boyd v. Mosely*, 2 Swan., Tenn., 661.

Were the papers issued by defendants, warehouse receipts? In determining this question we need only look at the documents themselves, although it is clear that Baum & Co. knew from evidence outside the papers that defendants had not actual possession of the whisky, for they had seen the receipts issued by Ripy. The papers themselves disclose the same fact, for it is stated on each of them that the whisky is in "the bonded warehouse of Thomas B. Ripy's distillery, No. 112, fifth district of Kentucky," and they further show that the whisky is stored in bond, subject to the government tax. The internal revenue laws of the United States provide that bonded warehouses shall be located only on the premises of distillers, shall be kept by no other person than the government storekeeper and the distiller acting together, and that distilled liquor placed therein shall not be removed until the tax upon it has been paid. Sections 3247, 3251, 3267, 3271, 3274, 3288, 3294 and 3296, Rev. Stat.

Of these laws all parties are presumed to have knowledge, and if the papers on their faces did not sufficiently disclose the fact that the whisky was not in the actual possession of the defendants, the statements they did contain, taken in connection with these provisions, must have removed all doubt upon the subject. The facts, then, are that the purchasers knowing that the sellers had not actual possession of the goods, took from them instruments in the form of warehouse receipts. If a party having only the constructive possession of goods may be a warehouseman as to them, then we shall have two warehousemen in possession of the same goods at the same time, and if each can issue a receipt, the delivery of which is to be taken as the delivery of the property, we may have two different persons in constructive possession of the same property at the same time. A warehouse receipt can only be issued by a warehouseman—that is, by the person having actual custody of the property. To hold otherwise would tend to destroy them as instruments of commerce, for their value is mainly dependent upon the certainty that the goods will be forthcoming when demanded by the holder. *Cochran v. Ripy*, 13 Bush., 495.

There is a class of cases in which it is held that where one issues a warehouse receipt for goods not in his possession to a *bona fide* purchaser without knowledge, such pretended warehouseman will be estopped to deny that he has the goods when called upon to deliver them. *Griswold v. Haven*, 25 N. Y., 595; *Whitlock v. Hay*, 58 N. Y., 484; *Stewart v. Phoenix Ins. Co.*, 9 Lea, 104. But this case is not of that sort, for the papers, as we have seen, showed upon their faces that the property was not in the actual possession of defendants.

The kindred proposition that defendants are estopped by reason of their form to deny that these are warehouse receipts, is answered by the same fact that they disclosed to every holder that the goods were not in the actual possession of James Levy & Bro., but in that of Ripy. *Commercial Bank v. Colt*, 15 Barb., 500.

The foregoing considerations lead us to the conclusion that these documents are not warehouse receipts, and whether they may be interpreted as delivery orders addressed to the distiller, or as contracts to deliver in the future, they lack the peculiar quality which the law attaches to warehouse receipts. They cannot stand for the property, so that their delivery is to be taken as the delivery of the property. Such being the case, the constructive possession of the goods remained with the defendants throughout the transaction. *McEwan v. Smith*, 4 H. L. Cas., 309. Having the goods still in their possession, the defendants were entitled, upon the happening of the insolvency of Baum & Co., to a lien upon them for the payment of the purchase money, unless there is something in the transaction or in the conduct of the defendants, inconsistent with the idea that a lien would be retained. In case of a sale upon credit, such as this was, the law gives the seller the right, when the purchaser becomes insolvent, to take advantage of the circumstance, perhaps accidental, that the goods are still in his possession, to assert a lien upon them to secure the payment of the purchase money. *Arnold v. Delano*, 4 Cushing, 33; *Keeler v. Goodwin*, 111 Mass., 490; *Southwestern Freight Co. v. Stanard*, 44 Mo., 71; *Reader*

v. Knatchbull, 5 T. R., 218, n; Roget v. Merritt, 2 Caines, 117; Benedict v. Field, 16 N. Y., 595; Sigerson v. Kahmann, 39 Mo., 206; Milliken v. Warren, 57 Me., 46.

The only remaining question is, have the defendants said or done anything which may be construed as a waiver of their right to a lien, or which may estop them from asserting it? It has been frequently held that if a vendor acts in a manner inconsistent with the retention of a lien to secure purchase money, such as taking warehouse rent from the vendee, levying an execution against the property of the vendee upon the goods sold claiming them by a different title, and the like, he cannot afterwards assert a lien upon them, notwithstanding the fact that they remain in his possession. *Hurry v. Mangles*, 1 Campbell, 451; *Jacobs v. Latour*, 5 Bing., 130; *Chapman v. Searles*, 3 Pick., 38.

In this case it is claimed that section 4 of the act of the general assembly of Kentucky, printed on the face of the papers issued by defendants, contains a provision which oebars them from asserting any lien upon the goods. That section reads as follows, omitting the portions not material to this question: "Section 5. That no warehouseman or other person shall issue any receipt or other voucher for any goods * * * to any person * * * as security for any money loaned or other indebtedness unless such goods * * * shall be, at the time of issuing such receipt or voucher, the property, without incumbrance, of said warehouseman; and if encumbered by prior lien, then the character and extent of that lien shall be fully set forth and explained in the receipt, and shall be actually and in fact in store and under control of said warehouseman at the time of giving such receipt or voucher." This statement, it has been said, is equivalent to a declaration incorporated into the paper, that if any lien existed it would be stated in the instrument, and as none is stated, the purchaser, and those claiming through him, had the right to assume that no lien was reserved for any purpose. It is not claimed that the act has any extra territorial effect as law, but that by placing it upon the paper defendants have made it a part of the instrument, entitled to the same force and effect as any other statement or representation contained in it. If that be true, and for the purpose of the argument we shall assume it to be, what effect is to be given that section? This so-called receipt was not issued "as security for any money loaned or other indebtedness," nor were the goods when sold "encumbered by prior lien," nor were they "in store and under control of" defendants when the paper was issued. For these reasons we have concluded that the section did not operate as a waiver of any rights the defendants would otherwise have, nor does it estop them from asserting a lien for purchase money.

Our conclusions are, that defendants have the constructive possession of the goods, for which they have not been paid, and as the purchasers are insolvent, the defendants have a lien to secure the purchase money, and as it is not alleged or proved that the purchase money has been paid or tendered, the verdict will be set aside and a new trial granted.

Force and Harmon, JJ., concur.

Long, Kramer & Kramer, for plaintiffs.

Wilby & Wald, for defendants.

NEW TRIAL—CHANGE OF SECURITIES—JURY. 166

[Hamilton District Court, March 11, 1884.]

Avery, Maxwell and Buchwalter, JJ.

HERMAN F. JASPERS V. PATRICK MALLON (ASSIGNEE).

The granting by the trial court of a new trial is not reviewable by petition in error, upon judgment against the plaintiff in error at such new trial. *Smith v. Bd. of Education*, 27 O. S., 44; *Conord v. Runnels*, 23 O. S., 601.

The change of securities of a pre-existing debt constitutes one a "holder for value" of negotiable paper, taken on account of such debt. *Roxborough v. Messick*, 6 O. S., 448.

It is not error for the court in a proper case to say to the jury that the testimony of a witness to a certain fact is contradicted by other witnesses, but leaving the question of fact to the jury. *Berry v. State*, 31 O. S., 219, 230.

A judgment will not be reversed for permitting papers not in the case to be taken by the jury in their retirement, where it could not have prejudiced the party.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

Affirmed.

Von Seggern, Phares & Dewald, for plaintiff in error.

Mallon & Coffey, for defendant in error.

FIRE ESCAPE—OWNER. 166

[Hamilton District Court, March 11, 1884.]

†JAMES LEE ET AL., ADMR'S, V. ANNA C. KIRBY ET AL.

The owner in fee of a lot and building which is leased to a firm which occupies and uses the same as a "rag factory," is not the "owner of any factory, workshop," etc., within the meaning of the act relating to fire escapes, passed April 19, 1883. (80 O. L., 187.)

ERROR to the Superior Court of Cincinnati.

MAXWELL, J.

Affirmed.

E. G. Hewitt and Ramsey & Matthews, for plaintiffs in error.

McDougal & Longworth; Stephen Coles; F. T. Cahill; Reuben Tyler and Stallo & Kittredge, for defendants in error.

†For report of decision of superior court in this case see ante, 000. The decision of the district court was affirmed by the Supreme Court; see opinion, 42 O. S., 458.

SALE—ACCEPTANCE.

[Superior Court, Cincinnati, General Term, February 23, 1884.]

H. S. LIVINGSTON V. HENRY KLOPPER.

Where defendant in St. L., wrote to plaintiff in C., an offer to sell him certain stock at a price named, saying nothing as to how or whenever the contract, if made, should be carried out, and plaintiff at once accepted the offer in absolute terms, but added the words: "Send transferred certificate here. Draw or will remit." *Held:*

1. The acceptance was not qualified by the language added, which was merely a suggestion as to the mode of executing the contract already closed.
2. The sale of the stock by defendant to another without revoking his offer to plaintiff, such sale being unknown to plaintiff until after his acceptance, did not prevent the acceptance from closing the contract.
3. Defendant having thereby disabled himself from performance, plaintiff was not obliged to tender performance.
4. Where there is no market price at the place of delivery, evidence of such price at the nearest place where there is such, is competent.

HARMON, J.

On January 18, 1881, defendant, at E. St. Louis, after some previous correspondence, wrote plaintiff, at Cincinnati: "I have \$5,000 stock in the Baltimore stock-yards, 25 per cent. paid in, which I will sell you for \$2,500. * * * If you want this stock let me know at once, as I can sell it to two other parties for the price I mention to you; only you have written me several letters concerning the stock."

On receipt of this letter, the next morning the plaintiff telegraphed this answer: "Offer for Baltimore stock-yard accepted. Send transferred certificate here. Draw, or will remit." To which defendant in turn replied at once by telegraph: "Had already sold the stock before your message was received."

The action is for damages for failure to deliver the stock.

The first defense is, that there was no contract, because plaintiff attached to his acceptance conditions as to delivery and mode of payment. We think, however, that the acceptance was absolute, and that the latter part of the telegram was in the nature of a suggestion as to the most convenient mode of performing a contract already closed, rather than the proposal of a new term for the assent of defendant. It is certainly not expressed as a condition, nor could it have been so understood by either party.

Where or how the transfer of the stock and the payment of the price were to have been accomplished, there being no express stipulation upon the subject, it is not necessary to decide, because, defendant having disabled himself from performance by selling to another the stock bargained for, which was the specific shares then owned by him and all he had, *Mowry v. Kirk*, 19 O. S., 375, it was vain and therefore unnecessary for plaintiff to make formal tender of performance. *Williamson v. Moore*, 1 Disney, 30; *Bates v. Wiles*, 1 Handy, 536; *Brock v. Hidy*, 18 O. S., 306, 310; *Steel Works v. Dewey*, 37 O. S., 242.

These cases differ from *Mowry v. Kirk* and *Simmons v. Green*, 35 O. S., 104, in which there was merely a denial of the contract of sale. But the court would certainly have to shut its eyes to the light of common sense and everyday business experience to hold that it was ever

the intention of the parties to accomplish the exchange of the price for the stock by personally meeting for that purpose.

We think plaintiff sufficiently shows his readiness to receive and pay for the stock. And we do not regard plaintiff's letter in reply to defendant's telegram, that he had already sold the stock, as a waiver of any of his rights or an assent to a rescission of the contract. Plaintiff simply wrote that he was surprised to learn that defendant had sold the stock, and thought defendant should try to purchase a like amount of it for him at the same price. This was simply an unaccepted proposal by plaintiff to accept other stock instead of what he had bargained for.

The sale of the stock before defendant received the message of acceptance did not prevent the formation of a contract by that acceptance. In the first place, it does not appear that it was sold before the message of acceptance was placed in the hands of the telegraph company, at which time the contract became complete. *Taylor v. Ins. Co.*, 9 How., 390.

In the next place, even if it did so appear, defendant would still be bound. He could safely sell to another only by revoking his proposal to plaintiff or by waiting a reasonable time without an answer. He did neither, but acted in utter forgetfulness or disregard of that proposal. It was too late to revoke it after it had been accepted. *Pollock on Contracts*, Wall's ed., p. 8, & n., "e."; *Anson on Contracts*, 17-23.

While defendant's sale to another was a revocation, so far as his own intention was concerned, it could not affect plaintiff, unless communicated to him before his acceptance. *Leake's Digest of Law of Contracts*, 42. Had plaintiff learned of such sale in any way before his acceptance, it would have been a communicated revocation. *Dickinson v. Dodd*, L. R., 2 Ch. D., 463. We know of no case which goes further than this.

Testimony as to the market value of the stock in question in Cincinnati on the day of this sale was admitted at the trial and excepted to by defendant, because he contended that the price in St. Louis must control, that being the place of delivery. If we concede the correctness of this view as to place of delivery, and that the testimony was improper when admitted, it is proper to consider it now, because it was afterward made to appear that there was no market or market value for the stock in St. Louis, and that Cincinnati was the nearest place where it had such. *Abb. Trial Ev.*, 308-9; 2 *Sutherland on Damages*, 373.

The cost of sending stock from one place to the other being too insignificant to consider, and the market price at Cincinnati being the only one in evidence, the result is the same, whether it be considered as itself the value to be used, or as only evidence to show the value in St. Louis.

The market here was rapidly rising, and witnesses vary as to the price. We think it is fairly shown to have been not less than seventy cents on the dollar upon the face value, and the damages will be \$1,000 and interest.

Judgment for plaintiff.

Force and Peck, JJ., concurred.

DISCHARGE OF BANKRUPT.

[Superior Court, Cincinnati, Special Term, March 11, 1884.]

ROBERT W. HAMILTON, Ex'r, v. WILLIAM P. CUTLER ET AL.

A discharge granted in individual proceedings in bankruptcy by or against one who is a member of a partnership firm, discharges him from partnership as well as individual liabilities.

FORCE, J.

This was an action on a promissory note made by the firm of W. P. Cutler & Co.

The defendants filed separate answers. An averment in Cutler's answer is, that he was duly adjudged bankrupt and received discharge. The plaintiff filed a reply, and a motion is made to strike from the reply two averments. One averment is, that the bankruptcy proceedings averred in the defendant's answer were the individual proceedings of W. P. Cutler, and not of the firm, and the firm was not a party thereto. The other averment is, that this plaintiff was not notified and this claim was not presented. The second averment is of course immaterial, and will be struck out on motion. The other presents a question which has been disputed—whether a discharge in bankruptcy granted to a person where the proceeding is a proceeding as to him individually, operates to discharge him from his liability as a member of a firm to creditors of the firm.

The whole matter of bankruptcy is regulated by statute.

A discharge in bankruptcy discharges the bankrupt from all debts and claims which are provable against his estate. U. S. R. S., section 5115. By section 5067, Revised Statutes, "all debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day, * * * may be proved against the estate of the bankrupt."

The statute does not say all separate debts, and the language certainly by ordinary construction includes debts due by the bankrupt jointly with another. And further, section 5118, Revised Statutes, provides: "No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

It is not easy to see how the statute could provide more explicitly that a discharge given to a bankrupt in an individual proceeding will discharge his joint as well as his separate liabilities.

The act of 1800 was not so explicit as the present act. Section 6 of that act allowed the "creditors" of the bankrupt to prove their debts, and in *Tucker v. Oxley*, 5 Cranch, 534, it was held that the term "creditors" necessarily covered joint as well as separate liabilities. Chief Justice Marshall, in giving the opinion, said of such joint liability, "although due from the company, yet it is also due from each member of the company." And the court held, also, that a proviso similar to section 5118, U. S. R. S., removed all doubts as to the right of a joint creditor to prove against the estate of one partner in bankruptcy. Our bankruptcy law is derived from the law of England, and in England it has certainly been held, at least since the year 1721, *Ex parte Yale*, 3 P. W., 24, note A, that if one member of a firm becomes bankrupt and obtains his dis-

charge he is released from all his debts, joint and separate. So, by the law of England, as settled by the terms of the statute and adjudications under it, and by the act of congress of 1800, as settled by the language of the statute and adjudications under it, a discharge in individual proceedings discharges a bankrupt from his joint as well as his separate liabilities. The act of 1867 contains substantially the same provisions. If they differ in anything, they differ in being more explicit, and upon the face of the statute I do not see room for question.

The adjudications of the national courts, however, are not uniform. It was held by Blatchford, J., in 1868, in the southern district of New York, that in such case joint liabilities are provable. *In re Frear*, 1 Nat. Bank. Rep., 665, the same ruling was made in the same district by Hall, J., in 1871, in the case *In re Leland*, 5 Nat. Bank Rep., 222. The same ruling was made, after a very full consideration, by Field, J., in the district court of New Jersey in the case *In re Abbe*, 2 Nat. Bank Rep., 75. The same ruling was made, after a very full consideration, in the district court of California, by Hillyer, J., in the case *In re Webb*, 4 Sawyer, 326. The same ruling was made in Minnesota, by the district court, Nelson, J., in the case *In re Pease*, 13 Nat. Bank Rep., 168; and this ruling was approved and held to be correct in the district court of Wisconsin, by Hopkins, J., in the case *In re Jewett*, 15 Nat. Bank Rep., 126. See p. 139. And finally, the same ruling was made by Lowell, J., circuit judge, in 1876, in the case of *Wilkins v. Davis*, 15 Nat. Bank Rep., 60, in an opinion so cogent and exhaustive that it seems to me to be entirely conclusive of the question.

Still, the decisions in the national courts have not been wholly uniform. District Judge Brooks, in North Carolina, held that the discharge of a member of a firm upon his individual proceedings in bankruptcy does not discharge him from partnership debts, unless there are proceedings also against the firm. *Hudgins v. Lane & Smithson*, 11 Nat. Bank Rep., 462; and Judge Blatchford, in a later case, charged a jury, in an action at law, that if there was, at the time of the individual bankruptcy, proceedings partnership property and it was brought in, the discharge covers also firm debts, and so if there was no partnership property; but if there was partnership property and it was not brought in, the discharge does not affect firm debts. *Crompton v. Conkling*, 15 Nat. Bank Rep., 417. This charge of Judge Blatchford to the jury is in conflict with his earlier rulings, and seems to be in conflict with the statute which provides that a discharge in bankruptcy is a discharge not from debts that are proved, but from debts that are provable.

The mode of proceeding to be adopted seems to be that stated by Lowell, J., in *Wilkins v. Davis*. The bankruptcy of a member of a firm operates as a dissolution of the firm. Therefore, the assignee of such bankrupt becomes successor to such bankrupt in his interest and liability as member of such firm. Hence, it is the business of such assignee if the firm is solvent, to collect from the other members the value of the bankrupt's interest in the firm. If the firm is insolvent, the other partners may wind up and settle and prove against the estate of the bankrupt member, as a claim, the money advanced by them in paying his share of the excess of indebtedness over assets.

The motion is sustained, and the averment is stricken out as immaterial.

Ferris & Wilder and Nye & Oldham, for motion.
Boyce & Boyd, *contra*.

[Hamilton District Court, February 26, 1884.]

EDWARD SARGENT, EXR., ETC., v. JAMES W. SIBLEY.

For opinion in this case, see 6 Dec. R., 1219. (s. c., 13 Am. Law Rec., 33)

TAXATION OF CHURCH PROPERTY.

[Hamilton District Court.]

†COMMISSIONERS (HAMILTON CO.) v. J. B. MANNIX, ASSIGNEE, ETC.

1. Where the statute exempted from taxation "all * * * houses used exclusively for public worship * * * and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same," etc.: Held, that a vacant lot of land separated from a cathedral by a lot of land 45 feet in width, on which stood the residence of the archbishop, which was in the rear of the cathedral, and which was taxable, was not "attached" to the cathedral, nor was it necessary for the occupancy, use and enjoyment of the same.
2. This court having held, in what is known as the archbishop's case, that such property as was held by the late archbishop for church uses did not pass to his assignee, but to his successor, the present archbishop. The property in question, if exempt from taxation, was so exempt because it was held for church uses, and did not pass to the assignee. If on the other hand it did pass to the assignee, it passed because it was not held for church uses, but was subject to taxation.

MAXWELL, J.

The defendant in error, as appears by the petition in the case, filed in the court of common pleas, was and had been for some time prior to the filing of the petition, the assignee, under our state insolvent laws, of John B. Purcell, late archbishop of this diocese in the Roman Catholic church.

It is alleged that he, as such assignee, and the said John B. Purcell, had been seized of and had been in possession of, for a number of years, a lot of land on the corner of Central avenue and Eighth street, that the said John B. Purcell had paid taxes on this lot up to about 1864, when the auditor of state directed the auditor of this county to take this lot of land from the tax list and hold it exempt from taxation, for the reason that it was held and used for church purposes, that it was taken from the tax list, and held exempt until 1870, when the district assessor at the decennial appraisement put it on the tax list again, where it remained from that time on until the year 1881, when it was sold by the assignee. It is further alleged that it was put on the tax duplicate again through clerical error, and that, as it was exempt from taxation, and as the said John B. Purcell and the plaintiff, the assignee, had paid taxes up to 1881, when it was sold, that the plaintiff, the assignee, was entitled to recover back the taxes paid during the five years preceding the application made to the county commissioners for a refund, which in his petition he alleged he had made. He claimed that he was entitled to recover as

† For common pleas decision reversed hereby, see *ante*, 18. See also *Mannix v. Commissioners*, 43 O. S., 210.

a refunder \$6,852.24, taxes paid during the five years prior to June 4, 1881, the time at which he had made his application to the county commissioners for a refunder.

The county commissioners rejected the application. The assignee appealed from the commissioners to the court of common pleas, and the court of common pleas found in his favor and rendered judgment for the amount claimed with interest from June 4, 1881. The county commissioners bring the case to this court and ask a reversal of the judgment of the court of common pleas.

It appears from the testimony that the archbishop originally bought half of a square, bounded on the one side by Plum street, on another by Eighth street, on another by Central avenue, and on another by an alley running through the square. On that part of the lot fronting on Plum street, the cathedral was erected, occupying the whole of the part of the lot which fronted upon Plum street. Immediately in the rear of the cathedral and running transversely across the lot is a lot about 45 feet in width, upon which is erected what is sometimes called the archbishop's palace, intended as a place of residence for those who might be connected with the cathedral in an official capacity.

By the decision of the Supreme Court, in *Gerke v. Purcell*, 25 O. S., 229, that residence property was held to be taxable and taxes have been paid upon it ever since. That left a lot extending from the lot upon which the residence is erected to Central avenue, being bounded on one side by Eighth street, on another by Central avenue, on another by an alley and on another by this residence lot and separated entirely from the lot upon which the cathedral stands by this lot upon which the residence stands. This last lot is entirely vacant, except for some temporary structures used for the convenience of the residence. This is the lot in question in this case.

Three objections present themselves to our consideration, either one of which if sustained would be fatal to the case of defendant in error, as presented in this court. First: It does not appear in the bill of exceptions nor anywhere in the record what the amount of taxes paid was, nor is the rate of taxation nor the valuation of the property set out in such a way that we may inferentially discover what the amount of taxes paid was.

The second objection is as to the right of J. B. Mannix, the assignee, to bring this action. By the decision of this court in what is known as the archbishop's case, it was decided that the property which John B. Purcell held in his capacity of archbishop of the diocese for church uses did not pass to the assignee; that only such property passed to the assignee as the archbishop held as an individual, subject to be applied to his debts as an individual, the church property passing to his successor the present archbishop of the diocese. That decision presents this dilemma. If the property in this case was exempt from taxation it was exempt because it was the property of the church held for religious purposes, not property belonging to John B. Purcell, individually, and if so, it did not pass to the assignee, consequently the assignee would not have any right to prosecute a suit for the recovery of taxes illegally paid on it. If the property was exempt from taxation, as property held for church uses, the title passed to the present archbishop of the diocese and the action must be by him for the benefit of the church at large, and would accrue to the benefit of the trust now held by the present archbishop. If on the other hand this property did in fact pass to the assignee,

it so passed because it was not the property of the church, but the individual property of John B. Purcell, and if so it was subject to taxation just as any other property would be subject to taxation. So that, whichever view may be taken of that matter, either equally defeats the right of the assignee to recover in this case.

The third question is as to the merits of the case itself. That is presented by the consideration of both the testimony offered on the hearing and the construction of the statute.

The statute, section 2732, under which this property is claimed to be exempt, is as follows: "All * * * houses used exclusively for public worship * * * and the grounds attached to such building necessary for the proper occupancy, use and enjoyment of the same," etc., shall be exempt from taxation.

It will be observed that there are two elements necessary to exempt church property from taxation in the state. One is that the grounds must be attached to the house used for public worship, and another is that these grounds must be necessary for the proper occupancy, use and enjoyment of the same. The word "attached," as used here, is equivalent to the word "annexed," which has received legal construction, meaning simply, physically joined to. Can it be claimed that the lot in controversy here, separated as it is from the lot on which the cathedral stands by another lot 46 feet in width is annexed to the lot on which the cathedral stands? We think not. And again, can it be claimed that this lot, being so separated from the lot on which the cathedral stands is necessary for the proper use, enjoyment and occupancy of the cathedral? It is not always easy to say just where the line should be drawn in such a case, but it may be said that it is where the necessity ends and the mere convenience begins. It may be and no doubt is true that this lot is indirectly a convenience to the cathedral, for it is a convenience to the archbishop's residence. It may be a convenience in many respects, but we cannot see from the testimony, how it is a necessity for the proper use, occupancy and enjoyment of the cathedral.

In *Boston, etc., v. Boston*, 129 Mass. 178, it was held "land owned by a religious corporation upon which no church edifice has been erected * * * and which is separated by a passageway from the portion on which the church stands and which is not necessary and incidental to the church as a house of worship is not exempt from taxation."

That case presents very nearly the same state of facts as this. There the Redemptionist fathers had purchased quite a large lot, erected buildings upon one portion, and made a narrow passageway across the lot through which they were accustomed to pass and repass, and claimed to hold the unimproved part exempt from taxation, but the court held that they could not because it was not necessary to the occupancy of their building. The court refer also to the fact that it was separated by this passageway from the part on which the buildings stood.

Judgment reversed.

O. J. Cosgrave and Chas. Evans, for plaintiff in error.

D. Macneale, for defendant in error.

HABEAS CORPUS.

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[Hamilton Common Pleas.]

IN RE ALICE CURD ALIAS ALICE JENKINS.

1. The writ of *habeas corpus* can only be issued in cases where "a person is unlawfully restrained of his liberty," or where a person, entitled to the custody of another, is unlawfully deprived of the same.
2. In cases other than those of controverted custody, the allegation of unlawful "restraint of liberty," or words of precisely the same import, is essential in the application or petition to give the court jurisdiction.
3. Where an application or petition is defective with respect to such essential and jurisdictional allegation, no amendment will be allowed.
4. Such a defect in the application or petition is not waived by the appearance of the respondent, and a trial.

CONNER, J.

A petition was filed in this case by one Joseph H. Smith, on the 17th day of November, 1888, representing "that a white child known as Alice Jenkins, of the age of about four years, is illegally restrained and possessed of, without any legal authority, by one Sallie Jenkins, a colored woman;" praying that a writ of *habeas corpus* should issue to said Sallie Jenkins according to law; "and that upon hearing thereof said Alice Jenkins may be discharged from such illegal possession." This petition was duly verified, and thereupon a writ of *habeas corpus* was issued, and the child and said Sallie Jenkins brought into court. Upon the preliminary hearing the respondent was not represented by counsel, and did not desire any, and, after the hearing by the court of a statement from her, the case was continued for some weeks, to enable her to communicate with the parents of the child, and enable them to be heard, if they, or either of them, so desired. At this time the child was temporarily committed to the custody of one Dr. Fletcher, who appeared with the respondent as her friend, and to whose custody the respondent consented the child should be committed, if it was to be given to any one, and it has been in his custody ever since, the respondent having had the right to visit and see the child at all reasonable times, up to about three weeks ago, when this privilege was withdrawn by the court upon the showing that some feeling had arisen and existed between the family who were kindly caring for the child, and the respondent, caused by the alleged misconduct of the respondent, and alleged ill-treatment of the respondent by them.

Upon the second hearing the respondent was represented by counsel who have continued to represent her ever since. Owing to the engagements of said counsel the hearing has been continued from time to time, until the case was finally submitted, some two weeks ago.

No pleadings have been filed by the respondent, but by consent of parties it has been considered that if any were necessary they should be considered as filed. And, at the suggestion of her counsel, the case has been fully heard as though an answer had been filed, denying that the child has been illegally restrained and possessed of by respondent, and averring that said Sallie Jenkins was the lawful custodian of said child, and a proper one.

The relator claims, and has offered testimony to prove, that the respondent had no right to the custody of the child; that she was not a

proper person to have its custody, on account of intemperance, violence of temper and language, and that the circumstances of life and the surroundings in which the respondent lived would seriously prejudice the future of the child.

The respondent claims, and has offered testimony to prove, that she received the child from its mother when it was but a few hours old, and is keeping it by virtue of an alleged agreement with the mother until it is seven years of age; that she has fed and clothed it ever since, with very little, if any, assistance from either of the child's parents; that she has treated it kindly and properly; that she is a proper person to have its custody, and denying specifically the charges of the relator as to her intemperance or violence of language and temper.

One thing is established most clearly by all the evidence, and that is that the respondent has treated the child with the utmost kindness, and has fed and clothed it as well as she possibly could, and far better than might have been expected of one in her station of life; and another thing that is established beyond question is the manifest attachment she has for the child and the child for her. This attachment between them speaks volumes for her kindness and care of this little one—cared for by her in the years when its parents had practically if not wholly abandoned it. It is also clear from the testimony of the respondent that she has had occasional communication with the child's mother during the years it has been in her care, but that the mother has left her to struggle, almost unaided, with its support; and it is also clear, and a most important fact in this case, that the respondent has been in frequent communication with the mother during the hearings of this case; that she knows exactly what is the object of the relator in instituting and carrying on this proceeding, and that she still deems it proper and for *her* best interests, at least, to keep her identity concealed, and leave her child's fate and future to whatever decision the court may come to, although she must know, since she is in communication with the respondent, that the court would be only too glad to have her assert her claim to the child if she so desires; and she must also know that, by that decision, she might lose all control over the child.

It also appears from the testimony of the respondent, that for many years she has been rearing illegitimate children under contracts with their parents or friends not alone in this community, but elsewhere, as one to whom such unfortunate children may be taken for care and raising, and that even since this application has been for hearing she has been requested to take another such child to raise.

The petition or application in this case is made by said Smith individually, and, while the testimony shows that he is an official in the society for the prevention of cruelty to children and animals, yet it is also shown by the testimony that the society is not prosecuting this action, but only that some of its officers are individually interested in seeing it carried on, the motive therefor, as the court is perfectly satisfied, being their interest in what they believe to be for the best interest of the child.

After the full hearing of the case, and the opportunity was afforded to counsel for either party to present all the evidence desired, and after the final argument was commenced, a demurrer to the application for the writ was filed by counsel for the respondent, alleging that the language of the same was so defective, and such a variance from that prescribed

by the statute, as that the court had no jurisdiction of the matter, and that the application must consequently be dismissed.

This demurrer raises, therefore, three questions :

First—Is the application in compliance with the statute, and did the court thereby acquire jurisdiction of the matter at issue?

Second—If it is not in compliance with the statute can it be amended now?

Third—Has the defect, if there was one in the application, been waived, and has the court thereby acquired jurisdiction?

First—As to the application being defective in form, and that the court is without jurisdiction in the case.

Section 5726, Rev. Stat., provides that “a person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of *habeas corpus* to inquire into the cause of such imprisonment, restraint, or deprivation.”

Under this section it seems to me clear that there are but two classes of cases in which the court has jurisdiction and can issue the writ.

The first class is where “a person is unlawfully restrained of his liberty,” and this includes both a restraint of liberty by an actual imprisonment, or a detention, either by a public officer with or without color of law, or by a private individual.

The second class is where one who is entitled to the custody of another is unlawfully deprived of the same.

The writ of *habeas corpus* is in this state not a common law right, but a statutory right; and as a statutory right it must be strictly construed and strictly confined to the cases for which it is authorized by the statute. While it is the great writ of liberty, and will be, as it ought to be, most favorably regarded by the courts of the state, yet they must construe it and award it in the strict light of the statute.

And in construing the law of *habeas corpus* as applicable to the cases of children, the distinction between the law of England and of this country must not be forgotten—namely, that under the English law all children seem to be regarded as the wards of the government, while here the government is not so paternal, and will not interfere unless a case for its exercise of authority is clearly made out and is clearly within its powers of adjudication.

Section 5728, Rev. Stat., provides that “Application for the writ shall be by petition, signed and verified either by the party for whose relief it is intended or by some person for him, and shall specify—

“First—That the person in whose behalf the application is made is imprisoned or restrained of his liberty.

“Second—The office or name of the person by whom he is so confined or restrained. * * *

“Third—The place where he is so imprisoned or restrained, if known,” etc.

In sections 5729 and 5734, of the statutes, also, the phrase “restrained of his liberty” is used.

From the specific language of section 5726, prescribing the cases in which the writ is to issue, and the first paragraph of section 5728, prescribing the form of the application, it seems to me that an essential allegation of the petition or application, in at least every case that is not one of controverted custody, is the allegation of “restraint of liberty;” and that that allegation must be made in those exact words, or words of

precisely the same import; that what the person is deprived of which will authorize the writ is his liberty, and that that word "liberty" is essential and cannot be supplied by any other term except "imprisoned," which is also named in the first paragraph of that section. I have said that this restraint or deprivation of "liberty" is an essential allegation of the petition, except possibly in cases of controverted custody. But I need not now discuss that class of cases, since the relator in this action, does not claim, and his counsel have expressly disclaimed all through the case, any right to the custody of the child. But the relator simply claims that he makes the application for the writ on behalf of the child, who, he claims, is restrained of its liberty, although he admits his application does not state the claim in that language.

Passing now to the consideration of the exact language used in this application we find it to be, that the child "is illegally restrained and possessed of without any legal authority" by the respondent, and prays that the child "may be discharged from such illegal possession." There is certainly here no allegation of restraint of liberty, *eo nomine*, nor does it seem to me to be such a synonymous phrase as to come within the language of the statute, which, I have before said, was material and necessary to give the court jurisdiction. A child is not like a person, *sui juris*, entitled to liberty in that broad sense of the word, which allows freedom of action and control. As a child it must necessarily be under the control and within the custody of some one, either its parent or some lawfully appointed custodian selected by the proper authorities if it has been abandoned by its parents or parent, or some one to whom the parents or parent has transferred the custody temporarily or permanently. The language of this application, therefore, it seems to me, does not and cannot, raise the issue of the child's being restrained of its liberty in the sense of its being imprisoned or confined or deprived of that amount of freedom to which, as a child, it is entitled; but raises, if it raises anything at all, simply the issue of the right to its custody. And as this issue is, confessedly, not the one the relator intended to raise, and as the relator expressly and repeatedly during the trial denied any claim on his part to its custody, it seems to me, for the reason given above, that the application is fatally defective, and that it gave the court no jurisdiction of the case.

The next question to be determined is, can this application or petition be now amended?

As the amendment, if allowed, would be so important and vital as to give the court jurisdiction where it did not have it before, I have no hesitation in holding that such an amendment cannot now be made, unless the original jurisdictional defect has been waived by the appearance of the respondent at the trial. And I am confirmed in this opinion as regards this particular case, when it is remembered that the evidence tends to show that the respondent has the custody of the child by an agreement with its mother, and the relator has confessedly no claim thereto, and the evidence further tends to show that the child has not been deprived of such liberty as a child is entitled to, but it is simply detained by the respondent under her claim of custody. And, therefore, no amendment can now be made, in the light of the evidence offered, which would tend to improve the relator's right to maintain the action, or give the court jurisdiction beyond that attempted to be given by the application.

The last question to be determined is, has the defect in the application been waived by the appearance of the respondent at the trial, and has the court thereby acquired jurisdiction?

As I stated before, when the respondent first came into court, and during the first day's proceedings, she was not represented by counsel, and, although the court then expressed a willingness to continue the hearing until she obtained counsel, and requested her so to do, yet she desired the matter to then proceed. She was then ignorant of her rights, and had she then had counsel, it might have been that the objection to the form of the application would then have been made, and the same then dismissed for informality. Therefore, I cannot presume that she appeared voluntarily, or that she consented to the trial proceeding, knowing her rights and waiving objections to the formality of the application. Nor do I feel justified in holding that by her subsequent employment of counsel and her production of evidence that she thereby intended to waive her legal rights, and especially her right of objecting to the jurisdiction of the court.

It was held by Judge Gholson in the case *Ex parte Bessie Evans*, a case of controverted custody of a child, 2 Disney, 40, that "there are cases in which it has been held that where personal liberty is in question facts which would amount to a waiver under other circumstances will not be given that effect." And it seems to me this case is one where that principle should apply, and that I cannot hold that the respondent, by her appearance and the presentation of her case, has waived her legal right of objecting to the jurisdiction of the court; and especially when it is borne in mind, as held by Judge Gholson in the Bessie Evans case, that the child has the right to have the case decided only by a court that has jurisdiction, and that had jurisdiction by virtue of the language of the application, and not by the acts or consent of the respondent.

Therefore, I hold that the demurrer to the application or petition is well taken; that said petition is wanting in the essential allegation that the child is "unlawfully restrained of its liberty;" that being so defective this court acquired no jurisdiction under said petition; that it is a defect which cannot now be cured by amendment, either by permission of the court or which would now be justified by the evidence; and that such defect has not been waived, and jurisdiction by the court has not been acquired by any waiver of the legal rights of the respondent, or the child by the respondent appearing on the trial and producing evidence to substantiate her claims to the child and her fitness as its custodian.

I regret very much to be thus compelled to dispose of this case upon what might be considered a technicality and not upon the merits of the controversy, and upon that principle which is always "the pole star" to guide the court in similar cases where it has jurisdiction, to-wit, the best interests of the child. But the respondent has the legal right to demand of the court, and the court is bound by every principle of law and justice, to decide the question of its jurisdiction, without in any way passing upon the merits of a controversy, when that question is raised and its decision is adverse to the claim of jurisdiction.

If it is claimed by the relator that this child has been abandoned and that the respondent is not entitled to its custody, then he or some one else must be appointed, by the proper authorities and in a legal way, its guardian or custodian, and then sue out a writ of *habeas corpus*, alleging a deprivation of the custody by the respondent; or, if the relator wishes

the action to proceed on the allegation that the child is unlawfully restrained of its liberty, he must so state in his application.

And in this connection it is but proper for me to say that this application was not prepared by the present counsel for the relator, and that neither his attention nor that of the court was drawn to the defect therein until all the evidence had been offered, and the counsel for the respondent was making his argument.

Before making the order in this case, it is but proper for the court to express its thanks to Dr. Fletcher and the family of Dr. Davis, to whose care Dr. Fletcher committed the child, pending this hearing, for their kindness in thus caring for this little child.

The petition will be dismissed without prejudice to another application or to any other action the relator may take, at the costs of the relator, and the child will be returned to the respondent, Sallie Jenkins.

C. C. Davis, for relator.

S. F. Hunt, for respondent.

LOSS OF SERVICES—NEGLIGENCE.

[Hamilton District Court, March 25, 1884.]

Avery, Maxwell and Buchwalter, JJ.

CINCINNATI OMNIBUS CO. v. LENA KUHNELL.

1. Physicians' bills, though not specially contracted for and still unpaid, are a proper element of damages in an action for loss of services.
2. A mother suing for loss of service by injury to her minor son, may recover for the value of the nursing, but not for the loss of her time in having to nurse him instead of earning money.
3. It is not error in an action by a parent, for loss of services, to charge that the parent is entitled to recover for the diminished ability to earn money until the son is twenty-one years old, without deducting the cost of his maintenance.
4. To recover for injury to an infant for the future, a parent or person entitled to the services, must specially aver loss of prospective service.
5. Riding on a back platform of a street car by permission of a conductor, and in the absence of rules of the company being posted or brought to the knowledge of the passenger, is not contributory negligence as a matter of law, and is a question for the jury.
6. Whether the driver of an omnibus is negligent in having his team unhitched and unguarded, merely wrapping the lines around the brake, may be a question for the jury.

ERROR to the Court of Common Pleas.

MAXWELL, J.

The action was brought for injuries sustained by the son of the defendant in error, a young man eighteen years of age, living with her. The injuries were caused by the collision of an omnibus of the Cincinnati Omnibus Co. with a car of the Cincinnati St. Ry. Co. The car was proceeding along Fourth street westwardly, the young man sitting upon the dashboard of the rear platform of the car. The omnibus was standing backed against the sidewalk in front of the St. James Hotel, the horses being turned slightly toward the east, leaving a space between the street car and the tongue of the omnibus of twelve inches. The driver of the omnibus was on top of the omnibus, at the rear end, at the time of the injury, receiving a trunk. The lines of the horses were wrapped about the brake of the omnibus. As the car came opposite the hotel the horses of the omnibus gave a slight turn to the west, bringing

the pole in contact with the center of the street car, causing the pole to fly back when it reached the end of the car and run through the dashboard of the rear platform, catching the young man's leg between the pole and the dashboard, and injuring it severely, possibly permanently. There was a verdict for plaintiff (defendant in error) for \$1,800. *Held*:

(a) First—Whether the driver of the omnibus company was guilty of negligence, taking into account all the circumstances, the fact that he had left the horses standing without any other guard than simply wrapping the lines around the brake, was a question for the jury.

(b) As to whether the young man was guilty of contributory negligence, the proof not showing that any rules forbidding passengers to stand on the platform of a street car were posted in the car, or that they were brought to the knowledge of the young man, he occupying the position by permission of the conductor, he was not guilty of contributory negligence, *per se*, in occupying that position. 97 Pa. St., 55; 87 N. Y., 63.

But whether or not it would be negligence *per se*, in a case depending between the plaintiff below and the Street Car Co., it would not be negligence, *per se*, in a case between the plaintiff and the Omnibus Co., for the Omnibus Co. could not avail themselves of the rules of the Street R. R. Co. unless the circumstances should be such as to make it negligence in itself to stand upon the platform of a street car.

(c) The question of the negligence of the Street Car Co. was one for the jury, it being shown that there was a clear space of twelve inches in which to pass at the time of the injury.

Second—Plaintiff would be entitled to recover for the loss of the services of her son until he was twenty-one years of age, under proper pleadings and proofs. 3 Sutherland on Damages, 261, 279, 722. But there is a clear distinction between cases where a person brings an action for injury to himself, where the law presumes that damages may accrue from consequences growing out of the injury, and damages sought to be recovered from loss of service resulting from injury to another, and in the latter case there should be a special averment alleging loss of prospective service. 1 E. D. Smith, 52; Thompson on Negligence, 1250; Shearman & Redfield on Negligence, 608; 2 Wait's Pr., 399; Sedgwick on Damages, 605; 2 Nash on Pleadings, 997; 1 Bates on Pleadings, 148; 73 Ind., 252.

Third—Physicians' bills were a proper element to be included in the damages. The fact that the mother made no contract for the services of physicians would be no objection, as the law would imply a contract, the services being necessities for which the mother was, on the death of the father, liable. The fact that those bills were not paid is not material. 3 Sutherland on Damages, 721, 725; Gries v. Zeck, 24 O. S., 329.

Fourth—A charge of the court that the mother was entitled to recover for the diminished ability to earn money resulting from the injury until the son was twenty-one years of age, without deducting the cost of his maintenance, was not erroneous.

Fifth—The charge of the court that the mother was entitled to recover the loss to her which resulted from her having to nurse her son and not being able to earn anything outside, was erroneous, as the rule should have been the reasonable value of the nursing.

Reversed.

R. S. Fulton and Paxton & Warrington, for plaintiff in error.

Campbell, Bates & Bettman and L. M. Hadden, for defendant in error.

REPLEVIN.

[Hamilton District Court, March 25, 1884.]

KREBS LITHOGRAPHIC CO. V. JACOB H. STUDOR.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

In replevin for the possession of certain chattels, it was set up that in a former action between the same parties for conversion of the chattels, verdict and judgment in damages was obtained by the plaintiff. The record of the former action disclosed that it was brought upon five causes of action for over \$6,000 in all, one of which was for the value of the chattels in question that it was alleged belonged to the plaintiff and had been demanded and refused, and was besides for consequential damages for detention prior to the alleged conversion. The answer in the action did not deny that the property was the plaintiff's, but alleged that it was withheld under an attachment against him. The verdict was a general one, for \$800, without distinguishing between the causes of action:

Held, evidence was competent that the judge so instructed the jury as to exclude the damages claimed for conversion. Further, after verdict and judgment, the defendant's continuing to hold under the attachment until it was paid and discharged by plaintiff—this was conclusive that the property remained the plaintiff's.

The court cited *Youmans v. Caldwell*, 4 O. S., 72; 36 O. S., 471; 49 Penn. St., 346; 10 Wend., *Porter v. Wagner*, 81; El., B. & E., 386, *Freeman on Judgments*, 273, 276; *Bigelow on Estoppel*, 48; 2 Smith. Lead. Cas. (7th ed.), 769, 775, 782.

Affirmed.

Moulton, Johnson & Levy, for plaintiff in error.

Wilby & Wald, for defendant in error.

PROMISSORY NOTE.

[Hamilton District Court, March 25, 1884.]

† OHIO FORGING CO. V. JAMES LAMB.

1. A valid patent is a sufficient consideration for a promissory note.
2. Fraudulent representations as to utility of patent or its cost of manufacture will not, in the absence of proof of tender, by assignee to assignor of written assignment, avail as a defense to such note.

ERROR to the Superior Court of Cincinnati.

BUCHWALTER, J.

1. A patented device which is capable of being applied to some practical or beneficial use, and is not frivolous or injurious to the well-being or morals of society is valid without regard to the degree of its utility or its pecuniary value, and an interest therein is a sufficient consideration for a promissory note. *Tod v. Wick*, 436 O. S., 871; 102 Mass. 60.

2. Letters patent issued upon any device import, *per se*, that it has novelty and utility, that it is a valid patent, and therefore has value.

3. In an action upon a promissory note given for a patent right, where the defendant admits the execution and ownership thereof, but pleads fraud in the contract as to the utility of the patent and asks rescission, the proof showing that the device had a practical and beneficial use, but tending to show that fraudulent representations were made as to the degree of utility, and that it had not been, and could not be made at a certain price or in a certain mode as falsely represented, and could not be sold for cost price in the market competing with other devices for similar use: *Held*, the patent being valid and no proof of a tender by assignee to assignor of a written assignment thereof being shown, that the defendant cannot avail itself of its plea of fraud and is not entitled to a rescission of the contract, and that it was not error for the court to grant a motion to arrest the testimony of the defendant from the jury and give judgment for plaintiff. That the court gave judgment instead of directing the jury to give a verdict for plaintiff was not prejudicial to defendant.

The court cited Benjamin on Sales, section 543, note; Wharton on Contracts, sections 285, 919; 2 Parsons on Contracts, (7th ed.) 257; *Tod v. Wick*, *supra*; 102 Mass., 60; 124 Mass., 553; 26 Kan., 226.

Affirmed.

C. W. Cowan and W. H. Whittaker, for plaintiff in error.

G. W. Stone and O. P. Cobb, for defendant in error.

INJUNCTION.

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[Hamilton District Court, March 25, 1884.]

†E. POTTER DUSTIN V. WILHELMINA BAUER.

1. Whether refusal to dissolve a temporary injunction is reviewable on error.
2. Where injunction is the object of the action, and the merits of the cause remain to be determined by the judgment, the refusal to dissolve a temporary injunction is not a final order to which a petition in error will lie.

ERROR to the Court of Common Pleas.

AVERY, J.

The court cited 47 N. Y., 469; 59 N. Y., 242-3; 67 N. Y., 684-5; 95 U. S., 99; 28 Mich., 463; 80 Ill., 183; 60 Penn. St., 444; 51 Tex., 536; 2 Dan. Ch. Pr., 1664, 1677, note 4; High on Injunctions, 1693, 1702. Commenting upon *Watson v. Sullivan*, 5 O. S., 42; *Railroad v. Sloan*, 31 O. S., 1; *State ex rel. v. Commissioners*, *ante*, 000; 83 S. C., 89 O. S., 58.

Dismissed.

Tafel & Lampe and Dustin, Diehl & McCarthy, for plaintiff in error.
M. Pohlman, for defendant in error.

†See also *Burke v. Railroad*, 45 O. S., 631.

AGREEMENT FOR ALIMONY.

[Hamilton District Court, March 25, 1884.]

MELINDA B. NEELY V. JOHN M. NEELY.

Ratification, after divorce has been announced, of an agreement as to alimony previously made, renders such agreement valid and binding.

ERROR to the Court of Common Pleas.

BUCHWALTER, J.

In an action to set aside an entry of satisfaction appended to a decree awarding alimony to plaintiff and to enforce decree for balance claimed to be unpaid, the defendant by answer averred that by cross-petition in the original cause he asked divorce from plaintiff and charged her with gross neglect of duty and adultery, that he took testimony by depositions tending to prove adultery, that thereafter at the request of plaintiff it was agreed that he should pay and she receive \$2,000 in satisfaction of alimony irrespective of the amount to be ordered by the court, and that no proof be offered to support the charge of adultery; that the parties observed that agreement at the trial; that the court granted a divorce for gross neglect of duty on defendant's cross-petition and awarded plaintiff alimony \$35.00 by installments, and that with full knowledge thereafter plaintiff affirmed her agreement and accepted \$2,000 cash paid her by the defendant, when her attorney with her consent and approval inserted the words of satisfaction. To this answer plaintiff demurred. The demurrer was overruled, and upon the trial of the issues the court made a special finding of facts which sustained the averments of the answer and also that plaintiff did not tender back the \$2,000: *Held*, 1. That when the court announced the divorce, she became a *feme-sole*; that thereafter she was competent to contract with the defendant as to alimony and her affirmance of her former agreement was valid.

2. That on payment of the \$2,000 the agreement was fully executed; that the payment of part before due under the decree would be a valid consideration for the reduction of the amount, and that she cannot now be heard to complain of the fraudulent contract to which she was a party to suppress testimony at the original trial.

Affirmed.

Peter Keam, for plaintiff in error.

McMath, for defendant in error.

HUSBAND AND WIFE—CONVEYANCE.

[Superior Court, Cincinnati.]

GEORGE DODSON V. MARY E. DODSON AND LAURA H. SLADE.

1. A lease was made to A., with privilege of purchase, upon his paying \$19,000 before the expiration of the lease. He paid \$9,000, and was unable to pay more. His wife paid \$4,000 from her separate estate, and by consent of all parties a subsequent lease was made to her, with privilege of purchase upon payment of \$6,000, which she paid, and the lessor conveyed to her with warranty. A., before the expiration of his lease, made a deed of the premises to plaintiff, absolute on its face, but in fact to secure payment of \$5,000, which deed was placed on record: *Held*, A., by paying \$9,000, acquired a contingent equity in the land, contingent upon complete payment being made.

2. The deed to plaintiff was not a legal mortgage, but was a charge upon such equity. The record was not constructive notice.
3. A.'s wife had no knowledge of the charge in favor of plaintiff, but receiving A.'s contingent equity as a gift, she took it, subject to the charge. Plaintiff is entitled to a lien upon nine-nineteenths of the premises.
4. This charge is not a breach of the warranty in the conveyance by the lessor to A.'s wife.

FORCE, J.

This is an action for the sale of land under a deed absolute on its face, given by Robert M. Dodson, deceased, to the plaintiff, but, as alleged, given to the plaintiff in fact to secure to him the payment of \$5,000 due to him from said Robert M. Dodson.

In June, 1869, Mrs. Slade leased the premises to Robert M. Dodson for three years, with a privilege of purchase, \$5,000 to be paid down, \$4,000 within six months, and \$10,000 more on or before January 1, 1872. Dodson paid \$5,000 and \$4,000, but no more. The three years of the lease expired. A few days after the expiration of the lease, on July 1, 1872, Mrs. Slade leased to Mary E. Dodson, the wife of Robert, the premises, with the privilege of purchase. Mrs. Dodson, her husband being embarrassed and unable to make further payments, had paid \$4,000 of her own money, and the privilege of purchase named in the lease to her was for \$6,000. That lease expired before the whole \$6,000 were paid.

Another lease was made to her, with a privilege of purchase, and she finally completed the payment of the \$10,000. That being done, the \$19,000 stipulated in the original lease having been paid, Mrs. Slade conveyed the premises by warranty deed to Mrs. Dodson. Robert Dodson assented to the leases subsequent to the first being made to his wife, with the privilege of purchase to her upon her paying the sum named therein. She made no stipulation to him that she would purchase, nor did she give any consideration to him. Before the first lease expired, Robert Dodson made the deed to the plaintiff, which the plaintiff placed on record.

Mrs. Mary E. Dodson appears, from the evidence, not to have had actual knowledge of that deed before her purchase. Her husband died before she completed her purchase. The question is, has the plaintiff any interest by reason of the deed to him? If so, is it good as against the defendants or any of them? At the time that Robert gave the deed to the plaintiff, Robert was not owner of the premises. He did not possess even that equity in the land which is owned by one who has a contract for the purchase. He had a privilege to buy upon the payment of the sum within a named time, about one-half of which he had paid. His interest was simply, then, a contingent equity. That is not such an interest in land as is contemplated by our statute concerning mortgages; and the deed to the plaintiff is not, therefore, a legal mortgage; and the fact that it was put upon record does not operate as constructive notice of its existence for any purpose.

But a person may charge even an expectancy, and this deed may fairly be held to be a charge upon Robert Dodson's contingent equity, which charge would become a lien when that contingent equity should ripen into an estate. There was no formal transfer by Robert Dodson to his wife of any interest that he might have; but when, after the expiration of his lease, Mrs. Slade made a new lease to Mrs. Dodson, with a new privilege of purchase, in which privilege of purchase Mrs. Dod-

son had credit for the \$9,000 which had been paid by her husband, and Robert Dodson assented to this new arrangement, this new arrangement operated as a transfer from him to his wife of that contingent equity which he had by virtue of his payment of \$9,000. But this transfer was without consideration. Mrs. Dodson paid nothing for it. She made no stipulations—she put herself under no obligation to him or to any one else. The transfer to her was, therefore, a volunteer, a gift. Hence, not being a purchaser for value, she took from her husband whatever she acquired from him, subject to charges which he had placed upon it, although she had no knowledge thereof. And hence she took his contingent equity of \$9,000, subject to the charge in the plaintiff's favor of \$5,000. There was a great amount of evidence produced on both sides upon the question whether or not there really was in good faith any debt due from Robert Dodson to the plaintiff. Upon the whole, it is found upon the evidence that Mrs. Dodson cannot question the acknowledgment that her husband made of the charge of \$5,000.

Evidence was also offered to show that the deed to the plaintiff was made to him simply for the purpose of enabling him to be security on a bond for Robert Dodson in a contingency which was apprehended, but which never came to pass, and that, therefore, Mrs. Dodson is entitled to have a reconveyance. It is true that the seventh section of the original statute of frauds, which requires trusts in land to be manifested and proven by a writing signed, has been omitted from the Ohio statute of fraud; and in Ohio a trust in land can be manifested and proven by parol. But that can be done only by the clearest proof, and such proof is wanting.

As for Mrs. Slade, she is made party to the suit as warrantor of Mrs. Dodson's title.

But whatever encumbrance the plaintiff has upon the land is an encumbrance made by Robert Dodson. Robert Dodson could not encumber the title or interest of Mrs. Slade while held by her. The charge which he created took effect only upon the interest acquired by him from Mrs. Slade and posterior to such acquisition by him, and such a charge is not a breach of Mrs. Slade's warranty.

The property being a dwelling-house, not capable of partition, the order is, that if the plaintiff's claim is not paid, the premises be sold, and of the proceeds of such sale, costs and the plaintiff's claim be paid out of nine-nineteenths and that ten-nineteenths be paid, without deduction, to Mrs. Dodson.

W. A. Goodman, for plaintiff.

McGuffey & Morrill; Ferris & Wilder; S. A. Miller and Huston & Holmes, for defendants.

SERVICE ON NON-RESIDENT—PARTNERSHIP.

[Hamilton Common Pleas.]

KNIGHT V. HINTON & FLETCHER.

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1. A non-resident of the county served out of the county with summons, in a case brought on three causes of action, one of which is against said non-resident jointly with a resident of the county, and the other two causes of action are against such non-resident alone, can, on motion, enter his appearance as to such two causes of action solely for the purposes of the motion, have the said two causes of action stricken from the petition, and be dismissed from the case as to them.
2. One partner cannot sue another, upon an indebtedness due by the firm, even though the firm has been dissolved and all its business settled except said indebtedness, unless the amount of the same has been agreed upon between the partners, or unless there was a special promise by the partner, who is defendant, to pay the same.

CONNER, J.

In this case Knight brings an action against Hinton and Fletcher, alleging that a partnership was formed between the three to construct a connection track between the Cincinnati Southern and the Cincinnati & Baltimore Railways; that the work was done by the partnership; the compensation therefor received; that the partners have had various settlements between themselves and distributions of the amounts received for the work; that all the creditors of the firm have been settled with, and that all the matters arising under and out of the partnership, have been settled, except the three items set out as causes of action in the petition.

The plaintiff then sets out as the first cause of action, that he was the owner of a pile-driver at the time of the formation of the partnership, and that it was agreed by the firm that his pile-driver should be used in the work, and that the firm would pay him therefor the same price per day as was paid to other parties for similar machinery; that it was so used; that the value of such use was \$591; and he therefore prays judgment against Hinton and Fletcher individually against each of them, for the sum of \$197 and interest.

As a second cause of action, he claims that Hinton was to furnish the necessary capital for the partnership and as needed; that he did not do so upon one occasion; that the partnership was then compelled to borrow the money and pay interest therefor, and he prays judgment against Hinton for one-third of the amount of interest so paid.

As a third cause of action, he claims that, at the dissolution of the partnership, Hinton wrongfully took certain tools belonging to the partnership, and he asks a judgment for the one-third of the value thereof.

Fletcher is a resident of Hamilton county, and was served with summons. Hinton is a resident of Greene county, and was served with summons in that county, under section 5038, Rev. Stat.

The defendant, Hinton, has filed a motion to strike from the petition as against him, the second and third causes of action, and to dismiss the action as against him as to the matters set up in said causes of action, on the ground that he is a non-resident of Hamilton county, nor was he, nor could he have been, summoned in Hamilton county, when he was served with summons in the case.

In framing this motion the defendant is careful to use this language: "Defendant, David Hinton, now comes for the purpose of this motion only, and in no wise entering an appearance herein, moves," etc., so as to rebut any inference of voluntary appearance in the case.

The ordinary motion in such a case, where a party desires to be relieved from the effect of being served, is a motion to set aside the service. But in this case that cannot be done, because the service is good as to the first cause of action, which is against both Hinton & Fletcher, if they can be sued jointly thereon.

Therefore, it being apparent from the petition itself, that the second and third cause of action are clearly individual claims against Hinton alone, if the plaintiff has any right to proceed on them.

Hinton has the right to have them tried in the county where he lives, and not here; and his appearance in this case by this motion, and also by a demurrer to the first cause of action, in which it is specifically stated that, "in no wise entering his appearance in this action, to the second and third causes of action" he demurs, etc., is not voluntary, and does not prejudice his rights. *Maholm v. Marshall*, 29 O. S., 611; sections 5020 and 5031, Revised Statutes.

The motion to strike out will therefore be granted, and the action, as to said second and third causes of action, will be dismissed.

The defendant, Hinton, has filed a general demurrer to the first cause of action, claiming that it is shown therein to be a partnership indebtedness, upon which there has been no settlement, no balance struck, or special promise by him for its payment.

It is apparent, from the face of the pleading, that this matter has never been settled or agreed upon by the partners as to the amount of the service and value thereof; and it is expressly averred that the contract for the use of the pile-driver was made by the partnership, and the promise of payment then was by the partnership, and there is no allegation of any special individual promise of payment by Hinton or Fletcher at any time.

In the absence of any such averments, as to a settlement between the partners or special promise of payment, no right of action against the partners is shown. *Pomeroy Remedies and Remedial Rights*, section 104; *Neil v. Greenleaf*, 26 O. S., 567, 570; *Collyer on Partnership*, pages 333, 339, notes.

The demurrer will, therefore, be sustained, and ten days will be allowed to file amended petition as to this first cause of action.

S. T. & W. S. Crawford, for plaintiff.

Nesbitt & Martin and E. J. Howard, for defendant.

ARBITRATION AND AWARD.

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[Pickaway District Court, March Term, 1884.]

Minshall, Loudon and Gregg, JJ.

†JOSEPH HASSENPFUG V. WILLIAM RICE.

1. The law relating to awards at common law is in force in this state. When the parties proceed at common law, the statute is not applicable to any part of the proceedings.
2. At common law the arbitrators and witnesses need not be sworn.
3. The allowance of usurious interest in the award was not illegal, there being a new and distinct consideration for it in this case. Besides, the agreement to arbitrate furnished a new consideration.
4. At common law it is not necessary that the award should show on its face that the parties were notified, or that they met at the place designated, or that witnesses were examined, evidence offered, or that the award was published from the office of the arbitrator.

This case came before the court on a petition in error filed to reverse the judgment of the court of common pleas. The case was tried in the court of common pleas before Judge Lincoln, who found for the defendant; and a bill of exceptions was taken (after a motion for a new trial had been overruled), in which bill of exceptions all the testimony was set forth.

The facts were as follows:

On the 29th day of March, 1881, the plaintiff and defendant entered into an agreement, in writing, submitting "all differences, damages and claims whatsoever now existing between the parties" to the decision of Palmer Low—the said award to be in writing and signed by said Low.

The said matter was to be heard by him at his office, at such time as he should appoint, reasonable notice thereof to be given to the parties, and the said Low was authorized to adjourn the said hearing at his pleasure. The submission contained this clause: "The undersigned mutually promise and agree to abide by and perform the award of the said arbitrator. It is further agreed that a certain promissory note made by said William Rice to said Hassenpflug, dated April 1, 1866, for \$448.10, shall be submitted to the said arbitrator, and in calculating whatever may be due thereon, the interest shall be computed at ten per cent. per annum."

This note was made payable with interest at ten per cent. per annum until paid.

The parties were notified to appear before the said arbitrator, and did appear before him, and submitted their claims. The plaintiff submitted, in writing, a claim for various sums of money paid to the use of said Rice at his request, amounting to \$937.23 paid in the years 1867 and 1868, and he allowed offsets paid by Rice on said account to the amount of \$867.25. In addition to these offsets, Rice claimed certain payments and credits. The arbitrator rejected all the claims on both sides, except the said promissory note; and made the following award:

"Award of arbitrator in case of Joseph Hassenpflug v. Wm. Rice, submitted to me as arbitrator on the 29th day of March, 1881, as per submission in writing in my possession: I find that the said William Rice is indebted to the said Joseph Hassenpflug as follows: On one promissory note executed to said William Rice and payable to Joseph Hassenpflug, dated April 1, 1866, and bearing interest at ten per cent., amounting at this date to the sum of \$1,169.06. I further find that said William Rice is entitled to a credit thereon of \$100, paid April 13, 1877, with interest thereon to this date, at 10 per cent., amounting to \$150, leaving balance due Hassenpflug of \$1,018.84. Dated April 18, 1882. Fees of arbitrator, \$25—each party to pay one-half.

(Signed)

"PALMER LOW."

An action was brought by Hassenpflug on this award.

The defendant filed his answer to the petition of the plaintiff, alleging that the said award was void, for divers reasons, and among others the following:

1. That the said arbitrator was not sworn.
2. That the witnesses before said arbitrator were not sworn.

†This judgment was affirmed by the Supreme Court; see opinion, 45 O. S., 377.

3. That a large number of items were presented to said arbitrator for his consideration, all of which he willfully or negligently overlooked and did not pass upon.

4. That the said award failed to show that the parties were notified, or that they met at the office of the said Low, or that witnesses were examined, or that evidence was offered, or that the said award was published from the office of the said Low.

5. That said Low neglected to inform the parties when the said award would be published, and the said Rice had no knowledge that the same was to be published, until he received a copy of the pretended award through the post-office.

6. That the allowance of interest at ten per cent. per annum upon the said promissory note was unlawful and usurious.

Page, Abernethy and Folsom, for Hassenpflug.

1. The award is a good common law award. We do not pretend that it is a statutory award. Childs, Exr., v. Updyke, 9 O. S., 333; 1 Disney, 370.

2. At common law an arbitrator need not be sworn. Morse on Arbitration, pp. 110 and 111; nor need the witnesses be sworn.

3. It is not necessary that notice be given to either party of the making of the award. Morse on Arbitration, pp. 285, 290, 279; 1 Stephens *Nisi Prius*, p. 131; 1 Jacob Fisher's Dig., 393.

4. The arbitrator had a right to compute the interest at ten per cent. The allowance of interest at a greater rate than that allowed by law for the *past* use of money, where there is a new consideration, is not usury. The submission of the matter to arbitration furnished a consideration on each side. Besides, Hassenpflug testified that he never would have submitted his claim to arbitration if Rice had not agreed that the interest might be computed at the rate specified in the note, to-wit: ten per cent. per annum. 1 Sutherland on Damages, 531; Green v. Adams, 14 Am. Rep., 131; 1 Stevens, *Nisi Prius*, 161; 3 Pars. on Cont., 152; Morse on Arb., 185; Chase v. Chambers, *ante*, 000; Cunningham v. Green, 23 O. S., 296. It is no ground of objection that an award is contrary to law. Morse on Arbitration, 297.

5. An award may be a sum in gross. Morse on Arbitration, 265, 254-5; 1 Bacon's Abridgment, 338, 339; 37 Barb., 251; 12 Wend., 156; 16 Mass., 395; 2 Am. Law Reg., 637; 6 Wait's A. & D., 540, 541, 546 and 547.

6. Awards are final and conclusive like the judgments of a court of law, as to all matters within the submission, and unless there is fraud or misconduct on the part of the arbitrators, extrinsic evidence is not admissible to invalidate it. It cannot be shown that the arbitrators were mistaken. 6 Wait's Act & Defenses, 530.

7. The award recites that it is made "as per submission in writing in my possession." This shows that it is made in reference to the dispute between the parties. Gray v. Guennap, 1 B. & Ald., 106. An award ordering the payment of money carries mutuality in itself, as it must be held to be a satisfaction of the matters submitted. See cases cited in 6 Wait's A. & D., 541. The arbitrator required each party to pay one-half the costs. This is sufficient, and puts an end to all matters submitted, forever. 6 Wait's A. & D., 543.

8. *Prima facie*, an award is good, although not coextensive with the submission, because it is presumed that it embraces all that was called to the attention of the arbitrator; and if in fact other matters were called to their attention and not passed upon by them, *the fact must be proved*. 6 Wait's A. & D., 539.

9. No particular form of award was required at common law. It might be verbal. Morse on Arb., 256; Comyn's Digest, Arbitrament, B., 20.

P. G. Bostwick, for Rice.

MINSHALL, J.

1. The submission and award in this case were made according to the common law remedy in cases of arbitration. It is not claimed by the counsel for the plaintiff that they were made according to the statute, or are valid under the statute. We have no doubt whatever that the law relating to awards as at common law is in force in Ohio. This is clearly settled in the case of Childs v. Updyke, 9 O. S., 333. The remedy by statute is there declared to be simply cumulative. When the parties proceed at common law, we are of the opinion that the statute is not applicable to any part of the proceedings.

2. It is clearly settled that in common law arbitrations the arbitrators need not be sworn, and we think it equally certain that the witnesses need not be sworn. The arbitrator has no authority at common law to administer the oath, and an oath administered to the arbitrator or to the witnesses even by an officer having authority to administer oaths, would be extra judicial, and perjury could not be assigned in such case.

3. In regard to the question of usury, the court is of the opinion that the allowance of ten per cent. interest upon the note was not illegal under the circumstances. There was a new and distinct consideration for it, as there is in cases of partnership or contracts of sale, and many other contracts where the payment of a greater rate of interest than the law allows forms a part of the price at which an article is to be sold. In the present case the chief consideration for the submission was the agreement to permit the arbitrator to allow the rate of interest which had been formerly stipulated for in the promissory note. Besides, the agreement to arbitrate of itself furnishes a new and distinct consideration.

4. It does not appear on the face of this award that the arbitrator neglected or refused to consider all matters submitted to him. In regard to the testimony on this subject, the arbitrator states that he did consider all matters that were brought to his attention and "threw them out." This of course means that he rejected them after he had considered them.

5. The court is of the opinion that at common law it is not necessary that the award should show on its face that the parties were notified, or that they met at the place designated, or that witnesses were examined, or evidence offered, or that the award was published from the office of the arbitrator. If, in point of fact, a party was not notified, he may show that fact by testimony. It appears from the answer of the defendant that the award *was* delivered to him. He testified in the case, and does not deny it. We do not think it was necessary to give him notice that the award was about to be published. At common law an award need not be in writing unless the parties require it, and it may be delivered *ore tenus*. 6 Wait, A. & D., 534.

6. The court will make all reasonable presumptions in favor of awards valid upon their face, and they will be sustained, unless these presumptions are overcome by full proof. These positions are fully supported by cases cited in 6 Wait's Act. & Def., pp. 546 and 549.

Cockburn, C. J., says, in *Hodgensin v. Ferrie*: "It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been decided certainly go the length of deciding that unless there be something upon the face of an award to show that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it. So, here the parties have selected their own tribunal, and they are bound by the decision, be it right or wrong." 3 C. B., N. S., 189.

In the case of the *Boston Water Power Co. v. Gray*, 6 Met., 181, Chief J. Shaw said: "In general, arbitrators have full power to decide upon questions of law and fact which directly or incidentally arise in considering and deciding questions embraced in the submission. When not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted, because they are judges of the parties' own choosing. Their decision of matters of law and fact, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive—which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*; it is the final judgment for that case. * * * Therefore, it would be as contrary to principle for a court of law or equity to rejudge the same question as for an inferior court to rejudge the decision of a superior, or for one court to overrule the decision of another, where the law has not given appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous."

We think, therefore, the court of common pleas erred, and the judgment is reversed.

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FREIGHT RATES—PLEADING—TRIAL.

[Cuyahoga District Court, April, 1884.]

†H. T. THOMPSON & CO. v. C., C. & I. RY. CO. ET AL.

1. Under Revised Statutes, 3373, in an action against a common carrier, for enforcing discriminating rates, if the plaintiff purchased the property deliverable at its destination, at a fixed price, including freight, he is not the party to recover, and the seller alone can complain.
2. The discretion of a trial court in overruling a challenge will not be reversed where it appears that the juror stated that he worked for the defendant whenever he was sent for, that he was not on the pay roll and not then employed, and where such disclosure was volunteered in an answer to a general question put to the whole jury.
3. It is proper for the court to strike from a pleading an allegation of the manner of service of summons upon a defendant in another case, for the manner of service shown by the officer in conclusion.
4. The statement of a physician as to the severe illness of a witness, whose deposition is taken, which statement is accidentally taken to the jury room, will not warrant reversal of the judgment, no allusion being made to the subject-matter of the case, although it may have tended to arouse sympathy for the witness, as one about to die, and cause undue weight to be given to his testimony.

ERROR to the Court of Common Pleas.

LEMMON, J.

The first assignment of error in this case states that the court of common pleas erred in granting the motion of defendants to strike from plaintiff's reply.

The error assigned fails to inform this court what it was, the striking of which from said reply is alleged as error. In looking at the reply referred to, we find a portion of the same so obliterated by pencil lines drawn over the writing as to obscure the reading, and rendering a portion of the reply unintelligible.

We might dismiss this assignment of error from further consideration with the remark, that a pleading so obliterated would not claim the attention of the court.

We have endeavored, however, to make out and read the obliterated writing, and have succeeded so far as to find the reply to contain a statement of the service and the manner of service of summons in the action upon the Cleveland, Tuscarawas Valley & Wheeling Ry. Co. This portion of the reply being the part obliterated is, we may presume, the part ordered by the court of common pleas to be stricken out. With this action of the court of common pleas, we are content. The service of process in an action should be shown by the return of the officer making the service, and with the return so made the parties are concluded, hence, it was proper that the court should on motion order so much of plaintiff's reply, as contained a statement of the service of summons on a defendant from the pleading; this the court of common pleas did, and we approve and confirm their action in this regard.

For a second assignment of error the plaintiff says that the court of common pleas erred in overruling plaintiff's challenge to a juror.

†Leave to file petition in error to this case, in the Supreme Court, was refused February 17, 1885.

From the bill of exceptions it appears, that R. A. Jones being called as a juror, the plaintiff inquired whether any of the jurors were employees of either of defendants, whereupon said Jones arose and stated that he had worked for the first named defendant, the C., C., C. & I. Ry. Co., that plaintiff then challenged said Jones for cause, and thereupon said Jones, in answer to questions by the court, said he had worked for the first named defendant, hauling away dirt, ashes and rubbish from their depots in Cleveland; that he did their hauling of that kind when they sent for him to do so; that he had no contract with them about it; that they sent for him when they wanted him to do such work; that he was not on any pay-roll, was not then in their employ; that they did not, he supposed, consider him an employee of the company; that he also hauled and worked for others; that he sometimes was employed three or four days in a month working at depots, and sometimes only part of a day. And thereupon the court of common pleas overruled said challenge. The statute provides that "if there shall be impaneled for the trial of any cause, any petit juror * * * who is either party's employer, employee, counselor, agent, etc., etc., he may be challenged for cause * * * and the same shall be considered as a principal challenge, and the validity thereof shall be tried by the court, and any petit juror who shall be returned for the trial of any cause and against whom no principal cause of challenge can be alleged, may nevertheless, be challenged on the ground of prejudice against or partially for either party * * * or any other cause that may render him at the time an unsuitable juror, and the validity of such challenge shall be determined by the court."

The court of common pleas overruled the challenge of the plaintiff to the juror Jones, doubtless holding (correctly as we think), that Jones was not an employee of the C., C., C. & I. Ry. Co. The court of common pleas must have further held that the former transactions between said Jones and said defendant did not, so far as disclosed, show any prejudice for or against either party by said juror, nor that he was a partial or unsuitable juror to try the issues between the parties. In this ruling we see no error. Where a juror manifests no disposition to conceal the relations which have existed between him and a party, but makes a statement apparently frank and free, something more should be found to evidence his unfitness to fairly try an issue, than the fact that he had been occasionally employed by one of the parties to do temporary jobs. Some place must be given to the judicial discretion necessarily vested in the court before whom the impaneling of the jury proceeds. Before we should proceed to reverse for this cause something more should be shown us than the naked possibility that the juror, Jones, might have been influenced in his determination between the parties by circumstances so remote and inconsequential.

The third assignment of error states that the court erred in the charges given to the jury; the fourth, that the court erred in refusing to give the charges requested by plaintiffs to be given. We will consider these two assignments together. The specific objections taken to the charge of the court as given are, that the court of common pleas, assume the action to be brought under the statute, section 3373, for the recovery of the statutory penalty against carriers for enforcing discriminating rates; that the court instructed the jury that the action was one to recover such statutory penalty, and nothing else, and particular objection is made because the court instructed the jury that if they found from the evidence that plaintiffs purchased coal from O. Young & Co.,

to be delivered in Cleveland, then it was no concern of the plaintiffs what charges for carriage the defendants imposed; that was a matter between O. Young & Co. and defendants, and because in this connection the court said to the jury, that the plaintiffs could not recover in this action unless the jury found that defendants had imposed and collected of plaintiffs, upon coal of plaintiffs, shipped by the plaintiffs, rates in excess of those charged by defendants to others for carriage of the same or like property in the same direction at the time and over distances as great or greater than the distance along which the property of plaintiffs had been carried.

The court in this connection, directed the attention of the jury to the question, whether the coal when received and shipped by defendants, was the property of plaintiffs or the property of the miners from whom plaintiffs purchased; and to the question whether the plaintiffs purchased the coal at the mines to be delivered to plaintiffs at Cleveland, as was claimed by defendants—with freight added; and the court said to the jury, that if the jury found such claim of defendants to be the fact their verdict should be for defendants; and to determine this question, the court instructed them to look to all the evidence in the case bearing on that question, including letters of Young & Co., to plaintiffs. The jury were instructed if they found the coal when shipped was the property of plaintiffs, and that it was shipped by plaintiffs either in pursuance of a special contract or without any special contract, in which case the law would imply a contract, and the jury found that defendants imposed a charge on the carriage of said coal in excess of the freight charged and received by them from others for the carriage of coal from the same place or from places more distant, to the same point of delivery at the same time, then their verdict should be for plaintiffs for the statutory penalty, and for each such excessive charges they should find for plaintiffs a verdict. If, however, they found that the coal was sold to plaintiffs by the miners thereof to be delivered to plaintiffs at Cleveland, for a price agreed upon, which price was to include the price of the coal and of its carriage to and delivery at Cleveland, and the jury found that upon the coal so shipped and delivered, the defendants collected from plaintiffs on delivery the price of the coal including freight, then the plaintiffs could not recover, even though the jury found that defendants allowed and paid to the miners of the coal a rebate or drawback as charged by the plaintiffs.

To the instructions so given, and to each of them, the plaintiffs in error being plaintiffs below, in due time excepted, and they asked the court, in a series of requests to charge, to modify, and, in some respects, to overrule the instructions so given. The requests to charge so presented by plaintiffs, the court refused to give. Some of the requests were refused for the reason that they were embodied in the charge as given, others because inconsistent with the rulings and opinions of the court.

After a careful examination and consideration of the charge as given, of the requests to charge so refused, of the pleadings in the case, and the statute under which the action was brought, we have been unable to find any error of which the plaintiffs have cause to complain. Indeed, we feel it due to the court who presided at the trial, to say that the charge in the respects complained of, was explicit, clear and free from error; and that the record furnishes abundant evidence that the plaintiffs were given a fair and impartial trial.

Upon the trial a circumstance occurred which plaintiffs in error allege gave to the testimony of an important witness, improper weight to their injury.

One Young, a witness in the case, was taken sick, and an affidavit of his physician was read to the court, as it is said, in the hearing of the jury, stating Young's severe illness, and his inability to attend the trial; the court allowed adjournment to give opportunity to take his deposition, which was taken and read in evidence upon the trial. By some means, presumably an oversight of counsel, the physician's statement was found among the papers committed to the jury upon their retirement, and this is alleged as an error occurring at the trial, to the injury of the plaintiffs in error. No fraud or improper conduct is imputed to any one, and it will be observed that the statement of the physician contains no allusion to any of the matters in issue between the parties. Yet it is said that the statement tended to excite sympathy for the afflicted witness, and because of the probability it presented that the witness would not long survive, the jury may have been influenced to give undue weight to the statements of such witness.

We think the circumstance alluded to is not of sufficient importance to warrant this court in reversing the judgment of the court of common pleas. Matters of this character are liable to arise frequently during trials, and they in fact do not infrequently arise. If judgments were to be reversed for such cause, the expense and uncertainty of judicial proceedings would be largely enhanced, to the detriment of public interests. Before this court can endorse such a practice, it will require satisfactory evidence that the incident, whatever it may have been, prevented an impartial determination of the case. Something more will be required than a mere suggestion of the possibility of influence, from a circumstance apparently so unimportant, not chargeable to the procurement or act of the prevailing party.

Upon the record as a whole, we are impressed with the opinion that the plaintiffs in error were given a fair and impartial trial, that the rulings of the court were not unfavorable to them, and not erroneous, and that the parties should be held to abide the result.

The petition in error will be dismissed with costs and the cause remanded.

W. C. Rogers, for plaintiffs in error.

H. H. Poppleton and Joel W. Tyler, for defendant in error.

BANK CHECK—ALTERATION.

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[Hamilton District Court.]

JOHN DEMPSEY v. ELIZABETH MORAN.

In an action upon a bank check, as of date January 15, 1877, but bearing the appearance of having been altered to January 25, 1877, the maker set up the alteration in defense: *Held*:

1. That the alteration was material. 1 Ex. Div., 176.
2. That the alteration was not, either upon its face, or in connection with accompanying circumstances, peculiarly suspicious, or beneficial to the holder.
3. That upon the issue the burden of proof was on the defendant.

4. That it was error to charge the jury, "The burden of proof of showing when, how, and by whom, such alteration in the date of the check in controversy was made, such alteration being apparent on the face of the instrument, is upon the plaintiff, such alteration being one that would be beneficial to the holder"—citing *Huntington v. Finch*, 3 O. S., 445; 37 Am. R., 259, 25 Kan., 510, and cases in note; 10 Rep., 418; 63 Mo., 63; 44 N. H., 227; 8 Ex. Div., 171; 11 Conn., 531; 6 Cush., 314; 133 Mass., 566; Wharton on Evidence, sec. 629.

ERROR to the Court of Common Pleas.

BUCHWALTER, J.

The action was by plaintiff, Dempsey, against the executrix of Moran, upon a certain check for \$2,320.60, drawn by James Moran in his lifetime in favor of the payee, Edward McDonald, upon the Lafayette Bank, averred to be dated January 15, 1877, and endorsed to plaintiff, recovery sought against the estate of the maker, James Moran, and the estate of the payee and endorser, Edward McDonald. The defendant, Moran, answered and admitted the execution of the check as of date January 15, 1877, but averred that there had been a material alteration in the check by changing the date from January 15 to January 25, 1877, without the knowledge or consent of the maker, thereby discharging his estate from liability, all of which was denied by the reply.

Other issues were raised by the pleadings, and upon the trial of the case a general verdict of the jury was given against the plaintiff and in favor of both of defendants, and upon motion for a new trial the court granted the same and set aside the verdict as to the endorser, McDonald, but overruled the same, and entered judgment upon the verdict against plaintiff as to the defendant, Moran.

Of the errors alleged, it is claimed the court erred in its charge to the jury upon the alteration of the check.

The part especially complained of is in the following words: "The burden of proof showing when, how, and by whom, such alteration in the date of the check in controversy was made, such alteration being apparent on the face of the instrument, is upon the plaintiff, such alteration being one that would be beneficial to the holder, whether it was held by McDonald or the plaintiff."

The court, in another part of its charge, instructed the jury that the alteration from the 15th to the 25th of January was a material alteration, and in this regard the charge is supported by authority. 1 Ex., Div. B., L. R., 176.

As to what presumption arises and as against whom the presumption arises when an alteration is made in the date of the check, is a much mooted question. Various rules have been laid down, apparently supported by authority, among them the one which was adopted by the Supreme Court of this state in *Huntington v. Finch*, *supra*, that, "where such alteration appearing on an instrument is not peculiarly suspicious and beneficial to the person seeking to enforce it, the alteration will be presumed to have been made either before the execution of the paper or thereafter, by the agreement of the parties.

It is also mooted whether it is a question of law for the court to determine, or one of fact for the jury, under proper instructions by the court, as to whether a material alteration apparent on the face of the paper is peculiarly suspicious or beneficial to the holder. It was held in *Paramore v. Lindsey*, 63 Mo., 63, that "in the first instance the preliminary question, whether the alteration bore marks of suspicion, would be for the court on inspection of the instrument; that if the altera-

tion was suspicious on its face * * * the question of time and intent of the alteration should ultimately rest with the jury; that, in the absence of such suspicious circumstance, the presumption would be that the alteration was made prior to or contemporaneous with the execution; and likewise, it was held by McCreary, J., in *Cox v. Palmer*, 10 Rep., 418, where the court citing *Huntington v. Finch*, as laying down the rule by which the apparent conflict of authorities may be reconciled, also held that the question whether the alteration in the check was peculiarly suspicious or beneficial to the holder was a question of law for the court. It was held to the contrary in *Cole v. Hill*, 44 N. H., 234, viz., that it was a matter of fact to be determined not by the court but by the jury, with proper instructions.

In the case at bar, by the proof, it appears that when the check was dated January 15, 1877, the maker had no money in his bank, and did not deposit any or open an account until the twenty-fifth of January. And then again it appears in proof that when McDonald presented the check the second time at the bank this alteration appeared upon it. An explanation was made by him that he understood the funds were to be there that day, the 25th. And again, on the same day, McDonald, the payee, and Moran, the maker, appeared, and at a desk in the bank had a conference together. The proof is conflicting as to whether Moran in fact wrote the figures "1" and "2," and does not show that either were written by the hand of Dempsey or McDonald. There is no great dissimilarity in the ink by which the figures "1" and "2" were written. It is accountable in common experience by having applied the blotter to the figure "2" immediately after it was written, and to have let the ink dry as to figure "1;" there is no fact apparent in proof by which the holder of the check, either as McDonald or Dempsey, obtained any advantage by reason of the change.

If the court sought in this case, as appears by so much of the charge as herein stated, to determine as matter of law upon whom rests the burden of proof—granting it to have been the province of the court—there were no facts to sustain the conclusion that the burden was on the plaintiff; for the alteration was not, either upon its face or in connection with the accompanying circumstances, peculiarly suspicious or beneficial to the holder. Carrying the rule to its utmost limits as against the holder of the paper, if the burden were rightly determined as matter of law by the court, he could not be held to explain when, where, and by whom altered; it was sufficient, as held in *Drum v. Drum*, 137 Mass., 566, if the holder account that he himself or his agents, or those through whom he claimed, have not made the alteration and show the care and custody of the check or note; but he was not bound to show who did it, or the circumstances under which the change was made, simply to clear himself from the implication that he had made it purposely to affect the instrument. If the court sought, as appears in other portions of the charge to refer it to the jury to determine as matter of fact, then that portion of the charge prejudged the finding by the jury.

In this case the plaintiff was not seeking to recover upon an altered check. He was seeking to recover upon the check in its original date, and as has been held by numerous authorities, if an alteration has been made to carry out the purpose and understanding of the parties, or if made by the holder in good faith to carry out the agreement of the parties, which is thereafter repudiated by the maker, that the holder may restore the note to its original condition and bring this action on it in that state,

it appearing that the alteration was made in good faith and not for the purpose of fraud—18 Ind., 448; 13 O. F. Smith, 187; 11 Gray, 390; 51 Ia., 457; Byles on Bills, 7 ed., note, p. 326.

By the issues in this case the burden of proof was on the defendant. The defendant pleaded that the change was made by the plaintiff, and while it would have been proper for the court to instruct the jury with reference to presumptions arising in the event they should find as matter of fact that the alteration was suspicious and beneficial to the holder, yet that did not shift the burden of proof upon the plaintiff who duly called for instructions as to presumptions on the facts in proof. *La Boiteau v. Insurance Company*, 5 Dec. R., 242, (s. c., 4 am. Law Rec., 1.) superior court, general term, 1875. As there were other vital issues in the case, at least one of payment by the substitution of another check; it is to be regretted that the record does not disclose a special finding upon this issue of the alteration of the check, but we cannot determine whether it was their finding under this charge of the court that led the jury to the verdict in the case, or if it was upon the other issue. "A misdirection of the jury as to the burden of proof is error for which the judgment will be reversed at the instance of the party prejudiced thereby." *McNutt v. Kaufman*, 26 O. S., 127. For this error, therefore, the judgment must be reversed and the cause remanded for further proceedings at the cost of defendant Moran.

T. C. Mallon & Coffey, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

*CITY INSURANCE CO. v. JOHN E. ROBERTS AND EDWIN STEVENS.

*For opinion in this case see 6 Dec. R., 1213 (s. c., 12 Am. Law Rec., 744).

220 LOST CERTIFICATE OF DEPOSIT—INDEMNITY BOND.

[Hamilton District Court.]

†CITIZENS' NATIONAL BANK V. EUGENE E. BROWN.

Brown deposited with the bank, on August 9, 1882, \$1,145, and received a certificate of deposit, payable to his order on return thereof. The certificate, being undorsed, was lost by Brown on the sixteenth day of September, 1882, and he immediately notified the bank thereof, and on the eighteenth day of September, 1882, demanded payment. The bank refused payment unless Brown gave an indemnity bond: *Held*, On these facts that Brown was entitled to recover against the bank on his lost certificate without condition or indemnity, and that recovery in this action, or payment to Brown, would be a bar and complete defense to any other action on this certificate of deposit.

ERROR to the Superior Court of Cincinnati.

BUCHWALTER, J.

The defendant in error sought recovery against the bank upon a lost certificate of deposit, dated August 9, 1882, in the sum of \$1,145, payable to his order upon the return of the certificate. He averred that he lost this certificate, undorsed, Sep-

†See opinion of Supreme Court, 45 O. S., 39, affirming the above.

tember 16, 1882, of which he gave immediate notice to the bank, and demanded payment September 18, 1882. The bank admitted the deposit, the giving of the certificate, the notice of the loss, and demand for payment; but refused payment unless indemnified against liability upon any subsequent demand and recovery by the finder or holder of the certificate. On the trial the defendant in error recovered judgment as asked. For the reversal of that judgment this error is prosecuted.

We have read the proof given before the trial court, and find that the defendant in error, on September 16, 1882, between 7 and 10 P. M., visited several drinking saloons in the city, with his uncle, a Mr. Allen, and was somewhat intoxicated, but able to give an account of himself; that at a restaurant on Vine, where he and his uncle took a meal, he boasted of the money he had made and saved, as evidenced by this certificate of deposit, which he exhibited. Both testify it was not then indorsed and that Brown put it back into a memorandum book which he returned to his vest pocket. After their meal both went to Main street, and Brown took a street car for his home at Ninth and Main streets, fell asleep and rode to the head of Main street, where he was awakened by the conductor, who demanded another fare to return down the street, and therefore he discovered that his pocket book with the certificate of deposit was lost.

It was claimed by counsel that if there was a possibility that the certificate was not lost as claimed, or indorsed when lost, that recovery should not have been had. But viewing it by the test which counsel would demand, we are satisfied from the proof beyond even a reasonable doubt, that the certificate was lost without indorsement as claimed, it appearing without contradiction that it was seen but a short time before, and that his pocket book was lost at the same time.

The trial court, upon the proof offered, found that the certificate, when lost on September 16, 1882, was not indorsed by the plaintiff, that on September 18, 1882, demand of payment was made from the defendant, and that certificate was then overdue and payable, but that the defendant refused to pay the same.

The certificate of deposit in question was a negotiable instrument within the meaning of sec. 3171, Rev. Stat., but only by the indorsement of the payee, Brown. *Howe v. Hartness*, 11 O. S., 449; *Miller v. Austen*, 13 How. (U. S.), 218.

The stipulation in this instrument to pay "on return of this certificate," does not make it payable upon a contingency, or constitute a condition precedent to any payment; such provision is implied if not expressed, in every promissory note. It is a part of the law merchant that such note shall be returned to the maker upon the payment thereof, but the failure to so return will not defeat recovery. *Frank v. Wessels*, 64 N. Y., 155; *Hunt v. Devine*, 37 Ill., 137.

This certificate being drawn payable to Brown's order and lost without indorsement, no other recovery can be had thereon, even if found. This action would bar Brown from further recovery, or any one claiming by an after transfer. He who could forge the payee's name cannot recover, and were he to transfer it to another who, without knowledge, pays value therefor, such person could not recover. By proof of the forgery the bank can make a complete defense. In *Thayer v. King*, 15 O., 242, recovery was asked in an action at law upon three promissory notes, indorsed on the back but past due when lost and recovery had. The court held that any person finding the notes, though indorsed, or any person to whom they might be transferred, could not recover, because such person must take them with such equities as existed between the parties at the time of the loss.

In *Lamson v. Pfaff*, 1 Handy, 449, a recovery at law was sought upon a lost bill of exchange, of which an acceptance had been sent by mail from P. to L., payable to L.'s order six months thereafter, but never received by L., and thereby lost before due. The court, Gholson, J., in special term, held on these facts there was a right of recovery in an action at law, without indemnity; that the acceptance not being indorsed, no other person could thereafter recover in any other action founded thereon.

We are of opinion that the facts in proof put this case clearly within the rule stated in *Thayer v. King*; that the proof makes out a case as stated by plaintiff Brown in his petition, which this court (as otherwise constituted) held stated a good cause of action. *Brown v. Citizens' Nat. Bank*, *ante*, 000.

The rule as here stated and as held in the foregoing authorities, as to the right of recovery without indemnity, is controverted by the English rule, and likewise by the New York cases as cited by counsel, but the latter are founded on a statute requiring an indemnity in all cases, whether the lost instrument be indorsed or not, due or overdue. Vol. 2, N. Y. Laws, 406, secs. 75 and 76, as cited in 64 N. Y., 155.

With these views upon the foregoing issues, it is unnecessary to here state our conclusion upon the question whether this certificate was overdue when lost. The

authorities cited lead to much controversy. Of those tending to sustain the affirmative, there are, 36 Mich., 494; 37 Ill., 137; 29 Cal., 503; 1 Met., 369; *Howe v. Hartness*, *supra*; and if held to be determined by rules governing demand paper, then, *Hill v. Henry*, 17 O., 9; *Darling v. Wooster*, 9 O. S., 518. *Contra*, 18 Md., 320; 40 Vt., 377; 6 Hill, 297; 29 N. Y., 146; 41 N. Y., 581; 68 N. Y., 314.

For reasons hereinbefore stated, judgment of Superior Court is affirmed with costs.

Paxton & Warrington, for plaintiff in error.

T. Q. Hildebrandt, for defendant in error.

***NOTE**—In the foregoing case the court announces three propositions: *First*, that the certificate of deposit is in effect a negotiable promissory note, and governed by the rules and principles applicable to that class of paper. *Second*, that being such a note—negotiable by indorsement—if lost by the payee without being indorsed, he can recover from the maker without giving indemnity against future liability—because no legal title can pass to the finder “so as to invest any one with the privileges of a *bona fide* holder” to whom the maker would be liable, hence “no indemnity would be necessary.” *Third*, the words “payable on the return of this certificate” on the certificate is not a condition precedent, and will not justify withholding payment until the certificate is produced or an indemnity given; or, in other words such words on a certificate are useless.

The first question; is such a certificate of deposit a negotiable promissory note? The court holds the affirmative on the authority of the cases cited. In *Howe v. Hartness*, cited by the court, the only question involved, as stated by Scott, J., was “whether a note drawn for a specified sum, payable in currency, is a note drawn for a sum of money within the meaning of the statute,” or in other words whether the term “payable in currency” means payable in money, and the court on the authority of *Miller v. Reid*, 1 Burr, 457; *Keith v. Jones*, 9 Johns, 120; *Judah v. Harris*, 19 Johns, 144; *Morris v. Edward*, 1 Ohio, 189; *Swetland v. Creigh*, 15 Ohio, 118; *White v. Richmond*, 16 Ohio, 5, held that the term meant payable in money. These authorities decide that point; hence *Howe v. Hartness*, is in line with these authorities as to this point. The facts were that defendants issued a certificate of deposit payable in currency to the order of F. C. Markham, who negotiated—(sold it)—to another bank within two days after issuance. The plaintiff being a creditor of Markham, garnisheed the defendants after they had delivered (mailed) it to the payee and the only question involved was whether the defendants held the debtor's money, the creditor asserting that “payable in currency” was not payable in money, hence defendants held the debtor's money. The court held that it was payable in money, and that as it was negotiable, being an unconditional promise to pay a sum certain to a certain person or order, and negotiated before overdue, the defendants were not liable.

The case of *Miller v. Austin* *supra*, was a contest between the indorser and indorsee, and the court held that as the certificate was negotiable, and was in fact negotiated, “every reason existed that could prevail in cases where the paper indorsed is in the ordinary form of a promissory note.” The question involved was, was the certificate sued on, negotiable inasmuch as it contained words of negotiability and the court held that under the statutes of Ohio, it was negotiable. In *Hunt v. Divine*, the point decided is that an action could be maintained before demand and return of the certificate; on the ground that it was a promissory note as held in *Bank of Peru v. Farnsworth*, 18 Ill., 565; but that case only decided that a certificate of deposit, payable four months after date, was within the law prohibiting the issuance by banks of bills or notes otherwise than on demand. In *Bellows Falls Bank v. Rutland County Bank*, the point decided was that the holder of a certificate of deposit properly indorsed to him and payable on presentation, cannot sue until special demand made. The certificate provided that it was “payable to the order of himself (the depositor) on presentation of this certificate properly indorsed” and to hold the indorser it was also decided that such certificate was negotiable, following in this respect *Smilie v. Stevens*, 39 Vt., 315, although the court stated that “the transaction was not a loan, but a deposit, and the rights and liabilities of the parties are to be ascertained and governed by the rules of law applicable to this sort of bailment.”

Deposits in banks are bailments. Story on Bail., secs. 84, 88, 107, and are of three kinds, (1,) evidenced by credit on the bank book and subject to check, (2,) evidenced

*Decided in the Supreme Court of Ohio, 45 O. S., 39.

by a certificate of deposit and (3) *special*, wherein the deposit is to be returned in *individo*. All are obligations to pay a certain sum, at a certain time, to a certain person; all are negotiable, the first by check or assignment, the others by the certificates, which represents the deposits in whole or in part. Hence these evidences of deposit contain the elements of a promissory note, but are not in form or in fact notes. They are evidences of deposit, and when the question litigated is the negotiability or non-negotiability of paper, and the liabilities arising therefrom, the rules and principles of the negotiability of commercial paper apply; and likewise as to the other questions whether there is an unconditional promise to pay? Whether or not it is a sum certain, payable to a certain person, at a certain time; in which case the principle of commercial paper governing the particular question involved would apply. Hence a certificate of deposit is a negotiable evidence of deposit. Story on Bailment, secs. 84, 88, 107; Pothier by Evans, 2 Ch., 126. In *Howell v. Adams*, 68 N. Y., 314, it was held that no action will lie until after demand for payment on such certificate, which is not the case in promissory notes. The same point was decided in *Downes v. Phoenix Bank*, 6 Hill., 297, and in *National Bank of Fort Edward v. Washn. Co. Nat'l Bank*, 5 Hun., 606, where the court held that "this is the plain and undoubted understanding of all the parties, and when, as in this case they make the certificate payable on its return, properly indorsed, they have then added to their original undertaking as a *depository*, an agreement that they will pay the deposit to the holder of that certificate properly indorsed. They are therefore under liability as *depository* to be ready to deliver the money whenever demanded, and to deliver it to any holder of that certificate properly indorsed. It follows, therefore, that they are liable to a *bona fide* holder of the certificate, notwithstanding a payment to the original depositor."

Sanbourn v. Smith & White, 44 Iowa, 152, holds the same doctrine. "It is to be observed," said the court, "that mere lapse of time does not render the money due; but the return of the certificate is necessary. Now what did the parties mean by the return of the certificate? Evidently they meant the bringing of it back to the place where it was issued." In harmony with the foregoing, that the deposit is a bailment and a *priori* that the certificate is the agreement or evidence of the bailment, are the following cases: *West v. Murph.*, 3 Hill, 284; *Montgomery v. Evans*, 8 Ga., 182; *Brown v. Cook*, 9 Johns, 361; *Hoffmer v. Clarke*, 2 Greenlf., 308; 1 Dane Abr. Ch., 17; *Kilgore v. Bulkley*, 14 Conn., 363, where the court stated, "A deposit merely, without a certificate, is an implied promise to pay by the bank. A certificate of deposit is an express promise to pay. The indorsement thereon in an order or draft on the maker directing him to pay the contents to the indorsee. This constitutes the certificate a bill of exchange, and imposes on the parties the ordinary liabilities attached to that kind of paper." *The Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt., 377, expressly asserts that the deposit is a bailment, and approves *Downer v. Phoenix Bank*, *supra*. And so the case of *The Fort Ed. Bank v. Washn. Co. Bank*, *supra*, and *Payne v. Gardner*, 29 N. Y., 146; *McLain v. Hoffman*, 30 Ark., 428; *Derrick v. Baker*, 9 Port. Ala., 362; *Stewart v. Frazier*, 5 Ala., 114; *Jackman v. Partridge*, 21 Vt., 558; *Keene v. Collier*, 1 Met. Ky., 417; *Aurentz v. Porter*, 56 Pa. St., 115; *Girard Bank v. Bank of Penn. Tp.*, 39 Pa. St., 92; *Union Bank v. Planters' Bank*, 9 Gill & John, 439; *Johnson v. Farmers' Bank*, 1 Harr, 177; *Willets v. Phoenix Bank*, 2 Duer, 121; *Mechanics Bank v. B. & D. Bank*, 4 Duer, 219; and *Patterson v. Poindexter*, 6 Watts. & S., 229, where the court held that such a certificate of deposit (payable to order upon the return of the certificate) is not a promissory note within the statute of Anne, but a bailment, and negotiable for the purposes of transfer only. "Nothing," said the court, "is a promissory note in which the promise to pay is merely inferential. Nothing is a promissory note in which there is no more than a simple acknowledgment of the debt with such a promise to pay as the law will imply," and it was to protect "the bank as a stakeholder between antagonistic claimants that the condition was introduced which was as foreign to the term of a promissory note, as would be a condition to pay out of a particular fund." That part of the opinion of this case which seems to deny the negotiability of this kind of paper, although containing words of negotiability, is not in harmony with the weight of authority; but that part above quoted has not been specifically criticized or denied. The farthest in rejecting this case was the New York court in *Pardee v. Fish*, 60 N. Y., 266, which seems to disapprove of the entire opinion, although the subsequent cases of *Howell v. Adams*, 68 N. Y., 314, and *Baughton et al. v. Flint*, 74 N. Y., 477, substantially hold such a deposit a bailment in line with the cases. *Downes v. Phoenix Bank*; *Payne v. Gardner*, *supra*; *Payne v. The State*, 39 Barb., 634; *Herrick v. Woolverton*, 41 N. Y., 600; *Hotchkiss v. Masher*, 48 N. Y., 478. The question in *Pardee v. Fish* was whether the indorser of such a certificate was liable, and the court held that he was, on the ground that the paper contained words and

elements of negotiability and was a negotiable paper, and hence the indorser was liable; following in this point—namely—that an indorser for value is liable—the current of authority. But it was expressly stated that the question whether the transaction was a deposit or a loan was not presented, and in view of this stated that *Hotchkiss v. Masher* and *Payne v. Gardner* did not apply, although the ruling might be correct. And why? Because the question involved was the liability of the indorser which was not in *Hotchkiss v. Masher*, and *Payne v. Gardner*; and follows *Miller v. Austin*, 13 How., U. S., 218; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Levitt v. Palmer*, 3 N. Y., 19; *Barnes v. Ontario Bank*, 19 N. Y., 152; the first case only being in point. The following cases also sustain this doctrine: *Marzetti v. Williams*, 1 B. & A., 415; 20 E. C. L., 412; *Bank of Utica v. Mayher*, 18 Johns., 345; *Saunderson v. Judge*, 2 H. Bl., 191; *Hart & Card v. Greene*, 8 Vt., 509; *Merritt v. Todd*, 23 N. Y., 28; *Hotchkiss v. Masher*, 48 N. Y., 478; *Herrick v. Woolverton*, 41 N. Y., 581.

The second proposition as announced in the principal case is not settled. The cases are as numerous against as they are for it, and perhaps more so, and the reasoning is certainly the best.

If a deposit, evidenced by a certificate is a bailment, then the conditions of the certificate, as in every agreement, must be complied with, and if the certificate is lost or destroyed, the recovery of the deposit can only be had by giving indemnity. If it is a negotiable bill or note, the decisions are conflicting as to when indemnity is required; some holding that it must be given in all cases, and others only when it is lost before due.

One position is, that an indemnity should be given in all cases of loss, whether it be the loss of a certificate of deposit, a note, or other negotiable paper. This is best shown in the case of *Welton v. Adams*, 4 Cal., 37, where the payee sued the maker for the deposit after the certificate had been destroyed by fire, and where the certificate was payable to the order of the payee, on the return of the certificate. The court held, that an indemnity must be given in all cases. "It is undeniable," said the court, "that upon the payment of a note or bill, the payor has the right to its possession. Can this be taken away without an equivalent? It is said that proof of its destruction is sufficient assurance that it can never afterwards appear. But when we reflect upon the uncertainty and fallibility of all human testimony, it looks unjust to force the risk of its reappearance upon a party totally innocent of fault, and who has not bargained with a view to any mischance which may in the future result to his injury." This is approved and followed in *Price v. Dunlap*, 5 Cal., 483; *Randolph v. Harris*, 26 Cal., 562, where the practice is stated. This position seems to have been first taken by Lord Tenterden in *Hansard v. Robinson*, 7 B. & C., 90, where in a contest on a lost bill of exchange by the endorsee against the acceptor, it was held that the bill must be produced, because, (1) the custom of the law merchant required this; (2) the payor has a right to have it; (3) and can refuse to pay unless produced. Lord Tenterden said: "As far as regards his voucher and his discharge towards the drawer, it will be the same thing whether the instrument has been destroyed or mislaid. How is he to be assured of the loss?" Rely upon the statement of the payee, or defend an action at his peril. "If the bill should afterwards appear, and a suit be brought against him by another holder, a fact not improbable in the case of a lost bill, is he to seek for witnesses to prove the loss, and that the new plaintiff obtained it after it became due? Has the payee a right by his own negligence or misfortune, to cast the burden upon the acceptor? The customs of merchants does not authorize us to say that this is the law." This rule was approved and followed in *Posey v. Decatur Bank*, 12 Ala., 802, where the court also cites to the same effect, *Chitty on Bills*, 297; *Story Notes*—and 2 Greenl. Ev., 131; and held in *Burrows v. Goodhue*, 1 G. Greene, 48; and followed in *Wilder v. Seeleye*, 8 Barb., 408; approved in *Smith v. Rockwell*, 2 Hill, 482; *Davis v. Dodd*, 4 Taunt., 602; *ex parte Greenway*, 6 Ves., 812; *Massop v. Baden*, 16 Ves., 430; *Powell v. Roach*, 6 Esp., 76; *Pierson v. Hutchinson*, 2 Camp., 211; *Smith v. Rockwell*, 2 Hill, 482; *Poole v. Smith*, Holt, N. P., 144; *Ramuz v. Crowe*, 1 Ex., 167; 18 E. L. & E., 514; *Pooley v. Millard*, 1 C. & J., 414; *Champion v. Terry*, 3 B. & B., 295; *Anderson v. Longdale*, 3 B. & A., 660. But the ruling in *Hansard v. Robinson*, and *Ramuz v. Crowe*, it was asserted in *Wain v. Bailey*, 10 Ad. & E., 616, and *Clay v. Crowe*, 8 Ex., 298, to be too broad, and it was therefore held that in case of a destroyed negotiable paper, if specially indorsed, or unindorsed, so as not to be transferable, but by indorsement, the payee can maintain an action on it, or sue for the original consideration; because no one else can acquire title to it; and *a priori*, no indemnity required. Thus modified, some decisions seem to assert that if the negotiable paper is lost before due, and is payable to bearer, or payable to order, and is indorsed, the remedy is in equity where indemnity is required. If lost after due, or before or after

due if undorsed, or specially indorsed, the remedy for recovery is at law. *Allen & Wycoff v. State Bank*, 1 Dev. & Batt., 1; *McNair v. Gilbert*, 3 Wend., 344; *Kirby v. Sisson*, 2 Wend., 345; *Chewing v. Singleton*, 2 Hill, Ch., 371; *Thayer v. King*, 15 Ohio, 242; *Smith v. Walker*, 1 Sm. & M., 432; *Aborn v. Bozworth*, 1 R. L., 401; *Pintard v. Tackington*, 10 Johns., 103; *Fales v. Russell*, 16 Pick., 315. The reason for holding that no indemnity is required, is that no person in such cases can obtain a *bona fide* title; but this reason does not seem to be as good as that announced by Lord Tenterden, that in all cases governed by the law merchant, the instrument should be produced or indemnity given. The court in *Stone v. Clough*, 41 N. H., 290, upon holding that the maker was entitled to the possession of the instrument, said: "So far has this been carried, that an indorsee of a bill having lost it, could not in an action at law, recover the amount from the acceptor," "but must first tender sufficient indemnity, and then if payment is refused, he may enforce payment in equity. Payment cannot be insisted upon by the holder of a bill or note, unless he produces the same and offers to deliver it up." This was held to be the rule in *Dangerfield v. Wilby*, 4 Esp. N. P., 159; *Bevan v. Hill*, 2 Comp., 381; *Story Prom. N.*, sec. 243; *Spencer v. Dearth*, 43 Vt., 93; *Otisfield v. Mayberry*, 63 Me., 198; *Tucker v. Tucker*, 119 Mass., 79; *Mayor v. Magnon*, 4 Mart. La., 4; *Miller v. Webb*, 8 La., 516; *McGregor v. McGregor*, 107 Mass., 546; *Bridgeford v. M. M. Co.*, 34 Conn., 546; *Almy v. Reed*, 10 Cash., 421; *B. Lead Co. v. McGuirk*, 15 Gray, 87; *Tower v. Appleton Bank*, 3 Allen, 387; *Tuttle v. Standish*, 4 Allen, 481; *S. & N. Bank v. Hoskins*, 101 Mass., 370.

About the best reason for the doctrine that indemnity is not necessary, is given in *Aborn v. Bosworth*, 1 R. L., 461, where after holding that the drawer must pay a bill of exchange lost on a steamer, said: "The holder is entitled to recover if it does not put the drawer in a worse position than he would have been if the bill had not been lost. If there is risk it should fall on the party through whose negligence or misfortune the bill was lost, and not upon the drawer. It is not enough to prove the loss, unless the bill was destroyed, specially indorsed or undorsed, so that the finder or any subsequent holder could not recover upon it. There should be no risk that the drawer may be called upon to pay the same bill twice." And in answer to this, is the language of the court in *Hinsdale v. Bank of Orange*, 6 Wend., 379. "If the owner of a bill loses it, he *cannot* recover, but if he can prove that it is actually destroyed, he may; because if lost to the rightful owner, it may yet be in the hands of a *bona fide* holder, or in the hands of one claiming to be such, and the maker may be called upon to pay it without having the means of showing that the holder is not entitled to payment."

In Illinois, the courts seem to follow *Rolt v. Watson*, 13 E. C. L., 480, although no mention is made of *Hansard v. Robinson*, or the reasons approved by *Story*. *McMillan v. Berthold*, 35 Ill., 254; *Porter v. Cushman*, 19 Id., 575; *Darby v. McConnell*, 13 Id., 358; *Wade v. Wade*, 12 Id., 92; *Rogers v. Miller*, 4 Id., 334.

The following are about equally divided on the subject: *Meeker v. Jackson*, 3 Yeates, Pa., 442; *Bishing v. Graham*, 14 Pa. St., 14; *Brent v. Ervin*, 3 Mart. La., 303; *Lewis v. Petayvin*, 4 Mart. La., 4; *Temple v. Gove*, 8 Iowa, 511; *H. Bank v. Adams Ex. Co.*, 45 Pa. St., 419; *Bullet v. Bank of Pa.*, 2 Wash. C. C., 172; *Rowley v. Ball*, 3 Cowan, 303; *Morgan v. Reintzel*, 7 Cranch, 275; *Renner v. Bank of Col.*, 9 Wheat., 581; *Anderson v. Robson*, 2 Bay, S. C., 495; *Swift v. Stevens*, 8 Conn., 431; *Peabody v. Denton*, 2 Gall., 351; *Freeman v. Boynton*, 7 Mass., 483; *Whitewell v. Johnson*, 17 Mass., 449; *Gilbert v. Dennis*, 3 Met., 495; *Jones v. Fales*, 5 Mass., 101; *Clarke v. Reed*, 12 Sm. & M., 554; *Torrey v. Foss*, 40 Me., 74; *Poorman v. Mills & Co.*, 69 Cal., 349.

There seems to be no controversy when the negotiable instrument is proved to be destroyed. *Hagerstown Bank v. Adams Ex. Co.*, 45 Pa. St., 419; *Bullet v. Bank of Pa.*, 2 Wash. C. C., 172; *Marten v. Bank*, U. S. 4 Wash. C. C., 255.

A certificate of deposit is a receipt of a bank or banker for a sum of money received upon deposit, and when it contains words of negotiability it is negotiable. At any early day, the goldsmiths of England engaged in banking, gave receipts to their customers for moneys deposited. *Nicholson v. Sedgwick*, 1 Ld. Raym., 180; 3 Salk., 67; *Chitty on Bills*, 522; *Byles*, 81; although the civil law recognized such bailment. *Pothier by Evans*, Ch. 2, and the statute of Anne, denoted them bills of exchange. They were known as bankers' cash notes. *Chitty*, 522; and the very nature of the instrument and understanding of the parties, show that they were and are intended to represent money left in the custody of the bank for safe-keeping, to be retained until the depositor demands it. *Bank of F. Ed. v. Wash. Co. Nat. Bank*, 5 Hun., 605.

When the certificate contains words of negotiability, and is a negotiable instrument, it is as to its negotiability, governed by the same principles which con-

trol all negotiable instruments; hence the liability of an indorser is the same as upon the indorsement of any promissory note, or other negotiable instrument. *Hazelton v. Union Bank*, 32 Wis., 35; *Pardee v. Fish*, 60 N. Y., 265; *Cate v. Patterson*, 25 Mich., 191; *Mills v. Barney*, 22 Cal., 240; but because it assimilates with a promissory note on the one point of negotiability, it does not follow that in every point it is a promissory note, and is in truth and fact such an instrument.

Some certificates of deposit are not negotiable, as when it does not contain words of promise, *Hotchkiss v. Mosher*, 48 N. Y., 482; or is only the evidence of an agreement; *Sibree v. Tripp*, 15 Mees. & Wils., 23; or merely an acknowledgment of a deposit, 1 Am. Lead. Ca., 307; or payable in specified bonds, *Easton v. Hyde*, 13 Minn., 90; or certain kinds of currency, *Lindsay v. McClelland*, 18 Wis., 481; *Huse v. Hamblin*, 29 Iowa, 501; although, as has been stated, payable in currency means payable in money, and does not of itself make the paper unnegotiable. *Drake v. Markle*, 21 Ind., 433; *Pardee v. Fish*, 60 N. Y., 265; *Klauber v. Biggerstaff*, 47 Wis., 551. Nor is the paper negotiable if it does not contain the negotiable words required by a state statute. *International Bank v. German Bank*, 3 Mo. App., 367. And although the Pennsylvania cases deny the negotiability of any certificate of deposit, *Patterson v. Poindexter*, *supra*; *Charnley v. Dallas*, 8 Watts & S., 353; *Lebanon Bank v. Mangan*, 28 Pa. St., 452; *London Savings Bank v. Savings Bank*, 36 Pa. St. 498; yet the weight of the authorities sustains the doctrine first advanced, that if the certificate contains negotiable words and possesses the requisite features of certainty in respect to parties, and time, and mode of payment, it is negotiable; but the cases do not go further than the settlement of this single point. *Miller v. Austin*, 13 How., U. S., 218; *Lynch v. Goldsmith*, 64 Ga., 42; *Kilgare v. Bulkley*, 14 Conn., 362; *Bank of Orleans v. Merrill*, 2 Hill, 293; *Tripp v. Curtenius*, 36 Mich., 494; *Lafayette Bank v. Ringel*, 51 Ind., 393; *Fells Point Sav. Inst. v. Weedon*, 18 Md., 528; *Welton v. Adams*, 4 Cala., 37; *Brummagin v. Tallant*, 29 Cala., 503; *Mills v. Barney*, 22 Cala., 240; *Cote v. Patterson*, 25 Mich., 191; *Poorman v. Mills*, 35 Cala., 118; *Blood v. Northrup*, 1 Kansas, 28; *Fultz v. Walters*, 2 Montana, 165; *Frank v. Wessels*, 64 N. Y., 155; *Howe v. Hartness*, 11 Ohio St., 449; *Pardee v. Fish*, 60 N. Y., 265; *Daniel on Neg. Inst.*, sec. 1703; *Edwards on Bills*, 348; 1 *Parsons on B. & N.*, 27; *Morse on Banking*, 54; *Dos Passos on Stockb.*, 554. And the language, "Payable on the return of this certificate," or on "the presentation of this certificate," or of like import, does not interfere with the negotiability of the paper (*Miller v. Austin*, *Kilgare v. Bulkley*, *Pardee v. Fish*, *Welton v. Adams*, *supra*), although some cases construe such language to mean that no demand for payment is necessary, and that the maker must find the payee and pay it. *Cate v. Patterson*, 29 Mich., 191; *Hunt v. Divine*, 37 Ill., 137; *Brummagin v. Tallant*, 29 Cala., 503; *Tripp v. Curtenius*, 37 Mich., 499; but the true meaning of the words, and the agreement and understanding of the parties, is that the certificate is payable only when payment is demanded by the party entitled to receive the money, and producing the certificate as evidence of title and a compliance with the contract; and *converso* it is not the agreement, or understanding, or the custom and mode of business for the banker to seek the depositor; although the bank has the privilege of tendering payment; and for the reason that such is the agreement, the courts have expressly decided that the money is not due and payable until demand made; no action can be maintained, and the statute of limitations does not begin to run until then. *Howell v. Adams*, 68 N. Y., 314; *Downes v. Phoenix Bank*, 6 Hill, 297; *Story on Bailm.*, sec. 88; *Marzetti v. Williams*, 1 B. & A., 415; *Chitty on Bills*, 547; *N. Bank P. E. v. Washn. Co. Bank*, 5 Hun., 605; *B. F. Bank v. Rutland Co. Bank*, 40 Vt., 377. Even in *Howe v. Hartness*, 11 Ohio St., 449, the court say: "It was an unconditional promise to pay upon presentation of the certificate either by himself or his assignee." *Payne v. Gardner*, 29 N. Y., 146; (but in this case the dissenting opinion cites a good many cases to the contrary) *Fells Point Savings Institute v. Weedon*, 18 Md., 320; *Smith's Mer. Law*, 356; *Munger v. Albany*, 85 N. Y., 587; *Pardee v. Fish*, 60 *Id.*, 265; *Boughton v. Flint*, 74 *Id.*, 476; *Thurston v. Wolfborough Bank*, 18 N. H., 391; *Memphis v. —*, 2 Sneed, 482; *Hindsale v. Larned*, 16 Mass., 68; *Doughty v. Western Bank*, 13 Ga., 287; *Tower v. Appleton*, 3 Allen, 387; *Sanbourn v. Smith & White*, 44 Iowa, 152; *Tripp v. Curtenius*, 36 Mich., 494. In *Ins. Co. v. Weedon*, *Adm'r*, 18 Md., 320, the court after recognizing the negotiability of such a certificate, but not on the ground that it is a promissory note, stated, the bank "should have the right upon demand of payment to insist that the certificates should be produced and delivered up as its voucher of payment and as its security against any future claim," and that by the English authorities such as the rule, citing *Smith Mer. Law*, 356, note; *Story on Prom. Notes*, sec. 546.

The rule that a negotiable paper payable on demand, is payable without a demand is traceable to the decisions in *Copp v. Lancaster*, Cro. Eliz., 548; *Rumball v. Ball*,

10 Mod., 38; Collins v. Denning, 3 Salk., 227, and it is difficult to understand how such a rule could have been adopted, and extended to certificates of deposit, which are payable on the return of the certificate; especially when it is considered that the instruments involved in those cases were *not negotiable*, and the ruling that the debtor should seek the creditor in non-negotiable paper was proper. The rule and the reasons of Lord Tenterden seem the best, and no court has successfully controverted it. The Ohio court having the chance to place this doctrine on a solid foundation, has unfortunately failed to do it.

JMO. F. KELLEY,
Bellaire, Ohio.

AGENCY—BILLS OF EXCHANGE.

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[Superior Court, Cincinnati, General Term, March, 1884.]

Force, Harmon and Peck, JJ.

†KANAWHA VALLEY BANK V. JOHN A. ROBINSON.

1. Where an agent, acting within the scope of his agency, signs his own name to an instrument as agent, without designating his principal, and without indicating, by some form of words, that the writing is the act of the principal, he will be personally liable thereon.
2. In an action brought by the plaintiff, as indorsee, against the defendant as acceptor upon the following bill of exchange.

"\$265.87.

Kanawha & Ohio Coal Co.,
Coalburg, W. Va., May 14, 1874.

Seventy-four days after date, pay to the order of J. D. Moore, two hundred and sixty-five 87-100 dollars.

To Jno. A. Robinson,
Agent,

Cincinnati, Ohio.

By W. H. Edward, President,"
and "accepted payable at LaFayette Bank, Cin., O., John A. Robinson, Ag't,
K. & O. C. Co., June 16, 1882."

Held, that the said bill of exchange was drawn on and accepted by Robinson, personally; that the language of the acceptance imports a personal obligation; and evidence cannot be admitted to ascribe to it a purpose different from that which its language imports.

FORCE, J.

The action is brought by the plaintiff, as indorsee, against the defendant, as acceptor, upon the following bill of exchange:

"\$265.87.

Kanawha & Ohio Coal Co.,
Coalburg, W. Va., May 14, 1874.

Seventy-five days after date, pay to the order of J. D. Moore, two hundred and sixty-five 87-100 dollars.

To John A. Robinson,
Agent,

Cincinnati, Ohio.

Kanawha & Ohio Coal Co.,
By W. H. Edwards,
President."

Written across the above was the following: "Accepted, payable at LaFayette Bank, Cin., O.

John A. Robinson,
Agent K. & O. C. Co.,
June 16, 1872."

At the trial it was proved that the initials "Ag't K. & O. C. Co.," mean "Agent, Kanawha and Ohio Coal Company," and that the defendant was the agent in Cincinnati of the company. Other testimony was offered by the defendant, which, on objection by the plaintiff, was excluded, and the jury was directed by the court to bring in a verdict for the plaintiff. The case is reserved to General Term on motion for new trial.

†This judgment was affirmed by the Supreme Court; see opinion, 44 O. S., 441

Two questions are presented: 1, as to the legal import of the acceptance; 2, as to the exclusion of the testimony offered.

One essential quality of negotiable instruments, which pass freely from hand to hand, discharged of equities between the original parties, is certainty. A negotiable instrument must be certain as to the obligation to pay, as to the amount to be paid, and as to the person who is to pay. The acceptor in this case is either Robinson and not the company, or else it is the company and not Robinson; it cannot be an optional obligation.

There are direct authorities both ways. By the law, as settled in England, the acceptance is the personal acceptance of Robinson. A bill of exchange drawn on J. Diamond, Purser West Downs Mining Co., and accepted; "J. Diamond, Purser *per proc.* West Downs Mining Co.," was held the personal acceptance of J. Diamond. *Nicholls v. Diamond*, 9 Exch., 154. A bill drawn on "H. Bishop, Cashier of the York Building Co., at their house on Winchester street, London," with the address, "place the same to the account of York Building Co., as per advice," and "accepted, per H. Bishop," was held to be accepted by Bishop personally, and the letter of advice was not admissible in evidence against an indorsee. *Thomas v. Bishop*, 2 Strange, 955.

In the United States, the courts in New York and Massachusetts hold the same rule. A bill of exchange drawn on "J. R. Livingston, President Rosendale Mfg. Co., New York," and accepted as drawn, was held to be accepted by Livingston personally. *Moss v. Livingston*, 4 Coms., 208. To the same effect, *Haight v. Naylor*, 5 Daly, 219, and *Slawson v. Loring*, 5 Allen, 341. In other states, more numerous but less prominent as authority in commercial law, such acceptance is held to be either the acceptance of the company, or else ambiguous; so that parol evidence is admissible to prove it to be the acceptance of the company. *Shelton v. Darling*, 2 Conn., 435; *Amison v. Ewing*, 2 Cold., 367; *Exchange Nat. Bank v. Third Nat. Bank*, 4 Fed. Rep., 20; *Lafin et al. v. Seinsheimer*, 48 Md., 411. These cases are disapproved of by Daniel, in his *Negotiable Instruments*, vol. 1, sec. 414.

In this conflict of decisions, it is necessary to consider in some detail the cases and the grounds on which they have been decided.

The person who signs an obligatory writing is the person who is bound by it. It often happens that several persons bear the same name; or that a person is better known to many by his function or office, than by his name. Hence, words of description appended to the name signed, only aid the name in designating the person who is bound, and help to fix, not to alter, his liability.

When one is authorized to sign the name of another, such agent may write simply the name of the principal, without more. But to prevent suspicion of forgery, or doubt of authenticity, it is usual for such agent to add to the signature of the principal the statement that the signature is written by such agent. Hence the regular and recognized mode by which an agent signs for his principal is, A by B. This form is not essential. But it is essential that the signature should not be merely the name of the agent, with the addition of the word, agent or agent of a named principal, which are only words of description; but, in negotiable instruments, at all events, the paper must show on its face that the agent, in making that particular signature, is acting in behalf of his principal. As stated by Justice Gray, "In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent." *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass., 104. Or, as stated by Lord Ellenborough, the agent is liable "unless he states upon the face of the bill that he subscribes for another; unless he plainly says, 'I am the mere scribe.'" *Leadbetter v. Farrow*, 5 M. & S., 345.

The rule is so simple that it seems strange it should be ignored. But persons who undertake to sign on behalf of others exhibit a heedlessness that appears to be perversity, and have experimented with every form of signature that can be contrived. The numerous cases that have been decided range themselves in accordance with the test given by Lord Ellenborough and Justice Gray.

In the following cases the persons who wrote the signatures were held *not* personally liable:

When a promissory note was: "The undersigned, committee for the First School District, *on behalf of* said district." Signed, ———, Committee. *Andrews v. Estes*, 2 Fairfield, 267.

"On or before the first day of April, 1876, we promise to pay as trustees of Corinth Lodge," etc. *Stearns v. Allen*, 25 Hun., 558.

"I, as treasurer of the Congregational Society, or my successor in office, etc., promise." Signed, S. S. R., Treasurer. *Barlow v. Cong. Soc.*, 8 Allen, 460.

"We, the subscribers for the *Carmet Manufacturing Co.*, promise," etc., *Simpson v. Garland*, 72 Me., 40. Accordingly a note signed for Joseph Talbot, agent for *David Perry*. *Button v. Perry*, 16 Mass., 461. This case is explained in *Tucker v. Fairbanks*, 98 Mass., 101, as being the same as, "for David Perry, Joseph Talbot;" or "Joseph Talbot for David Perry."

"I promise to pay five hundred dollars—to be paid out of the township funds." Signed, Fred K. Monroe, Trustee of Johnson Tp. *Wallis v. Johnson School Township*, 75 Ind., 368.

"We promise," etc. Signed, Samuel D. Keith, Prest. Chicago Ready Roofing Co., W. H. Kretzinger, Secy., and attested by the corporate seal. *Scanlan v. Keith*, 102 Ill., 634.

Bill of exchange headed, "Belleville Nail Mill Co." Signed, W. C. B., Prest.; J. C. W., Sec'y. Addressed to J. H. P., Treasurer, and directed to be charged to account of Belleville Nail Mill Co. *Hitchcock v. Buchanan*, 105 U. S., 416.

Where there is nothing but the signature by president and secretary to indicate the obligation, the cases are in conflict.

Where action was brought by indorser of a bank check, signed "W. G. Williams, V. Pres't; E. P. Aistrop, Sec'y," evidence was admitted to prove that the checks of the corporation were always signed in that manner, and that the plaintiff was an officer of the corporation and aware of that fact, and on that it was held Williams was not liable to him personally. *Metcalf v. Williams*, 104 U. S., 93.

On the contrary, an order, "Please deliver to W. H. Glick, at his residence, nine sets of national business and primary charts, at \$36 per set, \$324, and we agree to pay for said goods on the first day of March." Signed, W. H. Glick, Pres't School Board; I. B. Southwick, Sec'y School Board, was held the personal obligation of Glick and Southwick, and evidence was not admitted to prove the contrary. *Wing v. Glick*, 36 Ia., 473.

In the following cases the signature has been held to be the personal obligation of the person who wrote the signature:

A note signed "A. B., Treasurer St. Paul Parish." *Sturdivant v. Hall*, 59 Me., 172.

"I promise," etc., signed "Cheever Newhall, President of the Dorchester Avenue R. R." *Ins. Co. v. Newhall*, 1 Allen, 130.

Or signed "John S. Eldridge, Trustee of Sullivan R. R." *Fisher v. Eldridge*, 12 Gray, 476.

A draft signed, "David Fairbanks & Co., Agts., Piscataqua F. & M. Ins. Co." addressed to "Piscataqua F. & M. Ins. Co." In this case evidence offered to prove that it was not expected or intended that defendants should be liable on the bill, and that it was only given to settle a loss, and was supposed and expected by both parties to create a debt against no one but the insurance company, was excluded. *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass., 101.

A note signed A. B., "President of the Mechanics' Ins. Co." 3 Wend., 94.

Or signed "E. Faw, Agent of the Marietta Paper Mill Co." *Faw v. Meals*, 65 Ga., 711.

"Twelve months after date the president, by order of the board of Houstonville and Bradfordsville Turnpike Road Company, promise to pay," etc. Signed, "E. J. Dodd, Pres't," and five others. *Caphart v. Dodd*, 3 Bush., 584.

"We, the directors of the Big Eagle and Harrison County Turnpike Co., promise," etc., signed by six names with no description annexed. *Pack v. White*, 78 Ky., 243.

"We, or either of us, as directors of the Hamilton and Germantown Turnpike Road, promise to pay," etc., signed by five makers, with no description appended to the names. It was held there was no ambiguity, and evidence was not admitted to show they intended to bind themselves, not individually, but in their representative capacity. *Titus v. Kyle*, 10 O. S., 444.

Signed "Samuel Shoup, Agent." Here (p. 128) the distinction is drawn between negotiable and non-negotiable instruments. *Anderson v. Shoup*, 17 O. S., 125.

Note signed "Edward K. Collins, Agent," evidence not admitted to relieve Collins from personal liability. *Collins v. Buckeye State Ins. Co.*, 17 O. S., 215.

"We promise to pay," etc., and to the names of the makers is added: "Trustees of the First Universalist Church of Princetown, Indiana." Such addition held immaterial, and its erasure not a material alteration. *Hayes v. Matthews*, 63 Ind., 412; approved in *Armstrong v. Kirkpatrick*, 79 Ind., 527.

"We, the Trustees of the Methodist Episcopal Church in Lebanon, promise to pay," etc., signed "Henry Brown" and three others. Evidence not admissible to relieve the makers from personal liability. *Hypes v. Griffin*, 89 Ill., 134.

"We promise," etc., signed by five makers, with the addition: "Vestrymen, Grace Church," after each name. *Tilden v. Barnard*, 43 Mich., 376.

To the rules established by these and many similar cases there are three exceptions: 1. When the cashier of a bank, in the course of his employment, signs or indorses, "A B, cashier," this is held to be the act of the bank, and imports no personal liability. 2. When a public officer, authorized by law to issue drafts or orders, signs his official signature, this is held to be an official not a personal act. 3. When a corporation regularly makes its payments by an order of the president or secretary on the treasurer. This is held to be an obligation of the corporation, given in that form, in order to secure a proper accounting. 4. Sometimes a corporation transacts its business in the name of an agent, adopting his name as the business name of the corporation; in which case bills and notes signed merely with the name of such agent, binds the corporation as effectually as if signed by the corporate name. As when the Medway Cotton Manufactory used the name of "Richardson, Metcalfe & Co." as its business name. *Medway Man. Co. v. Adams*, 10 Mass., 360; and when the Boston Iron Co. used the name, "Horace Gray & Co., as its business name. *Mulledge v. Boston Iron Co.*," 5 Cush., 158. The decision in *Devendorf v. W. Va. O. & O. L. Co.*, 17 W. Va., 172, is in accordance with this ruling.

The bill of exchange in the present action must be held to be drawn on and accepted by Robinson, personally.

The same result is reached by another consideration. While it is true that the same person may be both drawer and drawee of a bill of exchange, yet such paper, though in form a bill, is in fact a promissory note. No protest is necessary; acceptance adds no validity to it. The obligation is complete the moment the paper is signed and delivered. But the intention of the paper in the present action is clearly to have the additional currency given by having two parties liable upon it. The signature of the drawer, "Kanawha & Ohio Coal Co., by W. H. Edwards, Pres't," shows that the parties knew perfectly well how to sign so as to make the company liable. And being so signed and being drawn on "Jno. A. Robinson, Agt.," a form which is invariably held to mean Jno. A. Robinson, personally, shows that the two parties were intended, when the bill was drawn, to be the Company and Robinson.

And further, except in case of an acceptance for honor, which is not this case, no person but the drawee can be acceptor. An acceptance written by another person on the face of the bill is not an acceptance of the bill. Where a bill drawn on "Mr. W. C." was "accepted for the company, W. C., Purser," it was held the bill was accepted personally by W. C., or not at all; that there was an evident intention to accept; and although the language of the acceptance imported an acceptance by the company, yet, to give effect to the intention and to hold the bill accepted, the interpretation of the language was strained, and the acceptance was held to be that of W. C., personally. *Man v. Charles*, 5 Bl. & Bl., 973. In the present case no such violence is needed. The language of the acceptance, according to the cases, imports a personal obligation.

We hold, therefore, that there is no ambiguity in the instrument, and evidence cannot be admitted to ascribe to it a purpose different from that which its language imports.

The motion for new trial is overruled, and judgment will be entered on the verdict.

W. H. Mackoy, for plaintiff.

Lincoln & Stephens, for defendant.

[Hamilton Common Pleas.]

ARCHER V. MOORE COMBINATION DESK CO.

In a suit on account, the petition must allege that there is due on the account, etc., it is not sufficient to allege that defendant is indebted thereon.

CONNER, J.

In this action the plaintiff seeks to recover on an account alleging that defendant "is indebted to the plaintiff thereon, etc."

A demurrer is filed to this petition, alleging that it does not state facts sufficient to constitute a cause of action.

Section 5087, Rev. Stat., prescribes:

"In an action founded upon an account, it shall be sufficient for a party to set forth a copy of the account and to state that there is due him on such account," etc.

"Indebted" and "due" have not the same meaning, and do not represent the same state of affairs at all times. "Due" when used in a pleading implies a breach of contract, but there is no such necessary implication from the word "indebted."

Demurrer sustained.

REPLEVIN—PLEADING—INSTRUCTIONS TO JURY. 225

[Cuyahoga District Court.]

Mackay, Green and Lewis, JJ.

BARBARA MORAVEC V. HUGH BUCKLEY.

LEWIS, J.

1. In Ohio, under a general denial in a replevin suit, the defendant, a sheriff, may make any defense he has, and may under such denial prove his writ and levy on the goods in controversy. *Kober v. State*, 10 O. S., 444; *Kalston v. Oursler*, 105, 12 O. S., 112.
2. After the jury had retired to deliberate upon their verdict, they returned into court and requested further instructions as to the form of their verdict. Such instructions were given by the court in the absence of counsel for plaintiff and without notice to them. In this the court committed error. An instruction upon the form of the verdict is an instruction upon the law of the case, and any such instruction in the absence of, and without notice to counsel, is error. *Campbell v. Beckett*, 8 O. S., 211; 1 Pick., 337.
3. The court below, for the purpose of proving a date, permitted the petition in a slander suit, upon which the judgment under which the defendant justified was founded to be given in evidence and to go to the jury. In this there was error. So far as appears by the bill of exceptions, the whole petition was sent to the jury, and tended to divert their attention from the real issue, and was manifestly prejudicial.

Willson & Sykora, for plaintiff.

Smith & Novak, for defendant.

FORCIBLE ENTRY AND DETENTION—EXCEPTIONS. 234

[Hamilton District Court, April 22, 1884.]

STATE EX REL. JAMES POWERS V. RICHARD PAUL.

PETITION for Mandamus.

1. On application made for a writ of mandamus requiring a justice of the peace to settle and sign a bill of exceptions in a forcible detainer action, the record of such cause including the bill of exceptions in question, is competent proof for the reviewing court to consider, and if it appear therefrom that there is no error therein, so as to entitle the relator to file his petition in error thereto, by leave of court, in an action to reverse such judgment and proceeding, then the writ of mandamus will not issue, ordering the bill of exceptions to be signed, for that it would not be an effective remedy.

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Railway Co. v. Kelsey, Treasurer.

2 An equitable title cannot be set up in forcible detainer proceedings before a justice of the peace to divest him of his jurisdiction thereto, nor is proof thereof competent in such proceeding.

Opinion by Buchwalter, J., citing 46 Cal., 58, and 4 W. L. M., 251.
Long, Kramer & Kramer, for relator.
C. W. Baker, *contra*.

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COUNTY COMMISSIONERS.

[Hamilton District Court, April 22, 1884.]

STATE EX REL. CARSON V. BREWSTER (AUDITOR).

PETITION for Mandamus.

Petition averred that relator was employed by the concurrent action of the board of control and county commissioners as a janitor for the courthouse, and assigned for duty in the auditor's office and sought to require the auditor to draw his warrant on the treasurer for the payment of his services as such janitor. A demurrer was filed to this on the ground that the facts averred did not constitute a cause of action: *Held*, that this did not raise the question whether the county commissioners or auditor had a right to appoint a janitor for the auditor's office; that under section 1002, Rev. Stat., as amended, 78 O. L., 22, the county commissioners had the right to appoint janitors for the courthouse, and whether they assigned the relator to duty in the auditor's office or did not assign him to duty at all, he was entitled to compensation; that the court would not control the direction of the county commissioners so long as there was no bad faith or abuse of discretion in the exercise of the right of employment.

Writ granted.

Opinion by Maxwell, J.

Foraker & Black, for relator.

Burnet & Burnet, for respondent.

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RAILROAD TAXATION.

[Lucas District Court, April 10, 1884.]

Heisley, Jones and Pike, JJ.

†W., ST. L. & P. RY. V. JOEL W. KELSEY (TREASURER).

Revised Statutes, 2774, did not change the prior law, and the rules for the taxation of a railroad company, whose line runs through several counties of this state are, 1st. The value of the rolling stock is to be apportioned to the different counties and cities not as to value but in proportion to the length of the road in each. 2nd. The fixed property is to be apportioned in the proportion that the value of the part in each county or city bears to the total in the state. 3rd. The value of moneys and credits are to be apportioned in each locality in the same proportion as the fixed property.

In May, 1881, the board composed of the auditors of the several counties in this state, through which said railway extends, assessed the value of the property of said corporation subject to taxation in this state, at \$1,202,404. The whole length of said road in the state is seventy-five miles, of which three miles are in the city of Toledo. Three seventy-fifths of the assessed value of the main track and rolling stock was

†This judgment was affirmed by the Supreme Court without report, March 19, 1888.

assessed for taxation in the city of Toledo, and the total assessed value of the property fixed, such as station houses, side tracks, water and wood stations, etc., located in said city, other than the main track, was apportioned to said city, and also such portions of the company's moneys and credits as bore the same proportion to the whole amount thereof to be taxed in the state, as the assessed value of the fixed property to be taxed in the said city, bore to the total value thereof to be taxed in the state. The plaintiff in error claims that the total assessed value of its property for taxation in this state should be equally distributed to each mile of its road, and that, therefore, but three seventy-fifths of the assessed value should be apportioned to the city, being the same proportion that the length of the road in the city bears to its whole length in the state. The company paid the taxes levied on its property apportioned to the city of Toledo, as before stated, under protest, and commenced its action, now under review, in the court below to recover back the portion thereof it claimed was illegal.

The rights of the parties depend upon the construction to be given to sec. 2774 of the Rev. Stat., and to arrive at its meaning it is proper to refer to a former statute on the subject, 56 O. L., 183. By that act railroad companies were required to list for taxation, verified by the oath or affirmation of the person so listing, "all the personal property, which shall be held to include roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys and credits of such company or corporation, within the state, at the actual value in money in manner following: in all cases return shall be made to the several auditors of the respective counties, where such property may be situated, together with a statement of the amount of said property which is situated in each township, incorporated village, city or ward therein, the value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, incorporated villages, or townships, pro rata in proportion to the value of the real estate and fixed property in said ward, city, incorporated village or township; and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, incorporated village or township."

It was therein further provided: that if the proper return was not made to the auditor, or among other things, if he was of the opinion, "that it had not been listed in the location where it properly belonged," he should value and assess it as in other cases.

It is perfectly apparent, that under that statute, the property of railroad companies was to be taxed in localities where it was situated. The law was amended by the act of May 1, 1862, which was, in this respect, substantially the same as sec. 2774, Rev. Stat., which provides: that instead of the return of the railroad companies being made to the several auditors of the respective counties, wherein such property may be, it shall be made to a board of appraisers or assessors, composed of the auditors of the several counties, through which the road runs, and for the first time, prescribes the method of assessing the property of interstate railroads, by taxing the total value of the property in this state, and beyond it, and dividing it in the proportion, that the length of such road in this state, bears to the whole length of such road, and that the principal sum for the value of such road in this state shall be determined accordingly. It also provides that after the board has determined the amount or value to be taxed in this state, it "shall be apportioned, by said board, among the sev-

eral counties, through which such road, or any part thereof runs, that to each county, and to each city, village, township or district, or part thereof therein, shall be apportioned such part thereof, as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures and personal property of such railroad company in this state, and so that the rolling stock of such company shall be apportioned in the same proportion that the length of such road in said county bears to the entire length thereof in all of said counties or county, and to each city, village, and district, or any part thereof therein."

The changes that will be observed, by comparing this enactment with that of 1859, are, first, the creation of this board of appraisers or assessors, composed of county auditors; second, the taking into account the property of the company in all the counties together, in case of a road wholly within this state, and, in case of an interstate railroad, taking into account its property, as well that which is beyond this state, as that which is within it, and dividing it, to arrive at the portion to be taxed in this state. Third, the separating of the rolling stock from all other property, and providing that it shall be apportioned to each county, city, village and district, in such proportion, as the length of such road, in such county, city, village and district, bears to its whole length to be taxed.

These are evidently the objects the general assembly had in view, in changing the law of 1859. It is a well established rule, for the construction of statutes, that when certain material or prominent changes are made, in a statute, or material additional provisions are included, and there is a change of phraseology in some of its other provisions, it does not necessarily imply, that a change in the meaning of such other provisions was intended, and in construing it we are to be governed by the ordinary rules of construction.

To sustain the claim of the plaintiff in error, would require us to find, that a slight alteration in the language of the statutes, had worked a most radical change. Under the act of 1859 the property of a railroad company was assessed, and taxed, in the county, city, village or township, where it was situated. In this case it is claimed, that, if there is property of great value in a city, it is with the company's other property to be spread out over the whole road, awarded to each mile, as much of the assessed value for taxation, as to any other mile, thus withdrawing a large portion of valuable property in a city from city taxation, to the lesser rate levied in rural districts. We think that the general assembly did not intend to make any such change in the law; if he had, it would have spoken in no doubtful terms. But we think, the meaning of sec. 2774 is not hidden or difficult to be arrived at, although in some counties, at least, it has not been followed. The statute says substantially, that there shall be apportioned to each city, etc., such part of the assessed value "as shall equalize the relative value" of the property in that locality in proportion to the value of the entire property to be taxed in the state. The words "to equalize the relative value," seem to cloud the matter somewhat, but we think they mean here the same as to say "adjust the comparative or proportional value," so that if the total value of the company's property to be taxed in this state, exclusive of the rolling stock, were \$1,000,000, and of that one-fourth was in the city of Toledo, then one-fourth of the assessed value should be apportioned to such city for taxation.

The statute provides one mode of taxing the rolling stock, and another for all other property. If the general assembly had intended to tax all in the same manner, they certainly would have included everything in the same category, and would not have separated them, by the use of three or four lines of the statute, which the claim of plaintiff in error would, if allowed, require us to treat as surplusage, against the rule, that the statute should, if it can be done, be so construed as to give effect to all its parts.

There is nothing unjust in the construction we give the statute. There is great advantage to a railroad in passing through, or having a terminus at a large city, or other populous place, where it acquires a large portion of its business, and where, of necessity, its property must be valuable, and we cannot see why it should not pay the same rate of taxes, on such property, that private persons do; while there is justice in the manner of taxing the rolling stock, as it has no permanent location, but is movable, passing from one place to another, in this case, both within and without this state.

Section 2, of article 12, of our constitution, provides that taxation shall be by a uniform rule; and sec. 4, of article 13, provides that "the property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals;" but the plaintiff in error proposes that a part of the assessed value of its property in Toledo, shall, by legal sleight of hand, be transported to some rural district where it shall be subject to a much less degree of taxation, than property of equal value, belonging to individuals and situated in Toledo. It is doubtful whether a statute containing such provisions would be constitutional, as in that case it seems that the property of the railroad company would not be subject to taxation, the same as the property of individuals. In the city of Dubuque v. The C. D. & M. R. R. Co., 47 Ia., 196, a statute was under consideration, which provided for the taxation of railroad property in the manner claimed by the plaintiff in error in this case. The constitution of the state of Iowa contains a provision like sec. 4 of article 13 of our constitution, above recited. The court, composed of five judges, differed as to the constitutionality of the statute. The chief justice and one of his colleagues held it was unconstitutional on the grounds above suggested.

The moneys and credits of the company have relation to its other property, and should be accredited as much to one dollar thereof as to another, and as such moneys and credits have no special locality, the statute provides that they shall be apportioned to each county, city, village and township, in the same proportion that the fixed property is. We hold:

First—The rolling stock alone should be apportioned to each county, city, village and township through which the road runs, in the same proportion that the length of such road in such county, city, village and township bears to the entire length thereof in all the counties through which it runs.

Second—The fixed property, including the roadbed, should be apportioned to each county, city, village, and township through which the road runs, in the same proportion that the value in each bears to the total value in all.

Third—The value of the company's moneys and credits should be apportioned to each county, city, village, and township through which the road runs, in the same proportion as the fixed property.

In this case the plaintiff in error should find no fault, for its roadbed was apportioned in the same manner the rolling stock was, to which it was not entitled.

The judgment below is affirmed.

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BEQUEST—FORECLOSURE.

[Pickaway District Court, March Term, 1884.]

GEO. WOLF V. GEO. W. STOUT AND EMELINE STOUT.

Minshall, Loudon and Gregg, JJ.

1. A bequest to "my youngest child all of my estate after her mother's death or marriage * * * and to the heirs of her body forever," creates at common law an estate tail; and under the act to restrict the entailment of real estate in Ohio, the issue of said youngest child who is the first donee in tail take an inheritance in fee in said estate.
2. Therefore, where the estate was derived by plaintiff from the first donee in tail and conveyed by deed of general warranty to one of defendants, a mortgage being given to secure the balance of the purchase money, it would seem, in an action of foreclosure, that a decree could only be granted for the sale of the interest of the first donee in tail to satisfy whatever might remain due of the purchase money.

On the 22d day of February, 1877, George Wolf and wife conveyed to Emeline Stout 93 acres of land in Pickaway county, Ohio, by a deed of general warranty, with the ordinary covenants of title. The consideration for this deed was \$10,000, of which \$5,000 was paid by the conveyance to Wolf of another tract of land, and the residue by executing a mortgage to Wolf for \$5,000 upon the said 93 acres of land.

George Wolf filed a petition in the court of common pleas of said county to foreclose this mortgage. The case was heard in that court and a decree rendered in favor of Wolf. Stout and wife appealed the case to the district court, and they filed an answer and cross-petition setting up the foregoing facts, and further alleging that at the date of the deed executed by George Wolf he had not a legal title to the said 93 acres in fee simple; that his covenants were broken because Wolf derived his title from Orlinda Steele, daughter of Jacob Greeno, who had but a life estate in the premises; that he had more than paid the full value of the said life estate. Stout also made the children of Orlinda Steele defendants, alleging that they claimed an adverse interest in the premises, and praying for relief under sec. 5780 of the Rev. Stat. In the district court George Wolf assigned this mortgage to his son John Wolf, who was substituted as plaintiff on his own motion.

The children of Orlinda Steele, by their guardian *ad litem*, filed an answer claiming the remainder in fee in said 93 acres of land under the will of their grandfather, Jacob Greeno. Thereupon John Wolf dismissed his petition and then filed a motion to dismiss the action on the ground that there was no cause pending in court.

The will of Jacob Greeno was in evidence.

Smith & Morris, attorneys for Wolf.

P. G. Bostwick, attorney for Stout.

Page, Abernethy & Folsom, attorneys for the children of Orlinda Steele.

BY THE COURT:

The motion to dismiss this cause of action must be overruled.

The plaintiff had a right to dismiss his petition, but he remained in court as a defendant to the cross-petition of Stout and wife. The will of Jacob Greeno provides as follows: "I give and bequeath to my wife during her widowhood, the entire use and control of all my real estate, and also the use and control of whatever personal estate may remain after the payment of my debts aforesaid and my funeral expenses and the costs of administration and the settlement of my estate. If she should again marry, I then direct that she shall from that time have only such portion of my estate as would be allowed her by law if I had made no will.

"I give and bequeath to my youngest child, Orlinda Greeno, all of my estate that remains after her mother's death or marriage, as aforesaid, and to the heirs of her body forever, and I also direct that during her mother's widowhood she shall receive her maintenance from the proceeds of my estate in the hands of her mother until she marries. In case my said daughter Orlinda Greeno should die without lineal heirs, I then give and bequeath the remainder of my estate, both real and personal, after the death of my widow or her marriage as aforesaid, to my children by my first wife and to their legal representatives."

We are of the opinion that the language of this will, at common law, would be an estate tail in Orlinda Steele and the heirs of her body. The cases cited by the counsel for her children clearly settle this matter. 3 Bacon Abb., 428; 1 Wash., R. P., 72; 4 Kent. Com., 56; Harkness v. Corning, 24 O. S., 416; Pollock v. Speidel, 17 O. S., 439. This being the case under the act to restrict the entailment of real estate, passed December 7, 1811, (1 S. & C., 550,) the issue of Orlinda Steele takes an inheritance as an absolute estate in fee simple. We find that Orlinda Steele is the first donee in tail under the will of Jacob Greeno, and her children, who are before the court, are entitled, as her issue, to the inheritance in fee.

We, therefore, order and adjudge that John Wolf may have a decree for the sale of the premises to satisfy the residue of the purchase money claimed in the action, on giving bond in double the amount thereof, with two or more sureties, to be approved by the court, for the payment of the same, with interest, if the defendant, Mrs. Stout, or her privies be subsequently evicted by reason of this defect.

(After this decision was announced, one of the three judges went home leaving but two to hold the court, and a decree for the sale of the premises having been prepared, the counsel for the children of Orlinda Steele objected, that nothing could be sold except an estate in the premises for the life of Orlinda Steele; that her children were brought before the court to protect their interest, and not to deprive them of it by a sale in fee. The judges not being able to agree on this point, the case was continued.)

ESTABLISHING COUNTY ROAD.

[Pickaway District Court, March Term, 1884.]

Minshall, Louden and Gregg, JJ.

DANIEL A. HASLER ET AL. V. GEORGE HITLER ET AL.

1. Notice to a landowner of the pending of a petition to establish a county road, and of the time and place of meeting of the viewers, is not jurisdictional, where due publication of the fact of the petition has been made, and its omission does not render the proceedings void.
2. Where a landowner relinquishes all claim to compensation and damages this cures the error and no one else can object thereafter.

This was a proceeding before the commissioners of Pickaway county, Ohio, for the establishment of a county road.

Due notice of the filing of the petition was given by publication in a newspaper, and by putting up notices at the auditor's office and at other places in the township. Notice was also given to the landowners of the road view. The surveyor made his report, as did also the viewers, and damages were allowed to certain persons, and the report of the viewers in favor of the establishment of the road was read before the commissioners three times.

After the said report was read the first time, it was discovered that one Hiram A. Hitler had an interest in a tract of land affected by the road. A motion was made by those who opposed the road to set aside and dismiss the said proceedings, on the ground that no notice of the pendency of the said petition, or of the time and place of the meeting of the viewers was ever served upon said Hitler. Thereupon said Hitler filed a paper as follows:

"I hereby relinquish all claims to compensation and damages growing out of the establishment of the county road petitioned for by George W. Hitler et al.

H. A. HITLER."

Thereupon the commissioners overruled the objection and proceeded to establish the road. A petition in error was then filed in the court of common pleas, and this court sustained the ruling of the commissioners. Then a petition in error was filed in the district court alleging the same error.

BY THE COURT:

1. The jurisdictional fact in this case was the publication in the newspapers of notice, and setting up notices at the auditor's office and other places in the township, according to the statute. The notice to the landowners was not jurisdictional, and the want of such notice to Hitler did not render the proceedings void.

2. The release of damages and compensation by Hiram A. Hitler cured the error in regard to the omission of notice to him. No landholder was omitted but Hitler, and he had a right to relinquish his claim. No other person had any interest in his claim for compensation and damages, and his relinquishment cured this error.

The judgment of the common pleas and county commissioners is affirmed.

P. C. Smith and C. Curtain, for plaintiff in error.

Page, Abernethy & Folsom, for defendants in error.

LEGACY—LIMITATION OF ACTION.

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[Hamilton District Court.]

† A. S. LONGLEY, ADM'R, v. THOS. B. STUMP ET AL.

1. A legacy to a daughter, the only provision for her, "to be paid to her or her heirs as soon as practicable by my executors"—the "remaining property or money and credits" being devised to be equally divided after death of the widow of testator, among his three sons—constitutes, in case of deficiency of personal assets, a charge upon the real estate.
2. The lapse of six years from the time the right to payment of the legacy accrues, and the deficiency of personal assets is ascertained, constitutes a bar to an action by the administrator *de bonis non*, with the will annexed, to sell the real estate for payment of the legacy.

AVERY, J.

This is a petition by an administrator *de bonis non*, with the will annexed, to sell real estate for the payment of a legacy.

It is a settled rule that legacies are always presumptively payable out of personalty, and if there proves to be a deficiency for the payment of debts and legacies, the legacies must abate unless they are charged upon the realty. *Geiger v. Worth*, 17 O. S., 564, 567; 2 Redf. Wills, 208, section 5.

The first question, then, is whether the legacy here was so charged. This is a question of intention to be determined by the language used. The intention must be made to appear clearly, *Geiger v. Worth*, but need not be by express words. *Clyde v. Simpson*, 4 O. S., 445. The court is entitled to put itself in the place of the testator and then see how the terms of the instrument affect the subject-matter. The circumstances of his property and family constitute the standpoint from which the language of the testator is to be considered. *Moore v. Beckwith*, 14 O. S., 129, 132.

The legatee was a daughter—an only daughter, it would appear; the legacy was the only provision for her. From the circumstances of the property of testator, as shown by the account current of the executor—the only account filed—his indebtedness was much beyond the amount of his personal estate. The natural inference of intention would be that his daughter was to have this only provision for her—not merely if the personal assets were sufficient, but at all events. Artificial rules of construction, when applied to the terms of the residuary devise, lead to the same conclusion. By item 6, all the property he possessed, after deducting therefrom one-third of his goods and chattels for his wife—"down" he calls it, but what he means is shown by item 2—is left in the hands and under management of his son William until decease of his wife. By item 7, after the death of his wife, "then the remaining property or money and credits to be equally divided" among his three sons, John, William and Clementus. Whether "all the property which I possess," as the words are used in item 6, be taken as meaning after payment of the legacy; or whether the construction be adopted that a legacy "to be paid as soon as practicable" was nevertheless to be postponed until the future indefinite time of the widow's decease, and that the residue after payment was what was meant by the words "then the

† Motion for leave to file petition in error to this judgment was overruled in the Supreme Court, June 3, 1884. No further report.

remaining property or money and credits," as in item 7, in either event the real and personal estate were blended into one common fund, which is decisive of his intent to charge the legacy upon the realty in case of a deficiency of personal assets. *Moore v. Beckwith*, 14 O. S., 129, 185; 2 Redf. Wills (2d ed.), 211, section 11.

The question is, next, as to the defense as set up against the enforcement of the charge. Payment is pleaded, but the only evidence is lapse of time. The presumption from this is met by testimony that the executor whose duty it was to make payment admitted it had not been made—this as late as 1877 or 1878, a short time before he died. But the statute of limitations is further pleaded.

The right of defendants to interpose such plea is contested upon the ground that they have no interest. But the petition makes them parties as claiming an interest in the lands, and prays that unless they pay the legacy the said real estate may be sold. The answer of Catherine and Amanda Stump sets up title by purchase from the heirs of Clementus Stump; and while there is a reply denying each and every allegation inconsistent with the petition, it is surely not inconsistent with the petition that the defendants have title. Why else were they made parties? The action is not by one claiming title to exclude adverse claimants, but is by an administrator, with the will annexed, to sell real estate for payment of a legacy. If the defendants have no interest in the real estate there is no case before us.

The question of the statute of limitation involves consideration of the nature of the powers of an executor, or, as here, administrator *de bonis non*, with the will annexed. An executor possesses no power over the real estate except such as is expressly given by will. *Wills v. Cowper*, 2 O., 124, 128. Here no power was expressly given to the executor—his right of recourse to the realty could be only because of the duty of payment of the legacy, and the fact that it was charged upon the realty. For the same reason, such right of recourse would continue only during the continuance of the charge. The inquiry, then, is whether the charge continues for all time, or whether there be a statutory bar.

The contention is, that the case is one of continuing and subsisting trust. But in whom is the trust? It is only as between trustee and *cestui que* trust that lapse of time is no bar. *Williams v. First Presby. Church*, 1 O. S., 478, 506; *Paschall v. Hinderer*, 28 O. S., 568, 579; *Angell Lim.*, section 166. The executor was not made by the will trustee of the real estate of testator; and had he been, the trust would not be now in the administrator with the will annexed. *Wills v. Cowper*, *supra*. The only trust was that of executor—not a personal trust, but one passing to the administrator with the will annexed—a trust arising by law. *Wills v. Cowper*, *supra*; *Philips v. Harter*, 5 O. S., 122; *Foxworth v. White*, 16 Rep., 676. The real estate was not vested in him; his only power over it was under the statute (S. & C., 596, section 156; R. S., 6172): "When a testator shall have given any legacy by will that is effectual to pass or charge real estate, and his personal estate shall be insufficient to pay such legacy, together with his debts, the allowance to the widow and children and the costs of administration, the executor or administrator with the will annexed, may be ordered to sell his real estate for that purpose in the same manner and upon the same terms and conditions as are prescribed for the payment of debts." The trust in him as executor was for payment of the legacy, but that the plaintiff is a trustee does not affect the plea of the statute of limitations.

To whom, under a proper construction of the will, the real estate passed is not material, so long as it did not pass to the executor. If, under item 6, it passed to the son William, the trust was in him to hold it until decease of the widow, and then, under item 7, to divide equally with the other two sons, John and Clementus. The trust was not to pay debts and legacies; that was a duty devolving upon the executors, and this would be so even upon a construction of the will postponing the legacy until decease of the widow.

The fee to whomsoever it passed was subject of course to the legacy, but the charge was not a continuing and subsisting trust. The real estate was to be regarded as equitable assets (Story Eq., sections 552, 555),—*quasi* assets in the hands of the executor. 3 Redf. Wills, 2d ed., 239, section 20. But this did not constitute the devisee's trustees of a continuing and subsisting trust. It is held that the devisee of land charged with a legacy is personally responsible for payment of the legacy. *Glen v. Fisher*, 6 Johns, Ch. 33, 36; *Laskin v. Mann*, 58 Barb., 267; and see *Lockwood v. Stockholm*, 11 Paige, 387. This is because by accepting the devise the burden of paying the legacy is assumed. *Fuller v. McEwen*, 17 O. S., 288, 293; 2 Redf. Wills, 212, section 12, note. The devise is a trust for payment of the legacy, but it is a trust by implication. There is an obligation cognizable at law as well, and not falling within the exclusive jurisdiction of equity. A continuing and subsisting trust embraces only those technical, direct and express trusts which are of a nature to be solely cognizable in equity. *Yearly v. Long*, 40 O. S., 27, 32; *Paschall v. Hinderer*, *supra*; *Angell on Lim.*, section 178.

Strictly speaking, the statute of limitations, as such, is not pleadable in equity. If anything to the contrary seems to be said in *Yearly v. Long*, *supra*, p. 34, it must be taken, we think, as referring to causes accruing since the code of civil procedure. The statute governing here was the act of 1831 (Swan Stat., 1841, p. 553); but this did not in terms apply to suits in equity, only to actions at law. *Paschall v. Hinderer*, *supra*. Courts of equity proceed, however, in analogy to the statute, the only exception being in case of a continuing and subsisting trust; and where there is concurrent jurisdiction in law and equity, the equitable action is based in the same length of time as the action at law. *Paschall v. Hinderer*, *supra*, p. 577.

The act of 1831 contained a general provision barring "all other actions not herein enunciated within four years after such right of action shall have accrued." The "fourth" class of enumerated actions was as follows: "Actions upon the case and debt founded upon any simple contract not in writing, and action on the case for consequential damages, within six years." The limitations of the code of civil procedure are substantially the same, except that by the general clause, "actions for relief not hereinbefore provided for" are limited to ten years. In *Yearly v. Long*, *supra*, the equitable charge of a legacy under a devise conditioned for the payment of the legacy, is held to be barred after six years. The ground of the ruling is, that the personal obligation created is barred at law in the same time. That case was under the code of civil procedure, but, as just said, the limitations of the act of 1831 were, in this respect, similar. The case is authority here, and determines, we think, the period of limitation applicable. Indeed, any limitation short of twenty-one years would be sufficient even if the construction were adopted that payment of the legacy was deferred until the decease of the

widow. That event took place in 1863. The will itself was probated in 1884. The deficiency of personal assets, as shown by the account current of the executor, was ascertained at the date, at least, of filing that account, which was in 1836. The death of the legatee occurred in 1857, and her daughter, who was her heir, is now and was, at the death of the widow, in 1863, a married woman. But this did not affect the right of action in the executor—he, or the administrator *de bonis non*, was under no disability.

The petition is dismissed.

A. G. Collins, for plaintiff.

P. J. Donham, J. R. Johnston and C. W. Cowan, for defendant.

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LANDLORD AND TENANT—REPLEVIN.

[Pickaway District Court, March Term, 1884.]

Minshall, Louden and Gregg, JJ.

WILLIAM MOUSER V. CHARLES DAVIS.

A landlord can not bring an action of replevin against a tenant, of land rented on shares, for his share of the crop before a sufficient time has elapsed to allow the tenant to deliver it.

This was an action of replevin brought by Davis against Mouser to recover possession of certain wheat in the stack on the premises of Mouser. The action was commenced before a justice of the peace and appealed to the court of common pleas and tried there by a jury.

Evidence was given tending to show that Davis sowed the wheat on the premises of Mouser under a verbal lease; that Mouser cut the wheat at harvest and took possession of it, and then Davis brought this action of replevin and the wheat was taken from the possession of Mouser by the officer. On the trial in the common pleas, Judge Lincoln charged the jury as follows:

"If Mouser, being the owner of the land, made an agreement with Davis by which he was to sow any part of the land in wheat and by which Mouser was to receive his rent in wheat, when the same should be threshed out, and the plaintiff sowed said wheat in pursuance of said agreement, then Davis would be entitled to the possession of said wheat until he had a reasonable time to thresh it out after the same was harvested; and if during such time the defendant took possession of the wheat without the consent of Davis and detained the same from him, then your verdict should be in favor of the plaintiff."

BY THE COURT:

We are of the opinion that the charge of the court of common pleas as given above is correct. When land is rented on the shares and the tenant by the terms of the lease is bound to thresh the grain and deliver the landlord's share to him, then the tenant has the right to the possession until it is ready for delivery or until a reasonable time has elapsed to enable him to prepare the same for delivery. The ownership of the crop is in both landlord and tenant; but the right of *possession* is in the tenant until he has sufficient time to deliver the landlord his share of the grain. The landlord can not bring an action of replevin against the tenant for his share of the crop before sufficient time has elapsed to allow the tenant to deliver it.

[Superior Court, Cincinnati, General Term, April, 1884.]

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†HERMAN H. HOFFMAN ET AL., TRUSTEES, V. LEE H. BROOKS AND
WILLIAM WATERFIELD, PARTNERS.

†For opinion in this case, see 6 Dec. R., 1215. (a. c. 12 Am. Law Rec., 747.)

RECORD OF MORTGAGE—NOTICE—ERASURES—USURY. 260

[Pickaway District Court, March Term, 1884.]

Minshall, Louden and Gregg, JJ.

CECILIA STANBERY AND P. B. STANBERY, EX'RS, V. HENRY O'NEIL, ET AL.

1. Where a mortgage as recorded stated the true amount of the notes secured by it, and the condition contained a recital of that amount as well as the mortgage index: *Held*, this was sufficient to affect a subsequent purchaser with notice of the true amount, although the recorder had omitted to mention one of the notes in the body of the recorded mortgage.
2. Words written on the back of a note are no part of the body thereof *prima facie*, but are presumed to be done after the note is completed. And hence, an erasure or interlineation need not be explained before pursuing a remedy solely connected with the body of the note.
3. A change of interest to a usurious rate as between the original parties to a mortgage, will not discharge a subsequent purchaser.

On or about November 5, 1852, Henry and Charles Stanbery sold and conveyed to James Marshall lots 8 and 4 in entry 7568 in V. M. District in Pickaway county, one lot containing 125 and the other 110 acres of land. On the 26th of October, 1853, Marshall executed to Henry and Charles Stanbery a mortgage deed on the said premises to secure the payment of five promissory notes, all dated November 5, 1852, with interest payable annually; one for \$500 at two years, one for \$500 at three years, one for \$800 at four years, one for \$500 at five years, and one for \$350 at six years; total, \$2,350. The consideration stated in the mortgage was \$2,350, and in the condition the notes were described as four in number in the sums above stated and amounting to \$2,300.

The mortgage was recorded, but not correctly. The said notes were described as follows in the record: "Five in number, all dated November 8, 1852, and on interest from date; one for \$500 at three years from date; one for \$500 at four years from date, one for \$500 at five years from date, and one for \$350 at six years from date—total, \$2,350."

In the mortgage index the amount was stated at \$2,350. Subsequently Marshall sold and conveyed lot No. 4 to Mary Parker, and it was agreed in writing between Henry Stanbery and Marshall that on the payment by Mary Parker to H. C. Stanbery of \$1,080 in five annual payments with annual interest, they were to execute a release to her of lot No. 4. On June 1, 1855, she paid \$304.64, and on November 5, 1855, she paid them \$1,072.55, which was in full of her debt and they executed a release to her.

In December, 1856, James Marshall conveyed 75 acres of lot No. 8 to his son, Ed. M. Marshall, and on the 5th of April, 1858, Ed. M. Marshall conveyed said 75 acres to Henry O'Neil. The consideration in

the last named deed was \$2,250. O'Neil made several payments to Stanbery on this debt, amounting to \$1,289.40, and the last payment being made September 4, 1878. Chas. Stanbery at some time released his interest in the note to Henry Stanbery. All the payments were endorsed on the back of the several notes. One endorsement was as follows: "\$229.81 of principal paid by Mary Parker as of November 5, 1854, and interest on that sum to same date." "\$304.64 paid by Mary Parker June 1, 1855." All the other notes were endorsed as follows: "Interest on \$229.81 paid by Mary Parker up to November 5, 1854." All of the foregoing endorsements were struck out by some person before suit, except the endorsement of \$304.64.

On the 14th day of September, 1882, a petition was filed by the executors of Henry Stanbery to foreclose this mortgage. To this petition O'Neil made several answers. First—He denied the existence of any mortgage *as recorded*, and all notice of any other mortgage. Second—He alleged that Marshall and Stanbery made a contract without his knowledge or consent, changing the rate of interest to eight per cent. per annum. Third—He insisted the action was barred by the statute of limitations. Fourth—Alleged the debt to Stanbery was fully paid.

These defenses were denied. On the trial of the cause before Judge Lincoln in the court of common pleas, the petition was dismissed. On the trial in the district court on appeal, Mary Parker's husband testified that she never made on the said purchase but two payments; one June 5, 1855, \$304.64 to Charles Stanbery, and one of November 5, 1858, of \$1,072.50 to Henry Stanbery. And Charles Stanbery testified that Mary Parker never paid but one payment to him. These two payments were in full of the \$1,080 and interest which she had undertaken to pay. O'Neil wrote several letters to Henry Stanbery promising to pay him the balance on the mortgage, and Stanbery repeatedly sent him statements of the amounts due and unpaid, as claimed by him.

Page, Abernethy & Folsom, for the plaintiffs.

1. This action is not barred by the statute of limitations. O'Neil made four payments on the mortgage, the last one being made September 4, 1877. The fact of such payment is alleged in the petition and not denied in the answer.

2. There is no proof of any agreement between Marshall and Stanbery to change the rate of interest. If any such agreement was made it does not appear when it was made, whether before or after O'Neil made his purchase, nor whether the same was in writing, nor upon what consideration. If the contract had been altered in this respect it would not discharge O'Neil. See *Kuhns v. McGrah*, 88 O. S., 468.

3. The endorsement which appears to have been erased was not a double payment by Mary Parker. It was erased because it was a mistake. It is the same \$304.64 which is credited immediately below. Besides, if Mary Parker made three payments and overpaid her debt, she is entitled to recover the money back, and O'Neil cannot claim the benefit of it. The erasure is fully explained. The burden is not upon the plaintiffs to explain it. 2 *Parsons on Bills*, 554, 555 and note.

4. There was enough in the record to put O'Neil on inquiry. *Wade on Notice*, 74, section 161.

Smith & Morris, for defendants.

BY THE COURT :

We think there was enough in the record to affect the defendants with notice. The mortgage stated the consideration to be \$2,350. The condition of the mortgage recited the fact that there were five promissory notes, and that the total amount was \$2,350. The mortgage index stated that the amount which the mortgage was given to secure was \$2,350. It is evident from reading the record that the recorder omitted to mention the notes. There was enough in the record to put an ordinary man on inquiry. "A man is not at liberty to shut his eyes against the truth and shelter himself under the plea of ignorance. Where a fact comes to his knowledge that necessarily puts him on his guard, he is bound to make diligent inquiry and search for information at the sources from which it is most natural to expect it." There was enough in this record to satisfy any person that a note had been omitted in the description of the indebtedness, and to inform him that the true amount was \$2,350. See *Frost v. Beekman*, 1 J. C. R., 288; *Peter v. Collons*, 33 Me., 38; 38 N. H., 22.

There was no satisfactory evidence before the court that a contract was made between Marshall and Stanbery for the payment of interest at eight per cent. per annum. But if there had been such a contract, we conceive it would not discharge O'Neil. *Kuhns v. McGrah*, *supra*; *Davis v. Jewett*, 3 Green (Iowa), 226; 40 Ill., 296.

In regard to the statute of limitations it is in evidence that O'Neil was in correspondence with Stanbery for many years, and repeatedly promised to pay the mortgage debt. He made several payments on it, the last one being made in 1877; consequently the suit is not barred.

As to the question whether Mary Parker made two payments or three, we are satisfied from the testimony that only two payments were made, and that the erasure on the back of notes was made for the purpose of correcting a mistake. If it were incumbent on the plaintiff to explain this apparent alteration, we think the explanation was furnished. We are disposed to adopt the rule which presumes that this erasure was made in good faith, and for the purpose of correcting an error, and not with any fraudulent intent.

Commonwealth v. Ward, 2 Mass., 397; *State v. McLearn*, 1 Aikens, 811; *Kendell v. Lawson*, 2 Vt., 138; *Tappen v. Eli*, 15 Wend., 362; *Howe v. Thompson*, 11 Me., 152; *Meikel v. State Sav. Inst.*, 36 Ind.

The plaintiffs are entitled to a decree for the amount claimed.

ORDER FOR PARTITION.

263

[Cincinnati Superior Court, General Term.]

ELLIS v. HICKS.

It is not necessary or regular to insert in the entry of the order for partition the provision: "If the commissioners should be of opinion that the estate cannot be divided according to the command of the writ without manifest injury to the value thereof, they shall return that fact to the court with a just valuation of the estate."

FORCE, J.

This is reserved on a motion to amend the entry of order for partition by inserting in it a provision that in case partition can not be made without manifest injury to the value of the property, the commissioners

shall return that fact with a just valuation of the estate. Partition is a statutory proceeding.

Section 5757, Rev. Stat., provides that the court shall order partition to be made, appoint commissioners to make partition, and order a writ of partition to issue.

Section 5758 provides that this writ shall be directed to the sheriff, and command that he make partition by the oaths of the commissioners.

Section 5759 provides that the commissioners must view and examine the estate.

Section 5760 provides how they shall perform their duty when there are several tracts.

Section 5762 provides that when the commissioners are of opinion that the estate can not be divided without manifest injury, they shall return that fact with a just valuation of the estate.

These different sections of the statute are of three sorts: First, that addressed to the court, telling what way the court shall enter on the minutes; second, that the writ shall be addressed to the sheriff, and he shall execute the writ by the oaths of the commissioners; the third directs how the commissioners shall perform their duty.

The contention is, that the journal entry shall contain not only what the statute says it shall contain, but shall contain the provisions made for the direction of the commissioners. If any of the instructions for the commissioners are to be part of the judgment entry, all alike should be. But the meaning of the statute appears to be, that the court shall order partition to be made; that the writ to make partition shall be issued to the sheriff, and that the sheriff shall instruct the commissioners how they shall do that which they are to do under him.

Motion overruled.

Wulsin & Perkins, for plaintiff.

Wilby & Wald, for defendant.

272 INCORPORATION BY AN INSOLVENT—ATTACHMENT.

[Superior Court, Cincinnati, Special Term, March, 1884.]

†CHARLES BEITMAN & CO. V. HUGH MCKENZIE.

1. The defendant carried on the business of manufacturing shoes, had on hand a large stock of material in process of manufacture and had contracts to the amount of \$125,000 for shoes to be made. Finding himself insolvent, he turned his business into a corporation, assigning to it his stock, machinery, book accounts and contracts, and taking shares of stock in place. It appeared upon the evidence that he did so in the reasonable belief that he could thereby better provide for his creditors, and with that intent: *Held*, this transaction was without actual fraudulent intent, and did not afford ground for an attachment.
2. It was not made fraudulent by the fact that if he had done nothing, the first creditors who obtained judgments might have secured payment in full by levying execution.
3. Evidence that the defendant, upon forming the corporation, settled with the great majority of his creditors upon the basis that his assets were not diminished in value by change of form, and offered to so settle with all, is competent as tending to corroborate the direct evidence as to his intent.

†This judgment was affirmed by the district court; see opinion, *post* 000. The district court was affirmed by the Supreme Court, without report.

FORCE, J.

This is a motion to dissolve an attachment. The action in both cases was begun on August 30, 1883. Attachment was issued, property seized. The matter stated as ground for the attachment, was a transaction on August 18, 1883, whereby the defendant, then carrying on a large business, changed his business into a corporation, assigning to the corporation his stock in trade, machinery, book accounts and good will, and taking from the corporation stock in it.

On the hearing of the motion, evidence was offered as to transactions in October, whereby the assets of the corporation were put into the hands of Mr. Larkin, a banker, to secure Larkin for money advanced to pay off a number of creditors who compromised their claims. This transaction in October can have no effect in this hearing. The attachment was on the ground that Hugh McKenzie, on August 18, disposed of his property with intent to defraud, hinder and delay his creditors. That intent is not proved or disproved by the mode in which, in the subsequent October, an arrangement subsequently formed with the bulk of the creditors was carried out. The question is a simple one. There is no dispute as to August 18. The dispute is as to the intent with which the act was done. Deeds may be set aside for constructive fraud; an attachment can be sustained only by proof of an actual fraud. The intent named in the statute and which stands as a basis for an attachment must be proved to have existed in fact as an actual purpose. Of course it may be proved as any other fact may be proved, by evidence direct or indirect, or by presumptions; but whatever be the mode of proof, the fact to be proved is the existence of an actual, conscious, fraudulent purpose.

Now, in this case, Mr. McKenzie, having a large establishment and employing some three hundred workmen, and having on hand a stock of leather, and so forth, partly made into shoes, and having machinery, did, on the day after a note went to protest, with extraordinary celerity, transmute his business into a corporation. The first affidavit filed was sworn to in Columbus on the morning of August 18, and by the evening of that day, in Cincinnati, the certificates had been filed, certified copies issued, stock taken and paid up, books opened, corporation organized, directors elected and officers appointed, and the corporation had become complete. The fact of the extraordinary dispatch in making the corporation, together with the coincidence in time, with the protest of a note of Mr. McKenzie's, throws a suspicion over the transaction which requires explanation. And the question is, is the explanation sufficient?

It is in proof that Mr. McKenzie in the entire transaction, acted upon the advice of counsel, and in acting upon the advice of counsel, he seems to have stated fairly the condition of his affairs to them before taking their advice. After the corporation was formed he met his creditors, and gave to them access to the establishment and to his old books so that they could see for themselves, with the aid of a committee appointed by themselves, and an expert selected by them, the condition and value of the assets which he had at the time of the formation of the corporation, the assets including the stock on hand, the machinery and the credits. Mr. McKenzie claims that his idea in making the corporation was to enable him to do better for his creditors than he would have been able to do otherwise. At the time his first note went to protest he owned besides this business establishment, forty or fifty thousand shares of stock in other corporations, which was already pledged as collateral to secure specific debts. He owned, also, some real estate, one portion being some acres of his homestead, and the rest some lots near the Miami river, which was unincumbered, but was, as compared with his business establishment, of comparatively small value. The bulk of his property was his business establishment. If he had staid his hands, he claims, and obviously justly, that the creditors successively, as claims matured by taking successive judgments and making levies upon the assets of his establishment, selling out the machinery and the half worked up stuff in fragments would soon have exhausted the entire stock while making very little headway in paying off his debts; that this stuff, which, as part of a going business, was estimated at somewhere between sixty and ninety thousand dollars, would, if sold by a sheriff in scattered judgments, have produced a small portion of that sum; the good will, if any, could have amounted to nothing, but must have disappeared in these fractional sales. Mr. McKenzie claims that by turning his business into a corporation, and taking stock in place of the tangible assets giving the corporation all the assets which he had, connected with the good will as a going business, and the capacity to go on and carry out contracts which he had on hand in his business to the amount of \$125,000 for the coming season, that he put himself as such stockholder in a corporation in a much better position to help his creditors. First, that by his stock, he taking \$175,000 of stock in a corporation the whole capital of which was two hundred thousand, he could by pledging

this stock raise money more easily than he could while being in business, he having in that case nothing to pledge unless it would be a chattel mortgage, and a chattel mortgage upon stock in trade would be either accompanied with a power of sale to the mortgagor and therefore invalid to the mortgagee or without a power of sale to the mortgagor and therefore destructive to him. This estimate of Mr. McKenzie that he would be able to do better by his creditors by turning his affairs into a corporation seems not to have been an unreasonable one and is perhaps justified by the events. The committee of creditors who investigated his affairs took as their basis for his settlement with them his status as he was before he turned his assets over to the corporation; that is, they assumed that the value of his property could not, so far as they were concerned, be changed by any change in the form of the property made by him. They settled with him on that basis. They satisfied themselves that on that basis, that is, his condition before he made the corporation, a payment of twenty-five per cent. cash was all that his affairs would warrant, and they agreed to settle with him and he undertook to settle with them on that basis.

The whole question being whether or not his intent in making the corporation was in fact fraudulent, and the cases, many of them in this court, many of which have been affirmed by the district court, and the same rule established by the Supreme Court and declared by the courts of other states, being that to sustain the attachment there must be an actual fraud; it can not be sustained upon mere proof of constructive fraud. I must say that the evidence in this case does not show that Hugh McKenzie formed that corporation with a fraudulent purpose, and the motion to discharge the attachment is granted. As to the notes not yet due the action is dismissed.

Butterworth & Crossley; Hagans & Broadwell and Paxton & Warrington, for motion.

John W. Herron and C. B. Matthews, *contra*.

274 BRIDGES—AUTHORITY OF COMMISSIONERS.

[Superior Court of Cincinnati, General Term, April, 1877.]

†STATE OF OHIO EX REL. PUGH V. COMMISSIONERS (HAMILTON COUNTY).

1. The statutes give the county commissioners general authority to construct bridges and roads, and provide that in Hamilton county the commissioners in exercising this authority shall not make any contract or payment without the approval of the board of control.
2. Local acts subsequently passed authorize the commissioners of Hamilton county to construct certain designated bridges, roads, and avenues: *Held*, such local acts are to be taken in connection with the sections of the general statutes concerning the board of control, and they do not authorize the county commissioners to construct and pay independently of the board of control, unless such acts so prescribe, either expressly or by necessary implication.

FORCE, J.

The legislature at the session of 1883 passed sundry local acts authorizing the commissioners of Hamilton county to build two bridges, one over the Great Miami, the other over the Little Miami; and to construct, continue and complete certain designated roads and avenues. The commissioners were proceeding to contract for these improvements and pay for them without the approval of the board of control. This suit was brought to restrain such independent action. A provisional injunction was allowed. A motion was filed to dissolve the injunction, and the motion was reserved to general term.

The general provisions of the statute authorize the county commissioners to construct bridges in the line of existing traveled roads over streams and canals which intersect such roads. They also authorize the

† See decision of circuit court in *State v. Hagerty*, 8 Ohio Circ. Dec., 13,

commissioners to construct county roads, to be paid for out of the road fund, and free turnpikes, to be paid for by assessment on benefited lands.

They also provide that in Hamilton county there shall be a board of control, which shall have final action and jurisdiction in all matters involving the expenditure of money, or the awarding of contracts, by the county commissioners. Section 999. No contract or appropriation made by the county commissioners shall be valid till concurred in by the board of control. Section 1000. No action by the county commissioners in matters in which the board of control is authorized to act shall be valid until approved by the board of control, anything in any law of the state to the contrary notwithstanding. Section 1004. No liability whatever shall be created against the county, and no expenditure made, unless previously covered by an appropriation sanctioned by both boards separately. Section 1009.

As the statute prescribes that all powers given to the county commissioners by any law shall be exercised subject to the limitations named in the provisions concerning the board of control, the powers given by the local acts above-named must be exercised subject to these limitations, unless these local acts provide otherwise, either expressly or by necessary implication. The acts do not so provide expressly. Nor do they so provide by necessary implication, for their object appears to be not to suspend the authority of the board of control, but quite other and different. The acts authorizing the bridges provide that they may be built at points outside of the line of any existing road and be connected with the roads by approaches. They limit the cost of the bridges, in one case to \$80,000, and the other to the proceeds of a tax of one-sixteenth of a mill. And, in the case of the bridge over the Great Miami, it is provided it may be paid for by bonds payable in ten years, instead of seven years, as prescribed by the general statutes. The other acts provide that the roads may be paid for by a special tax, the amount of which is prescribed, to be levied for the special purpose.

Motion to dissolve overruled.

W. H. Pugh, prosecuting attorney, and Wulsin & Perkins, for plaintiff.

O. J. Cosgrave and Stallo, Kittredge & Wilby, for defendant.

PLEADING—STATUTE OF LIMITATIONS—ASSIGNEE. 283

[Hamilton District Court.]

EDWARD M. SPANGENBERG, ASSIGNEE, v. ADAM SCHWARTZ ET AL.

1. When it appears upon the face of the petition that the statute of limitations would be a bar to action, the better practice is to state the ground of the demurrer specifically. *Vore v. Woodford*, 29 O. S., 245. The bar of the statute cannot be made available by a demurrer that the plaintiff has not legal capacity to sue.
2. In this state the assignee of an insolvent debtor not only represents the assignor, but the creditors. *Hanes v. Tiffany*, 25 O. S., 549. Where the assignor, prior to his insolvency, but for the purpose of defrauding his creditors, conveyed his property to his wife with a secret trust that he should enjoy the income and benefit of it, and he took the profit of his business to pay off a mortgage and make improvement on the property, the assignee, as representing the creditors, has the right to petition for the sale of the property or an account for the same so divested from the creditors.

ERROR to the Court of Common Pleas.

MAXWELL, J.

Demurrer was filed to the petition and sustained. An amended petition being filed, a demurrer was filed and sustained as to that, and judgment entered for defendant. The demurrers to the petition and amended petitions were on the ground, that the plaintiff had no legal capacity to sue. The allegations of the petition were that in October, 1882, defendant, Adam Schwartz, made an assignment to plaintiff for the benefit of creditors, including in the assignment the property in controversy, described in the petition. Plaintiff alleges further, that in June, 1874, defendant, Adam Schwartz, being indebted to none of the creditors interested in these proceedings, conveyed this piece of property to his wife with a secret trust to the effect that he should enjoy the income from the property and the benefit of it, and it is alleged that that conveyance was made for the purpose of defrauding future creditors. The petition further alleges that at the time when this conveyance was made there was a mortgage on the property of \$2,500, and afterwards there were improvements to the amount of \$2,500 made on the property. The petition alleges that defendant, Adam Schwartz, being, after the conveyance was made, in business, took the profits of his business and paid off this mortgage and made improvements upon the property; in other words, diverted from those persons who are now his creditors, the profits of his business which would otherwise have gone to them to pay debts. The prayer of the petition is either for the sale of the property, or an account for the sums so diverted from the business of Adam Schwartz and from his present creditors. The demurrer was on the ground that plaintiff had no legal capacity to sue; and in the argument upon the case here it is claimed, as it appeared upon the face of the petition, that the conveyance was made in 1874, the statute of limitations must prevail. It has been settled, where it appears upon the face of the petition that the statute of limitations should prevail, and it is desired to take advantage of it by demurrer, there must be a general demurrer or the better practice would be to state the grounds specifically. *Vore v. Woodford, supra.*

We think the petition taken as to this demurrer is not well taken. As to the other question whether or not the plaintiff has legal capacity to sue, *Hanes v. Tiffany, supra*, disposes of it so far as our state is concerned.

In *Hanes v. Tiffany, supra*, a mortgage void as to creditors was held void as to the assignee in trust for the benefit of creditors.

The court there say: "The mode of providing for creditors by way of assignment in trust for their benefit, is recognized and regulated by statute; and we see no good reason why their rights may not be as effectually asserted through the assignee, as they could be by judgment and execution in case there had been no assignment."

Judgment reversed.

Gasser & Spaugenberg, for plaintiff in error.

M. Pohlmann and A. C. Grube, for defendant in error.

FOREIGN JUDGMENT—LIMITATIONS.

284

[Hamilton District Court.]

†JOHN REYNOLDS V. JOSIAH DRAKE.

A foreign judgment recovered in a court of record, is a specialty within the meaning of our statutes of limitation. Section 4980, Rev. Stat. And an action founded upon such judgment recovered more than eighteen years prior thereto, after deducting such time as defendant was absent from the state of Ohio, held on the authority of *Stockwell v. Coleman*, 10 O. S., 84, to be barred.

ERROR to the Court of Common Pleas.

BUCHWALTER, J.

Plaintiff filed his petition in the court of common pleas September 9, 1881, claiming a cause of action against defendant on a personal judgment recovered in the state of California, October 20, 1860, for the sum of \$4,068.50 with interest at ten per cent. per annum, and avers that the defendant absconded from the state of California about October 1, 1860, between the time of the filing of his answer and the time at which judgment was entered in that case, that he had ever since concealed himself, and that plaintiff did not know of his residence until within six months prior to the bringing of this action.

Defendant in his answer pleads the statutes of limitation of Ohio and California, and denies that he concealed himself or that he absconded from the state of California, but avers his residence in this city and county except such time as he was in California. And in answer to interrogatories on file, says he left San Francisco, Cal., October 1, 1860, for Cincinnati, Ohio, where he remained until July, 1869, when he left again for California, arriving August 10, 1869, and remaining there until December 2, 1871, when he returned permanently to Cincinnati, Ohio; his family during all that time residing in this county and state.

The bill of exceptions admits the proof substantially as stated in the answer to the interrogatories; and it is clear by the proof that defendant's residence in Cincinnati was not concealed, but was open and in accord with the mode of usual citizenship. No proof was made of the statute of limitations of California on the trial, and hence no issue raised under sec. 4990 of Rev. Stat. Deducting from the time intervening from October, 1860, when the right of action accrued, and September 9, 1881, when he filed his petition, such time as he was absent from the state of Ohio would leave more than eighteen years' residence in Cincinnati, Ohio.

The claim for reversal was not based upon issues of fact, but upon a question of law, to-wit: that the action upon a foreign judgment was not a specialty within the terms of the statute of limitations under sec. 4980, Rev. Stat. In other words it was claimed that there was no statute of limitation operating against a foreign judgment. The statute of 21, James I, the legislative foundation of the various statutes of limitations, provided an exception so that it did not run against one in whose favor the action accrued, if he be "beyond the seas." The statute of Anne made the exception that this statute did not run against a cause of action if the debtor be "beyond the seas." Some of the states enacted the

† Leave to file a petition in error in this case was refused by the Supreme Court. March 23, 1886; no report.

exception in favor of the plaintiff when he is without the state, but no such provision is made in Ohio, nor would there be reason for it, because no disability exists against a non-resident plaintiff bringing his action.

It was held in *Stockwell v. Coleman*, 10 O. S., 34, that "in an action of debt in this state upon a transcript of a judgment of a justice of the peace of the state of Indiana, a plea of the statute of four years is not a good plea, and that the transcript of such a judgment is to be regarded as a specialty under the statute of limitations of this state." In *Tyler's Executors v. Winslow*, 15 O. S., 864, the cause of action was founded on a domestic judgment, and there the court held that the statute of limitations did not apply to an action founded upon a domestic judgment, and if it be assumed that the construction given to the case of *Stockwell v. Coleman*, *supra*, was broad enough to have included a domestic judgment, the court specially limited it so as not to apply.

In *Fries v. Mack*, 33 O. S., 52, an action founded upon a judgment in the state of Kansas, it was sought to have a finding of the court that *Stockwell v. Coleman* was further limited or overruled, so that an action on a foreign judgment would be barred in ten instead of fifteen years. The court held that "the general limitation of ten years prescribed by sec. 18, now sec. 4985, Rev. Stat., of the Code of Civil Procedure, is not applicable to an action brought on a judgment rendered in another state or territory." And in the body of the opinion the court say: "But we think it unnecessary in this case to reconsider the question whether or not a judgment rendered in another state is to be regarded as a specialty within the meaning of our statute of limitations," and intimate that if they were to hold that it was not a specialty they would go further and put it upon the same footing as a domestic judgment; but the court further say: "The Supreme Court of this state, in *Stockwell v. Coleman*, *supra*, decided that a judgment of a justice of the peace of another state, is to be regarded as a specialty under the statute of limitations of this state." That decision has never been overruled.

It is clear that *Stockwell v. Coleman*, *supra*, is still in force and has not been overruled or limited as to an action founded on a foreign judgment. The legislature of the state for more than twenty-four years has acquiesced in that interpretation by the Supreme Court of this statute. More than eighteen years having elapsed since the time the right of action accrued on this judgment and the seeking to enforce it on the part of the plaintiff, it is in our judgment barred by this statute.

Judgment affirmed with costs.

Goebel & Bettinger, for plaintiff in error.

Bates & Smith, for defendant in error.

SERVICES OF PROMOTER OF CORPORATION.

285

[Hamilton District Court.]

THIRD WARD BUILDING ASSN. v. CHRISTIAN M. L. TZE.

Where a corporation avails itself of the labors and contracts of its promoters before organization and ratifies the same, it becomes liable therefor. But evidence is admissible to show that the services were gratuitously rendered. In this case proof was competent to establish an understanding among the promoters of a building association that the services of an attorney at law in effecting an organization of the company of which he became a candidate for the attorneyship, were gratuitously rendered.

ERROR to the Court of Common Pleas.

BUCHWALTER, J. . . .

The plaintiff in error is a corporation, created by articles of incorporation, under the laws of Ohio, and operating under a constitution and by-laws printed in German and English.

The defendant in error, an attorney at law, brought his action before a justice of the peace, and on appeal recovered a judgment for \$27.70 in the common pleas court on a verdict of the jury, for services rendered as an attorney at law, on an implied contract, for the promoters of the corporation in drafting the articles of incorporation and the constitution and by-laws.

The building association admitted the service, but claimed that he was himself a promoter of the company, anticipating other benefits than that of pay by the corporation; that he volunteered his services with an understanding that they were gratuitously given.

Some controversy was made, on the hearing, as to the scope of the answer. We are of the opinion that it is sufficient to entitle the building association to give proof to show that the services were gratuitously given.

There are various errors alleged, on which the judgment is sought to be reversed, and those specially relied on are the the rulings of the trial judge in excluding and ruling out testimony offered and given on behalf of the building association and his charge to the jury. The authorities clearly hold that if a corporation avail itself of the labors and contracts of its promoters before organization and ratifies the same, it becomes liable therefor, as for the services of the attorney in preparing the articles of incorporation thereof. *Ante*, 000; *Zahner v. Building Association*, 79 Pa. St., 54; *Bell's Gap R. R. v. Christy*, 2 Nevada, 257; *Porter v. Mining Co.*

Counsel for the building association at the trial put the following question to the several promoters and incorporators: "What was the understanding at the time as to the charges to be made by Lotze?" to which we think the court properly sustained an objection, for that it called for a conclusion of the witnesses instead of the facts on which the jury might found their conclusion.

It was further sought, however, by proper questions to prove that Mr. Lotze had acted in the capacity of attorney for other like associations; had rendered like service to their promoters in their organization; that some of them were principal promoters and incorporators of this association, and that he did render like services in such other associations gratuitously.

We are of the opinion that such proof was competent; that the questions called for facts tending to justify an understanding among the promoters that Mr. Lotze's services were gratuitously given to aid in effecting the organization of the company, of which he afterwards became a candidate for the attorneyship.

In other words, the proof should not have been limited, as the rulings of the court indicate, to what was said and done by the parties at the time of the service, for the recovery is not claimed on an express but on an implied contract, and it was competent to show all the surrounding facts and circumstances under which the service was rendered, so as to submit the issue to the jury whether the service was for pay or was gratis.

Mr. Lotze, on cross-examination, without objection, denied that he had said at various times, after the service rendered, to various members and promoters, "that he had given these services for nothing—gratis;" and on these persons being called in contradiction, Mr. Lotze's counsel moved to exclude from the consideration of the jury "all the alleged statements of Mr. Lotze—that he did the work for nothing"—made after the work had been done."

This motion the trial judge granted.

We are of the opinion that, if true, they were admissions against Mr. Lotze's interest, and tended to show the claim of the association, that he had gratuitously given the services in controversy, and that the court erred in excluding such proof and in refusing to submit the same with proper charge to the jury.

"The law implies a promise to pay for the reasonable value of the benefits received only when there is no evidence that they were conferred on other grounds than that of contract, * * * as where there is evidence of corresponding benefits, or services rendered by the other party in connection with or at the same time with those for which suit is brought, such evidence requires that the inference to be drawn shall be determined by the jury." *Spring v. Hulett*, 104 Mass., 592; 76 N. Y., 157; *Wharton on Contracts*, 719.

By the proof it appears that Mr. Lotze was a candidate for the attorneyship of this association, being an employment or office with compensation to be fixed by its officers.

For the errors stated the judgment of the court of common pleas will be reversed and the cause remanded for further trial.

Davidson, Conway & Gabler, for plaintiff in error.

H. M. Moos, for defendant in error.

[Hamilton District Court.]

†STATE OF OHIO EX REL. PROS. ATTY. V. EDGAR ROBINSON ET AL.

In a proceeding in quo warranto the time for answer stated in the summons was the third Saturday after the return day: *Held*, the summons should be quashed.

QUO WARRANTO.

†A case with same title as this, from district court of Clermont county, was affirmed by the Supreme Court Commission, without report, April 22, 1884.

AVERY, J.

Section 6770, Rev. Stat., provides for the service of summons upon petitions in quo warranto filed without leave and notice. When notice is given before filing petition, summons of cause is unnecessary. Section 6772 prescribes the time for answer, "within thirty days after the return of the summons." The general rules of pleading require that the answer be filed on or before the third Saturday after the return day, sec. 5097, Rev. Stat.; but by sec. 4956, where special provision is made as to pleadings, the special provision shall govern. Section 5037 prescribes: "The summons * * * shall be directed to the sheriff of the county, who shall be commanded therein to notify the defendant that he has been sued and must answer at a time stated therein."

The motion to quash is upon the ground that the time stated in the summons is the third Saturday after the return day, and not the prescribed thirty days. The motion appears to us to be well taken. It is true that, "in every stage of an action," the court is required to "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Section 5115, Rev. Stat. But this presupposes the action to be commenced—the question here is whether it has been commenced. The action is only commenced by filing a petition and causing a summons to be issued thereon. Sections 5035, 6770, Rev. Stat. This limitation upon sec. 5115 is marked, we think, by the very language of the section. The words are "pleadings or proceedings," which use of language is the more significant from the fact that in the next preceding section providing for amendments the words are pleading, process or proceeding. Undoubtedly under sec. 5114 a summons may be amended, *Burton v. Ins. Co.*, 26 O. S., 467; but as without appearance by the defendant it must be served anew, *Williams v. Hamlin*, 1 Handy, 95, nothing could be taken for the plaintiff here by amendment. The time for answer would only begin to run from the return day.

Motion to quash summons sustained.

Worthington, for motion.

S. A. Miller and Sater, *contra*.

INJUNCTION—BOND.

295

[Hamilton District Court.]

†SIMON KRUG ET AL. v. AMANDA H. BISHOP ET AL.

The dismissal of a petition upon which an injunction has been obtained dissolves the injunction, and a cause of action arises against the obligors on the injunction bond.

ERROR to the Court of Common Pleas.

SMITH, J.

The action below was brought upon an injunction bond of Amanda Bishop v. Frank Bruner and Simon Krug, who were sureties upon the bond. Judgment was recovered, and to reverse that judgment the petition in error was filed in this court.

†This judgment was reversed by the Supreme Court; see opinion, 44 O. S., 221.

It appears from the bill of exceptions that prior to the second of March, 1880, Amanda H. Bishop and others who claimed to be the owners of certain real estate in the city of Cincinnati, brought an action of forcible entry and detainer against Mildred F. Bascoe, who was in possession, on the ground that she was a tenant holding over her term.

Whilst that proceeding was pending, Mildred Bascoe filed a petition in the court of common pleas against the said Amanda H. Bishop and others who had commenced those proceedings before the magistrate, claiming that she was in fact the owner of the premises therein described, and though she had made a deed of the premises apparently in fee simple to the said Amanda H. Bishop and the other defendant, it was in fact given for security only, and intended to be a mortgage, and that she was ready to pay the amount due upon the mortgage, and asking for a decree of the court to declare it to be a mortgage, and also praying for an injunction to restrain the proceedings before the magistrate. A restraining order was granted in these terms, viz.: "By consent of parties in open court a temporary injunction is granted herein, and the defendants and each of them are hereby restrained from prosecuting an action in forcible entry and detainer before Nathan Marchant, justice of the peace, or in any way disturbing the possession of the premises until the final determination of this suit; and the said plaintiff is to enter into an undertaking to the defendants in the sum of \$250, with sureties satisfactory to the clerk, conditional according to law."

In accordance with that entry, an undertaking was executed in the usual form required by statute by said Mildred F. Bascoe, with Frank Bruner and Simon Krug as sureties, with the condition that they should pay to defendants in that case all the damages which they or either of them should sustain if it should be finally decided that the injunction ought not to have been granted. This bond was executed on the fifth of April, 1880, at the time the petition was filed. Apparently no steps were taken in this proceeding until the twenty-fifth of February, 1881, nearly a year afterwards, when some of the defendants filed an answer. Others had not been served with process. On the third of March, 1881, a motion was made for the first time to dissolve the injunction, and a few days thereafter a motion was made to dismiss, and the action was dismissed by the court in these terms: "This cause came on for hearing on the motion to dismiss for unreasonable neglect to make service upon the defendants who are necessary parties, and the court being fully advised, grants the same and orders the same to be dismissed without prejudice at plaintiff's costs." The dismissal of the action dissolved the restraining order. 2 High on Injunctions, section 1476; Green v. Pulsford, 2 Beavan, 73; Colean v. Bridge Co., 5 Blatchford, 56.

The question of the propriety of the dismissal in that case cannot be considered here. Dowling v. Pollock, 18 Cal., 627.

A neglect to prosecute by the plaintiff is sufficient ground to dissolve an injunction. 2 High on Injunctions, section 1490.

"The dismissal of a petition upon which an injunction has been obtained is a judicial determination that the injunction ought not to have been granted, and a cause of action arises at once against the obligors in the injunction bond." Pugh, Admr., v. White, 78 Ky., 210.

The terms of the undertaking required by the statute of Kentucky are similar to those in Ohio, and the judge giving the opinion in the last named case cites with approval the language of the court in Dowling v. Pollock, 18 Cal., 627, viz.:

"The suit was dismissed for want of prosecution, and with respect to the particular case the judgment of dismissal had the same effect upon the rights of the parties as would have resulted from a judgment upon the merits. It terminated the proceedings and by its legal operation and effect set aside and discharged the injunction. It was the final action of the court operating directly upon the injunction and destroying the foundation upon which it rested." * * *

"In effect a dismissal is a final judgment in favor of the defendants, and though it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceeding in the particular action the rights of the parties are affected by it in the same manner as if there had been an adjudication on its merits." See also Cunningham v. White, 45 How. Pr., 489; Carpenter v. Wright, 4 Bosworth, 655; Gold v. Johnson, 59 Ill., 62. And although the court had no authority to issue the restraining order, it was dissolved for the want of equity in the bill or even for the want of jurisdiction, yet the principal having obtained the benefit of the delay by the injunction, the obligors of the bond will be held. Adams v. Oliver, 57 Ala., 249; Kimm v. Steketee, 44 Mich., 527; Schuyler County v. Donaldson, 9 Mo. App., 385.

The dismissal of the action in this case dissolved the injunction. In that proceeding the action of the court was final, and by the terms of the undertaking entered into the plaintiffs in error had bound themselves to pay whatever damages which would result by reason of the injunction.

This cause was submitted to the court below for damages sustained by reason of the injunction. It was in force for more than a year, and expenses were incurred in dissolving it. Upon examination of the evidence it seems to us the judgment is not excessive.

Judgment affirmed.

W. H. Baldwin, for plaintiffs in error.

P. A. Reece, for defendants in error.

BREACH OF CARRIER'S CONTRACT.

296

[Hamilton District Court.]

CIN., N. O. & T. P. RY. CO. v. J. PARROTT.

Where a common carrier receives corn in bulk for shipment in a certain designated car, and by its proper agents receipts so-called "dray tickets" therefor and issues a bill of lading thereon at fixed price for shipment to a certain point, it is a contract to carry that specific car of corn, and it is a breach of the contract for the carrier thereafter to unload and refuse to ship it, and substitute therefor another car load of corn, though it may presumably be of the same grade and quality—no fact appearing in proof showing assent of the shipper thereto. *Dean v. King*, 22 O. S., 118—distinguished. The shipper or consignee is not bound to accept such substituted corn, nor if it arrive at its destination in a damaged condition to bring his action therefor as to such substituted corn, but has a right of action against the carrier for the breach of the contract of shipment of the corn named in his bill of lading.

ERROR to the Superior Court of Cincinnati.

BUCHWALTER, J.

The plaintiff in error, a common carrier, seeks to reverse a judgment of the superior court recovered against it, in favor of defendant in error at the May term, 1883, for \$431.50. Plaintiff in error claims that the trial court erred in its rulings upon the admission of evidence and in giving any judgment against plaintiff in that action. It appears by proof that on February 4, 1882, J. N. Parrott ordered of W. H. Hill & Co., commission merchants of this city, two car loads of shelled corn, one of yellow and one of white; that on the same day Hill & Co. bought the corn at the Merchants' Exchange, of Christie, Cobb & Co., who had bins in the I., C. & L. Elevator Co., of this city; that the contract was made in the presence of Mr. Stimpson, the superintendent of said elevator, and at the same time a bill, according to the terms of sale, called by witness a "dray ticket," showing purchase by J. N. Parrott of W. H. Hill & Co., was made out therefor. The elevator superintendent was directed to have the corn so purchased of Christie, Cobb & Co., loaded in two "Cincinnati Southern cars," by which name plaintiff in error was familiarly known, the same to be delivered to and the "dray tickets" to be receipted by plaintiff in error for shipment. On February 8, the superintendent of the elevator company sent word to the yardmaster of the I., C. & L. Railway Company, near by, to send him two "Cincinnati Southern cars." Two cars were sent on the order; one was the "Cincinnati Southern," and the other had the car-bed of the I., C. & L. Railway Company on the trucks of the "Cincinnati Southern." They were loaded and on that

day delivered to the plaintiff in error at its branch depot at Second and Park streets, this city, and its depot-master there stationed received these specific car loads of corn numbered 2231 and 813, and signed these so-called "dray tickets," which were at once delivered to W. H. Hill & Co., who procured at the office of the railway company of its agents a bill of lading for shipment of these two cars, and at once drew on Parrott, through their bank, for the price of the corn, the corn being consigned "to shipper's (W. H. Hill & Co.) order, notify J. N. Parrott, Timmons ville, South Carolina." When these cars reached the McLean avenue depot, a Mr. Cook, the car recorder, seeing this car-bed of the I., C. & L. Railway Company, notified the freight agent at that depot, who ordered back the car No. 2231 of white shelled corn to the elevator, refusing to ship as loaded. It appears that on February 8, out of the same bin and presumably of the same grade and quality of corn, car No. 741 of the "Cincinnati Southern" was loaded and forwarded for shipment; that the original car, No. 2231, was the next day unloaded into the same bin. The original car of yellow corn, No. 813, arrived at its destination in order, and was accepted by Parrott at Timmons ville. The freight was paid, and also the draft as originally drawn on him by Hill & Co. for the price of the two car loads of corn as per his bill of lading. About ten or eleven days thereafter the substituted car, No. 741, arrived, and Parrott, on an examination of the corn, found it in a rotten condition and refused to take it, and brought his action against the plaintiff in error for the breach of the contract to ship the car of corn specified in the bill of lading. When the plaintiff in error, by its depot master at Second and Park streets, receipted for the two cars of corn, which in fact were delivered to it and the bill of lading issued thereon, the contract to ship the specific corn in car No. 2231 was completed; and when the railway company refused to carry and ordered back that car load of corn to the elevator company, it made a breach of its contract of shipment. The substitution of another car of corn, though it may have been presumably of the same grade and quality from the same bin, was at their own risk. The defendant in error had a right to refuse to receive the car as he did, for it was not his corn, nor the corn contracted to be carried for him. It is not claimed or proven that Parrott, or even W. H. Hill & Co., had notice of the substitution of other corn—simply that the elevator company, which loaded, and Christie, Cobb & Co., who sold the corn, had notice, but they were not agents of Parrott, so that notice to them was not notice to Parrott. Nor can it be maintained that notice to W. H. Hill & Co. would avail after corn was accepted and bill of lading issued (and draft drawn thereon against Parrott). This case does not, by its facts, come within *Dean v. King & Co.*, *supra*. There the carrier receipted for goods not in fact delivered; here the bill of lading calls for corn in fact delivered. The damages would be the market value of the corn. The amount of recovery, however, in this case is not disputed if any recovery is to be had, the value thereof or damages being agreed upon. The argument made and authorities cited as to the right to mix corn put in elevators does not apply to the facts in proof. Here there was no agreement on the part of Parrott, nor any fact in proof from which it could be presumed that he had made any agreement by which his corn in car No. 2231 was to be put in any elevator or mixed with any other corn.

Judgment affirmed with costs.

Hoadly, Johnson & Colston, for plaintiff in error.

I. T. Harrison, for defendant in error.

RECEIVERSHIP OF FOREIGN PROPERTY.

319

[Superior Court, Cincinnati.]

GOODRICH H. BARBOUR V. CHARLES O. LOCKARD ET AL.

1. A receiver will be appointed to take possession of mining property, although the persons interested in it are not partners, where there are a number of joint proprietors who cannot agree as to the working of the mines, or the disposition of the property.
2. A receiver will be appointed to take possession of property in a foreign country where all the owners are within the jurisdiction of the court and it is otherwise a proper case for the appointment of a receiver.

MOTION to appoint a receiver.

PECK, J.

The parties to the action are jointly interested in certain gold mining properties situated in Nicaragua. Attempts have been made to work the mines, money has been expended for that purpose, machinery purchased, and stamp mills erected. The parties are utterly unable to agree. None of them are willing to furnish money for the further working of the mines, and it seems that the property is in danger of being lost to all of them owing to the unfortunate situation of affairs. The owners all reside here, and have been made parties to this action.

The motion is resisted because:

1. A court of equity is reluctant to appoint a receiver to take possession of property held by tenants in common, and it is denied that there is any partnership in this case. Assuming that it is not a partnership it is more than a mere tenancy in common. The parties have undertaken to do more than merely hold the real estate for their common benefit. The property was acquired with a view to the working of the mines. That object appears to have been defeated in large part by the difficulties and disagreements between the owners. No one of the parties can take possession and go on with the work. They cannot agree to do so, nor can they agree as to the disposition of the property. It seems to me that the case is sufficiently analagous to that of a partnership to justify the appointment of a receiver, if there be no other valid objection to such appointment. For this conclusion there is very high authority. *Jeffreys v. Smith*, 1 Jac. & W., 298; 2 *Daniells' Ch. Prac.*, 1727. In the case cited, Lord Eldon appointed a receiver for mining property owned and worked by a number of persons who could not agree.

2. It is urged that the property is not within the jurisdiction of the court, and for that reason a receiver should not be appointed.

But the courts of chancery in England have in many instances appointed receivers for estates in the East Indies, in Ireland, and other places beyond their jurisdiction. 2 *Daniells' Chancery Practice*, 1731. This can only be done where the owners are within the jurisdiction of the court and have been made parties to the suit. *Harvey v. Varney*, 104 Mass., 436. In such case it has been held that a receiver should be appointed for property outside the jurisdiction and in one case the delivery of possession of the property was enforced by proceedings as for contempt against one of the parties who attempted, by agents outside the jurisdiction, to prevent the receiver from obtaining possession. *High on Receivers*, sec. 170, n.

It is claimed that a receiver would be unable to obtain possession of these mines in Nicaragua. As all the owners are here in court, who is to prevent him from getting possession? It is not to be assumed that any of the parties by themselves or their agents will attempt to resist the order of the court. Nor is it to be assumed that the officers of the government of Nicaragua will of their own motion interfere to prevent possession from being taken. There is a class of cases in which it has been held that a receiver cannot be permitted to take possession of property outside the jurisdiction of the court appointing him—the leading one of which is *Booth v. Clark*, 17 How., 322.

But there is also another class of cases in which it is held that a receiver appointed in one state will be permitted to take possession of property in another. *Bank v. McLeod*, 88 O. S., 174, 184; *Hurd v. Elizabeth*, 41 N. J. Law, 1.

The principal ground of distinction between the two classes of cases appears to be this: Where there are creditors, or other persons having claims upon the property, residing within the state where it is situated, the courts of that state will not permit the foreign receiver to take possession, preferring the rights of its own citizens to those of the people of another jurisdiction, but if there be no party within such state claiming an interest in the property, the courts thereof will permit, and in a proper case will assist, the receiver appointed by the courts of the state where the owners reside to take possession. The rules governing the action of the court in such cases are so clearly set forth by the learned judge in *Bank v. McLeod* that it is unnecessary to say more on this point.

If the property were situated in Ohio, plaintiff would be clearly entitled to the relief asked, and if the property were thus situated, and the owners were residents of a foreign state or country, the courts of this state would assist a receiver duly appointed by the courts of such foreign country to obtain possession of the property. In the absence of evidence or information as to the laws or tribunals of Nicaragua, I think we must assume that under like circumstances they would act in the same manner.

Motion granted.

Rankin D. Jones, for motion.

Logan & Slattery and C. J. Hunt, *contra*.

LIABILITY OF BOARD OF PUBLIC WORKS.

[Hamilton District Court, June 9, 1884.]

†JOHN DALY V. FRANK A. TUCKER ET AL.

ERROR to the Court of Common Pleas.

Where an act of the legislature provided for raising a fund by grand levy on the taxable property of Hamilton county, to be used for opening, grading and completing a certain avenue within the corporate limits of the city of Cincinnati, that said fund should be expended under the direction of the board of public works of said city, and that no part

†For opinion of common pleas, affirmed by this decision, see *ante*, 000. See also *Johns v. Cincinnati*, 45 O. S., 278.

thereof should be diverted from the object for which said levy was authorized, or transferred to the credit of any other fund, or used for any other purpose whatever, and where said fund raised as provided was being expended in the construction of said avenue, under the direction of said defendants, members of said board of public works; the plaintiff, a laborer, received injuries by reason of the negligence of defendants without fault on his part: *Held*, That said defendants were agents of the state of Ohio in the construction of said avenue, and as such agents were not liable individually, nor could said fund be subjected to satisfy plaintiff's claim for damages by reason of said injuries, no express statutory provision authorizing a recovery.

Opinion by BUCHWALTER, J., citing *Dunlap v. Knapp*, 14 O. S., 64, 68, and *Board of Com'rs Ham. Co. v. Mighels*, 7 O. S., 109.

NEGLIGENCE—EXCEPTIONS.

[Hamilton District Court.]

CINCINNATI ST. R. R. CO. v. WM. MEYER.

ERROR to the Superior Court of Cincinnati.

MAXWELL, J.

1. Whether or not there was negligence on the part of the defendant or contributory negligence on the part of the plaintiff in any particular case, the testimony conflicting, is a question of fact for the jury under proper instructions from the court.
2. The rule applicable to steam railroads, in cases involving the question of negligence, does not apply to horse or street railroads.
3. Where a general exception is taken to the charge of the court upon the matter of damages, the question whether a particular portion was erroneous, it not being claimed that the whole charge was erroneous, cannot be raised.

Affirmed.

Paxton & Warrington and Stallo, Kittredge & Wilby, for plaintiff in error.

Durbin Ward and S. A. Miller, *contra*.

6

BUILDING ASSOCIATIONS.

[Superior Court, Cincinnati, General Term.]

MCKEOWN V. IRISH BUILDING ASSOCIATION.

1. Money paid under a mutual mistake of fact can be recovered back.
2. Where members of a building association passed a resolution that if every one would pay up his dues to 1879, the association might dissolve and each one would be paid off his share with a premium; and in accordance with this resolution most of the members having paid up their dues were so paid off and went out of the association; but approaching the time of final distribution it was found that there were not sufficient funds in the treasury to pay off all the members: *Held*, That the case being one of mistake of calculation and there being no element of fraud in the transaction, those who were not paid could recover their share from those who had gone out; that all who had not paid should pay in an amount that would pay them up to June 2, 1879, and as there were different classes, if the amount paid in by requiring all to pay up to June, 1879, was not sufficient to pay off those not yet paid, then those who had received the highest amount of profit were to be first assessed until they had been assessed an amount which would reduce their profit down to those who had received the next highest amount and so on.

PECK, J.

Most of the questions in this case have been heretofore passed upon by the general term of this court, but it is again before us upon some questions which it is necessary to determine. Defendant was one of the ordinary building associations incorporated under the laws of Ohio. It had a large membership, and seems to have been very prosperous during its life, so much so that surplus funds came into its treasury which it became difficult for the association to dispose of.

Finally a plan was devised by the directors by which it was thought that if every one would pay up his dues to June 2, 1879, the association might dissolve and each one would be paid out his share with a profit.

This plan was voted upon and adopted by the directors and stockholders. It was, as has been heretofore decided by the General Term, *ante*, 8 Dec. R., 17, directly in the teeth of the constitution of the association, and was not binding upon the members for that reason. However, there appears to have been very little objection made to it by the members of the association. A large number of them came in and paid up their dues to the date agreed upon, had their shares cancelled, received their money and went out of the association. But approaching the time of final distribution, it was found that there were not sufficient funds to pay all the members off in the manner first intended, so that after most of the members had been paid off there were eleven who had not received their money. These eleven are claiming in this action to recover as against the other stockholders (all of whom have been made parties) a sufficient amount to equalize themselves with those who have gone out. The situation is simply that of a mistake in calculation. There does not appear to be any element of fraud in the transaction. The arrangement seems to have been honestly entered into. Those who took their money and those who did not were alike affected with the belief that the plan would operate successfully.

It seems to us from the evidence that there is no reason why these eleven who have not been paid should not have as much as those who

have. They were all of equal standing. All of them had an equal right in the association and to their shares in its assets. It is claimed on behalf of those who have been paid off that they could not now be assessed to raise a sum to pay off the others, because there is something in the nature of an estoppel as against them. We fail to find any element of estoppel in the case. These parties defendant do not appear to be in any different position from that of persons who have accidentally received more than they are entitled to. The rights of no third party have intervened. It is not claimed that there has been any change of position of any of the parties by reason of overpayment. The directors appear to have originated the plan, and to have pressed it upon the association. They stood in the same relation to all the parties, and no one is bound to suffer by reason of their action more than another. We have seen that the stockholders acquiesced and that the action was illegal, so defendants have received moneys to which they were not legally entitled but with the acquiescence of the plaintiffs. The latter ask that the former be required to return a sufficient amount to put all parties upon an equal footing. To that we think they are entitled.

The question arises how shall this money be paid in order to equalize those not paid off with the others? The court have determined that it would be proper to assess all alike—that is, to require that all who have not paid shall pay up to June 2, 1879. Then all would stand on the same footing so far as payments to the association are concerned. There are several classes. Some were mortgagors, some not; some were borrowers, and some not. These different classes received different amounts. If the amount paid in by requiring all to pay up to June, 1879, is not sufficient to pay them all, then those who have received the highest amount of profit are to be first assessed until they have been assessed an amount which would reduce their profit down to those who have received the next highest amount. Then both classes will be assessed, and so on down until an amount is raised to pay the indebtedness of the association and equalize the profits which the members should receive.

Decree accordingly.

Healy, Brannan & Desmond, for plaintiff.

M. B. Hagans, John B. Mannix, H. P. Lloyd, A. A. Ferris and Edward Dempsey, for various defendants.

PERPETUAL LEASE—TAXES.

7

[Superior Court, Cincinnati.]

AMANDA JOSLYN ET AL. V. DAVID SPELLMAN ET AL.

Upon a perpetual lease, although without covenant by the lessee to pay taxes, so much of the taxes as are on account of improvements put upon the lot by the lessee are chargeable to him.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

Plaintiffs in error are the heirs of Henry F. Sedam. The defendant in error is in possession of a lot of land under a lease from Sedam. The lease was of a vacant lot for ninety-nine years, renewable forever,

without mention of taxes; at an annual rent of \$52.50, and a covenant that the lessee, his heirs and assigns "paying the rent and performing the conditions and agreements herein shall have and hold said premises during said term, clear and free of all claims whatsoever." At the date of the lease the lot was valued for taxation at \$290. In the decennial appraisal of 1870 it was increased \$300, making the total \$590; and in 1872, \$600 was added for improvements put on by the lessee. From and after the death of Sedam, in June, 1874, the taxes were unpaid, and the lot was sold at delinquent sale.

The action in the superior court of Cincinnati was for the rent which it was alleged had not been paid since the death of Sedam. The answer pleaded by way of set-off that taxes upon the premises during Sedam's lifetime had been paid at his request, and that work and labor had been done for him; and in addition the sale for delinquent taxes was set up as a breach of the covenant. Judgment was for the rent, but upon condition that the plaintiffs should first pay the delinquent taxes. The question presented is whether the taxes were chargeable to them.

Section 2846, Rev. Stat., provides: "It is hereby made the duty of every person seized of or holding lands, to list the same for taxation with the county auditor."

* * * Section 2847: "It shall be the duty of each and every person holding lands as aforesaid, to pay the tax which may be assessed thereon each and every year." * * *

Seizin is a technical term and may have only a technical meaning. But the words of the statute are, "seized of or holding land." The definition of "real property" and "land," by sec. 2730, Rev. Stat., is "not only the land itself, whether laid out in town lots, with all things contained therein, but also unless otherwise specified, all buildings, structures and improvements, and fixtures of whatever kind there are, and all rights and privileges belonging, or in anywise appertaining thereto."

At common law the lessee for any number of years had no interest in the land. His only interest was in the term. The land was in the owner who was seized. But under our statute permanent leaseholds have for some purposes taken their place as real estate. They are subject to the same laws of devolution and transfer and to judgment liens as real estate. For the purposes of taxation there is no statutory provision for taxing a leasehold separate from the land. Section 2897, Rev. Stat., provides that "where lands or lots liable to taxation are held upon permanent lease, and with the improvements thereon, are taxed in the name of the lessee and become delinquent, the sale shall be only of the interest of the lessee, if sufficient to pay the taxes," and provide further, "that nothing herein contained shall be so construed as to require such lands or lots to be differently described on the duplicate, or advertise in any separate or distinct form or in any other manner than other lands and lots under the provisions of existing laws."

That the leasehold estate may not be taxable separate from the land does not, however, conclude the rights of the parties. In *Cincinnati College v. La Rue*, Auditor, 22 O. S., 469, a proceeding in mandamus for the separate listing for taxation of the second story of a building, it was held that the substantial rights of the parties under the contract could not be made to depend on whether the auditor "does or does not list the property in the name of the lessee. The taxes are levied in respect to or on account of the property, in whomsoever's name it may be

entered on the duplicate." In *Cincinnati College v. Yeatman*, 30 O. S., 276, it is said, "while the taxes are levied and assessed upon property they are also a personal obligation of the owner of that property which it is his duty to pay. The general rule then is that whoever owns the property should pay the taxes assessed on it."

Of course the question remains whether the lessee of a perpetual leasehold containing no covenant to pay taxes is an "owner" for the purpose of taxation. In *Davis v. Cincinnati*, 36 O. S., 24, 26, under the provision (66 O. L., 254, sec. 626), "all assessments shall be a lien on the lots or lands assessed," it is said, Okey, J.: "The 'owner' referred to must, as a general rule, be one having a freehold interest in the premises assessed. Perhaps exceptions to the rule exist. See secs. 2733, 4181, Rev. Stat." Now sec. 4181 is as follows: "Permanent leasehold estate, renewable forever, shall be subject to the same law of descent as estates in fee are subject by the provisions of this chapter." In *Cincinnati College v. Yeatman*, 30 O. S., 276, 285, it is said, Johnson, J.: "At common law an estate for years, renewable forever, was a chattel; but by our statutes and by the decisions of our courts they are treated as real estate; *Northern Bank of Ky. v. Roosa*, 13 O., 335, 336; it is there said speaking of such estates: 'They have not, in fact, a single characteristic (since the act of 1821), of the old common law estate for years, except they may be granted to commence *in futuro*. They are immovable; they do not attend the person; cannot be defeated by any act of the grantor, as for example, a common recovery; are conveyed by the same formalities as freeholds; are subject to the same public burdens; descend to the heir, and cannot be subjected to the debts of the deceased owner, except by the proceedings necessary to subject freeholds.' As the law then stood, as well as now, such estates were taxable in the name of the owner."

Nevertheless, taxation upon the interest of the lessee could be only upon the value of his interest. In the absence of evidence it is not to be presumed that the yearly value would be in excess of the rents. There is no evidence of the value of the leasehold. The only evidence is the value of the improvements.

The lessee certainly is the "owner" of the improvements. They are upon the land and are part of it; but the tenant enjoys the benefit, not the landlord. The rents reserved are with reference only to the value of the lot. The plaintiffs in error should not, we think, have been charged with the taxes upon the improvements.

Judgment reversed and remanded.

J. A. Jordan, for plaintiffs in error.

Wm. Disney, for defendant in error.

9

ARRESTS ON SUNDAY.

[Franklin Common Pleas.]

EX PARTE CARROLL, ON HABEAS CORPUS.

Every indictable misdemeanor is a breach of the peace, and its author may be arrested at any time and in any place in Ohio.

Frederick H. Carroll, a member of the Columbus base ball club, was arrested on a warrant issued by a justice of the peace, on Sunday, June 22d, for violating statute 78 O. L., 126, by playing base ball at the base ball grounds of Columbus, O., and now asks to be discharged from custody on the ground that the arrest on Sunday for the offense charged was illegal under section 5458, Rev. Stat., of Ohio.

Colonel J. F. Holmes appearing for the officer and resisting the application, claimed that every indictable misdemeanor is a breach of the peace, and its author may be arrested at any time and in any place in Ohio, making the following points:

Section 5458, Rev. Stat., provides certain exemptions of time and place touching arrests. Among other things, that no person shall be arrested on Sunday.

Section 5459, provides that "nothing in this subdivision contained shall be construed to extend to cases of treason, felony or breach of the peace." * * *

From these sections it is argued that an arrest on Sunday for the misdemeanor of playing base ball on that day contrary to the statute (78 O. L., 126), cannot lawfully be made. We have a chapter called "Offenses against public peace"—secs. 6886, 6896, Rev. Stat. It is contended that Carroll's offense is not within this class, and therefore the arrest was illegal. Assault and battery, robbery and rape are not there either, but it is neither law nor logic to conclude they are not breaches of the peace. So of many other offenses even on the theory of counsel, that there must be some open, active violence to make a breach of the peace. Section 5459 does not say breach of the public peace. It is simply "a breach of the peace;" any breaking—any peace.

The laws represent public and private peace—the good order and security of person and property. The sections in question are in the civil code. They are enactments relating to civil arrests. The preceding subdivision relates to "execution against the person," and the preceding section, 5457, points out seven specially privileged classes. These arrests are not only purely civil arrests, but the language used in section 5459, and which gives rise to this controversy, in my humble judgment, emphasizes the fact that the statute has no criminal application.

Upon the theory of counsel for the applicant, these sections cannot aid him for want of a vital thing. That is this: "The state is not bound by the terms of a general statute, unless it be so expressly enacted." *State ex rel. v. B'd Pub. Wks.*, 36 O. S., 409; *McIlvaine, C. J.*, 414. 415: "The doctrine seems to be," etc., "*to Coster v. Mayor*, 43 N. Y., 399."

To accept the position contended for by the other side will be not only to bind the State in a criminal matter without naming it, and without express enactment, but by pure construction. This is contrary to principle, as well as a defiance of authority. "Nothing in this subdivision contained shall be construed to extend to cases of treason, felony

or breach of the peace." The argument for the applicant is that something in the subdivision shall be construed to extend to misdemeanors that are not active, violent breaches of the peace, and, being so construed, it shall prohibit arrests for such misdemeanors on Sunday. This certainly cannot be sound.

Now, let us turn for a little while to the law that lays its hands on wrongdoers below the grade of felons: "Section 7129. A sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer, shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village, until a legal warrant can be obtained." Shall arrest and detain any violator of law, etc.

The statute is mandatory. No limitation of time. No inhibition of place. There is no sanctuary, no "city of refuge" set apart for violators of law in these days, in this commonwealth. There is no limitation of the class or classes of law breakers that may be so arrested. The felony and the misdemeanor, the murderer and the petty thief, are alike in the eye of this arresting statute.

"Section 7133. When an affidavit charging any person with the commission of an offense is filed with such magistrate he shall, if he has reasonable ground to believe that the offense charged has been committed, issue a warrant for the arrest of the accused." No more limitation of time for filing the affidavit, or issuing the warrant, where any kind of misdemeanor has been committed than where the offense is a felony. And now, if opposite counsel be right, you have the farce of an affidavit filed, a warrant issued and the officer holding the state's command standing powerless, on Sunday, in the presence of the thief who has stolen goods or money of less value than \$35. By the way, how shall the officer know the value of the property stolen? He can arrest the rogue who has stolen \$35, but at the peril of being a trespasser does he touch the sneak thief who has taken \$34.90? It will not do.

It is suggested that the statute intended a reservation from annoyance in favor of our fellow citizens who engage in quiet misdemeanors on Sunday. You must wait until Monday before they can be arrested.

The policy of the law is to favor them on that day "because of the difficulty of getting bail." The policy of the law ought to be consistent, and, for the same reason, not annoy the felons and the higher grades of law breakers under them, by requiring them to hunt bail on Sunday.

The doctrine of the other side shows this anomaly or solecism; an outlaw protected by law. The law denounces arrest and punishment against the law breaker and in the same breath declares his person sacred from the law's hands on God's holy day. There is something wrong here.

Counsel appreciated their dilemma when they drew the petition.

It would not do to say the affidavit may be filed and the warrant issued, but no arrest can be made, on Sunday, so, they charge invalidity of the affidavit because made and filed on Sunday. What statute says so? Gentlemen propose to attack the affidavit on the ground that it was made and filed in violation of the statute against common labor on that day. The doctrine of the Bloom and Richards case, 2 O. S., 388, which will be a monument to the judicial learning and common sense of Judge Thurman after the man is forgotten, if that be possible, sweeps that idea out of existence.

The same observation applied to Bloom v. Richards might be applied to the same judge's opinion in McGatrick v. Wason, 4 O. S., 566.

If the statute—section 7183—did not cover the making of the affidavit and the issuing of the warrant on Sunday, it would still be justifiable on the ground, or principle of self defense, or self-preservation. Society has the same right to protect and preserve itself and its members that its constituents severally have to protect and preserve life. The statute does not say "except on Sunday" as to affidavits against any class of offenders. To say that filing affidavits and issuing warrants for the arrest of violators of law is common labor would be to make a deplorable condition of public affairs and interests.

Work out the view of counsel and Sunday becomes a day for deliberate lawlessness. Every class and hue and shade of misdemeanor may run riot except only those that have actual violence and putting in fear, or the like, accompanying them. Your policeman, or marshal, or constable, or sheriff, or deputy, or watchman, is a trespasser if he touches a sneak thief loaded down with plunder on the Sabbath day.

The latter may then laugh at a warrant and defy the power of the state. He may well say: "The state protects me in my lawlessness today, so I but keep each offense in the protected class of misdemeanors." The great cities of the state would exchange petty offenders over Sundays, and this exempted class of lawlessness would become a thriving industry. Illustrations by the score—yea hundreds—will occur to every legal mind, on reflection, where the law would be defied and justice defeated.

If counsel are right, every ingathering of the police in the cities and villages of the state for years, has been an invasion of the thief's rights and of his fellow offender's rights, when made on Sunday. The police and mayor of this city, once a week, wrong some poor innocents! The fact that other statutes are broken with impunity, can make no difference with the question.

Take for a moment the travesty of justice the doctrine would work under sections 6888 and 6889. The officers of the law could arrest the principals in a prize fight on Sunday, for they are made felons by section 6888; but if they touched a backer, trainer, second, umpire, assistant or reporter, present at the fight, mentioned in section 6889, they would be liable for assault and battery. These latter are made guilty of a misdemeanor that may have no active violence attached to it. They must be left until Monday. Monday would answer with the question the old darkey said the minnie balls asked, "Whar is ye? Whar is ye?" As with all these others, the Sunday roughs would be scattered to the four winds, and beyond the clutch of the law.

Now, from our earliest history, the conclusion of the indictment has been "contrary to the statute in such case made and provided and against the peace and dignity of the state of Ohio."

Let us glance at the law for the reason of this thing. "An indictment for an offense at common law concludes thus: 'Against the peace of said state or commonwealth.' The words 'against the peace' are essential in all cases, excepting in indictments for non-feasance; but there is no sufficient reason for the exception, and in these cases they are uniformly used." Heard's Criminal Pleading, 253.

5. "An indictment for a felony, whether at common or by statute, as well as for a misdemeanor, must conclude 'against the peace;' and the laying the offense *contra formam statuti* will not supply the omission of these words, which, in an indictment founded on a statute, besides the

words *contra formam statuti*, are absolutely necessary. *Id.*, 255; 2 Steph. Comm., 525-527.

I quote from 526: "All offenses are either against the King's (or Queen's) peace, crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in cases of treason, and a very few others) to be rather offenses against the kingdom than the sovereign, yet as the public, which is an invisible body, has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate; all affronts to that power, and breaches of those rights are immediately offenses against that magistrate, who is therefore the proper person to prosecute for all public offenses and breaches of the peace, being the person injured in the eye of the law." See also 3 Steph. Comm., 37-40.

Mr. Justice Stephen, one of the brightest, if not one of the most brilliant, law writers of England, now living, says: "The foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the monarchy itself and which was, and still is, embodied in the expression, 'The King's Peace,' the legal name of the normal state of society." 1 Hist. of Crim. Law of Eng., 184-5. These be the foundation stones on which we rest.

On the theory of my brethren, how can this court judicially determine that the thing done by the accused was not a breach of the peace? See *Commonwealth v. Jeandell*, 7 Am. L. Reg., 615, where it was held that driving a street car was a breach of the peace. See for definitions, Burrill's L. Dict., Breach of the Peace: "The offense of breaking or disturbing the public peace by any riotous, forcible or unlawful proceeding."

Rapal. & Law, L. Dict.: "A violation of that quiet peace and security which is guaranteed by the laws for the personal comfort of the subjects of this kingdom."

Tomlin's L. Dict.: "Peace of the King: Is that peace and security both of life and goods which the king promiseth to all his subjects, or others taken into his protection."

Bouvier's L. Dict.: "Breach of the Peace: A violation of public order; the offense of disturbing the public peace. One guilty of this offense may be held to bail for his good behavior. An act of public indecorum is also a breach of the peace. The remedy for this offense is by indictment."

This definition from Bouvier is substantially adopted in the case of *Galvin v. State*, 6 Cold. (Tenn.), 484.

If every misdemeanor is not a breach of the peace in Ohio, what is the sense or meaning of sec. 7116, Rev. Stat.? "Any person convicted of a misdemeanor may be required by the court to enter into a recognizance, with sufficient surety in such sum as the court may deem proper, to—keep the peace and be of good behavior," etc.

Why may the court put the tramp who has stolen a pint of peanuts under bond to keep the peace, unless the offense was a breach of the peace? The section connects itself with the definition from Bouvier, "One guilty of this offense may be held to bail for his good behavior."

There is a beautiful definition of peace in *Keen v. Monkheimer*, 21 Ind., 3: "When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace."

"Section 610. Every justice of the peace shall be a conservator of the peace, and shall have jurisdiction in criminal cases throughout the county where he is elected and where he resides, on view, or on sworn complaint, to cause every person charged with the commission of a felony or misdemeanor, to be arrested and brought before himself," etc. There is no distinction in this statute of time or person. The justice, may, on view, cause the arrest of the author of treason or of the author of a misdemeanor, on Sunday. So he may, upon "sworn complaint," cause like arrests.

Felonies and misdemeanors are classified by section 6795: "Offenses which may be punished by death or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors." In *Mitchell v. State*, 42 O. S., 383, our Supreme Court has held (June 17, 1884) that: "In this state, the common law distinction between felonies and misdemeanors never existed."

Section 7116, we have seen, provides for a bond to keep the peace in case of every conviction for misdemeanor, in the discretion of the court. Section 7187 provides a form of bond to keep the peace adaptable to such case. Its condition is, "and in the meantime to keep the peace and be of good behavior toward the citizens of the state generally, and especially toward the said C. D.," etc.

Counsel ask why sec. 5459 uses the language, "treason, felony or breach of the peace" instead of treason, felony or misdemeanor. The language is found in both constitutions—article 1, section 18, constitution, 1802; article 2, section 12, constitution, 1851. It is the enactment of the people of the state. It was used, no doubt, with a view to describe every infraction of the criminal laws of the state. The petty police offenses, many of them created by municipal authorities, are called misdemeanors, and the use of that word in the statute might have led to confusion. Treason is felony by the terms of sec. 6795.

The supremacy of the law is the type and guaranty of order, peace and security of life and person and property to every human being in the commonwealth. The violation of that law has broken that peace and good order, whether guilty of treason or petit larceny.

WYLLIE, J.

The question involved seems to my mind to be very simple. The words "breach of the peace" may be regarded in two senses. Open, active outbreak and violence in the commission of some unlawful act would be the one sense, and the thief who stealthily enters one's house and commits a quiet larceny illustrates the other sense. In legal contemplation the latter is a breach of the peace as well as the former.

In the saving clause with which sec. 5459, Rev. Stat., begins the words "breach of the peace," in my judgment, mean indictable misdemeanor.

The greater part of the violations of the criminal laws of the state are the lesser grades, and the law-making power did not intend to excuse from arrest, at any time, those guilty of or charged with misdemeanors.

Section 7129 makes it the duty of the officers there named to arrest offenders against the law without reservation or distinction as to time or place; and when a warrant is placed in the hands of an officer, it is his duty in like manner to execute it, Sunday or week day. No other construction has ever been acted on in the state, and any other would be highly mischievous.

The demurrer to the return will be overruled; the writ discharged and the accused remanded to the custody of the officer.

PRACTICE—VACATION OF JUDGMENT.

20

[Cuyahoga District Court.]

Lemmon, Wickham and Commager, JJ.

CHARLES FLIEDNER V. JOHN D. ROCKEFELLER.

1. A decree granted to a defendant on his cross-petition for want of reply, without notice to plaintiff, is not an interlocutory but a final decree, where, pursuant to the prayer of the cross-petition, such decree is that the note and mortgage sued on be reformed as to amount, and that certain liquidated demands be credited as set-offs against plaintiff's claim, and, that a jury be impaneled to assess the value of certain other demands and that they be set-off against him.
2. A petition to vacate a judgment rendered in favor of a defendant on his cross-petition, by default, for want of reply filed after the term, should not be granted on the ground of unavoidable casualty, in that the agent of the plaintiff, who alone had personal cognizance of the facts to be alleged in the reply, was sick and unable to give plaintiff the information, where it appears that such agent had reported to plaintiff the outline and the results of the facts at the time they occurred, and there was no declaration of diligence, on the part of the plaintiff, or proof that he or his attorney made any efforts to remedy the alleged defects of ability to reply, caused by such sickness. A party should show, not merely a good defense, but, first, that he was without negligence on his own part and that of his attorney, and second, that he exercised due diligence in attempting his defense, and third, the unavoidable casualty.

ERROR from Common Pleas of Cuyahoga county.

COMMAGER, J.

Some years ago Rockefeller and Fliedner exchanged lands. The balance due Fliedner, some \$23,000 or thereabout, was agreed upon and was paid to Fliedner in cash. There arose certain leases, and ultimately a note and mortgage, and other transactions between the parties, which remain unsettled until the time of the commencing of this action. A note and mortgage were given Rockefeller by Fliedner, and a lease given Fliedner by Rockefeller, out of which certain debts arose, and certain set-offs claimed by Fliedner against them.

On February 26, 1881, John D. Rockefeller filed in the common pleas court of Cuyahoga county a petition, asking for a judgment against Charles Fliedner, and that certain lands of Fliedner be subjected to the payment of the amount ascertained to be due.

On May 2, 1881, Fliedner filed in said court his answer and cross-petition, asking for reformation of the note and mortgage set forth in Rockefeller's petition, and that Rockefeller be required to clear said premises of a certain lien or encumbrance arising from a certain street improvement, according to contract, or account for certain money, retained by Rockefeller, before he be permitted to foreclose said mortgage and other offsets against the claim of Rockefeller.

To this answer and cross-petition no reply was filed, nor leave obtained for further time, nor any showing by Rockefeller indicating an intention to contest the matters set forth in Fliedner's answer and cross-petition.

On Monday, July 7, 1881, being a day in the May term of said year, and being a regular day for the taking of defaults in said court, judgment was taken against Rockefeller in favor of Fliedner on the petition and answer, said Rockefeller being in default of reply, which judgment is as follows:

"May term, 1881. This cause came on to be heard on the petition and answer of Charles Fliedner therein, and the said plaintiff being in default of reply or other pleadings to said answer, the court do find that the allegations in said answer contained are true; and it is therefore ordered, adjudged and decreed that there be credited on said note in plaintiff's petition described, the payments in said first defense of the said answer of the said Charles Fliedner, with interest from the several dates thereof to the first day of this term, to-wit, the sum of \$610.85, and the same be offset against the amount due on said note after the same is reformed in accordance with this decree. And the court do find that the second defense in said answer is insufficient in law. To which finding the defendant excepts. And the court find that said note was by mistake made for the sum of \$6,940, when, in accordance with the agreements of the parties, it should have been made for the sum \$5,279.03. And it is therefore ordered adjudged and decreed that said note be, and the same is hereby reformed and changed so that the same shall be for the sum of \$5,279.03, in accordance with the agreement of the parties. And it is further ordered, adjudged and decreed that there be credited on said account for rent in the plaintiff's petition set forth the said payments in said defendant's fourth and fifth defenses set forth, together with interest thereon from their respective dates to the first day of this term, to-wit, the sum of \$4,345.21, and that the same be offset against said account for rent. And it is ordered that a jury be impaneled to assess the amount of damages suffered by said defendant on the causes of action in his sixth and seventh defenses set forth, and that so much thereof as is necessary be applied to the payment of the balance of said note and account in plaintiff's petition set forth after deducting the payments herein adjudged to be credited and set off against the same, and that said defendant have judgment for the balance."

That during the September term of said court, to-wit: December 9, 1881, John D. Rockefeller filed in said court his petition to vacate said decree, in which he prays that the decree, order or judgment obtained by Fliedner may be vacated and set down for trial, for the grounds, to-wit:

"1. By unavoidable casualty and misfortune this plaintiff was prevented from defending in said former action, for fraud on the part of said Fliedner in obtaining said order, judgment and decree, and because said judgment was wrongfully, unjustly and illegally obtained.

November 9, 1882, this cause was heard by the court of common pleas upon this petition of Rockefeller, the answer of Fliedner, and exhibits and testimony offered in evidence, and the court find in favor of the plaintiff below (Rockefeller) as follows:

"That the order and decree set forth in the plaintiff's petition and sought to be vacated is an interlocutory order and decree, made in a cause still pending in this court; that the said order and decree was taken and entered without any notice to or knowledge thereof on the part of the plaintiff or his attorney, and in violation of the rule of this court, requiring notice thereof to be given to all other parties interested in the same; that the said order and decree was taken and entered without any evidence being offered to prove the allegations in the said answer and cross-petition of the said Charles Fliedner; that the said plaintiff was by unavoidable casualty and misfortune prevented from defending against the said claims set up in the said answer and cross-petition of said Charles Fliedner in said original action, and against the entry of said order and decree; that the said plaintiff had, at the time said order

and decree was entered, and still has, a valid defense to the claims and matters set forth in the said answer and cross-petition of Charles Fliedner, filed in said original action. It is therefore the judgment of this court, and it is hereby ordered, that the said order and decree heretofore made and entered in said original action and proceedings be and the same is hereby set aside, vacated and held for naught, and that said John D. Rockefeller pay the costs in this action within ten days from this date, and in default thereof that execution issue therefor. To all of which findings, orders and judgment of the court the said defendant, Charles Fliedner, excepts, and he files his petition in error in this court, alleging that the court below erred in vacating said judgment.

Section 5354, Rev. Stat., provides that a court of common pleas may vacate its own judgment or order after the term at which the same was made for fraud practiced by the successful party (Fliedner in this case) in obtaining a judgment or order. And this is alleged in Rockefeller's petition to vacate as a ground of vacation. We are unable to find any proof of fraud practiced by Fliedner in obtaining the judgment below, and therefore pass to the second ground for vacation, set forth in Rockefeller's petition and provided for by statute, to-wit: "Unavoidable casualty or misfortune, preventing the party from prosecuting or defending."

Let us ascertain what in law is a casualty or misfortune which cannot be avoided, and such a one as would be ground for vacating a judgment.

In *Brand v. Stafford*, 28 La. Ann., 51, it was held: "To entitle one to such relief (vacation of a non-suit), it must be shown, first, it would be against good conscience to execute the judgment; second, and that there has been no laches or negligence on the part of the party complaining. The judgment complained of is one of non-suit, and is the result of negligence of the plaintiff. It was his duty to know what was being done in his case in the court in which he had instituted it.

In 93 Ill., 572, it is held that in order to maintain a bill to set aside a judgment to which there was a good defense at law, it must clearly appear, first, that the enforcement of the judgment would be unjust and against conscience; second, that the defendant was prevented from making his defense in the action by fraud, mistake, accident or surprise, and, third, without negligence, laches or default on his part, or the part of those representing him. In this case the attorney was sick, and had applied for an extension of time, and in his application stated that the pleas in said cases were peculiar and nobody could draw them but himself, and he could not explain by letter so that another could draw them. Leave for pleading was extended till the third Monday of July, at which time no pleas were in, nor was the party, or any one representing him present, and thereupon judgments were taken by default. The attorney had been sick, it appears, and confined to his room for more than four months previous to his death, which occurred two weeks after the judgment. The court on page 577, say:

"Parties litigant and their counsel must be presumed to know the rules of court, and it is their duty to comply with them; and if they do not, they must take the consequences. Such rules are instituted for the general good, and it is the duty of courts to enforce them; otherwise it would be useless to adopt them. If the general health of an attorney breaks down, he should notify his clients of the fact, so that they can take such steps as may be necessary for their protection. Appellan

seems to be proceeding on the theory that he is not responsible for the negligence of his counsel. The very reverse of this is the law."

In *Yates v. Monroe*, 13 Ill., 219, held: "When appellant sought to excuse himself for permitting judgment to go against him on the ground that his attorney had been guilty of negligence, it was said: "The negligence of counsel was his own negligence, and he must suffer the consequences."

In *Winchester v. Grosvenor*, 48 Ill., 517, held: "The fact that the attorney abandoned the case before trial, does not constitute accident or mistake of the character upon which courts of equity act."

In 71 Ill., 418, the court say: "The negligence of the attorney is the negligence of the party himself."

In *Pharr & Beck v. Reynolds*, 8 Ala., N. S., 521, held: "The sickness of a party to a suit, or the pendency of another suit against him requiring his attendance at another place, will not authorize the interference of a court of chancery after judgment. It was the duty of the party to send an agent to attend to his cause, or to put his attorney in possession of the means of continuing it."

In *Miller v. Albaugh*, 24 Ia., 128, the court hold the "unavoidable casualty" in these statutes must be such as to prevent the party from defending. Loss of a note constituting a defense not sufficient, and that, to have a judgment vacated, a party in addition must prove the exercise of due diligence on his part.

Now these cases clearly show that in addition to the defense capable of being made by Rockefeller, he must have been, first, without negligence himself or by his attorney; second, that he exercised due diligence in making or attempting his defense; and, third, that he was prevented by unavoidable casualty.

In this case and bearing on this point, Rockefeller only alleged the sickness of an agent, Cowles, who alone had negotiated and was acquainted with the matters which were a defense to the claims in Fliedner's answer and cross-petition; and the petition upon this point makes this allegation:

"The plaintiff further says that he did not personally participate in the negotiations preceding the taking of said note, lease and mortgage, nor did he in any way participate in, nor was he present at the time the same were taken, nor had he any knowledge or information whatever in regard to the same. That he neither knew how the amount of said note was arrived at, nor did he know as to the amount due on the lease for rent, nor as to the payment of rent thereupon. That Cowles had charge of and transacted the entire business of this plaintiff, and was the only person who had anything whatever to do with the negotiations or with the transaction of the business, or who personally knew what was done in regard thereto, and was the only person who could give the information necessary and requisite to draft and make a reply to said answer and cross-petition. That before said answer and cross-petition was filed the said Cowles was taken seriously sick, and continued seriously sick until long after July 7, 1881, and was during all that time wholly unable to do any business whatever, or to give to any one any information in regard to the matters set forth in the answer and cross-petition of said Charles Fliedner, or in regard to the making of such lease, note and mortgage to secure the same, or in regard to the payments thereon. That plaintiff, not having any knowledge or information in regard thereto, had to rely upon said Cowles for information upon which he could make a reply to

said answer and cross-petition, and that, because of the severe illness of said Cowles, he was prevented from obtaining the information, and prevented from making and filing a reply to said answer and cross-petition, and setting up his defenses thereto.

The testimony taken shows that while Cowles did the talking, or most of it with Fliedner, and negotiated the details, the facts—that is, the results of his acts and negotiations—were reported to Rockefeller, who kept a record of the same in his office, and that the statement of the account between the parties given to Fliedner was obtained from the books of Mr. Rockefeller. Cowles says: "I submitted to him the result of my negotiations. Whatever details were necessary for him to know I would give him. Rocketeller directed the suit to be brought, and a copy of the answer and cross-petition was in possession of his attorney two months before the close of the May term of court. There is no declaration of diligence on the part of Rockefeller, nor does the proof disclose any efforts made by him or his attorney to remedy the defects, if any, in his ability to reply caused by the sickness of Cowles."

We think the averments in the petition of Rockefeller and the proof in the case do not warrant the vacation of the judgment below on the ground of unavoidable casualty or misfortune, and we do not think Rockefeller was prevented from defending in the case below, but on the contrary think that his attorney was inattentive to the cause, and for this Rockefeller is legally responsible.

The further ground of vacation in the petition is: "Because said judgment was unlawfully, unjustly and irregularly obtained. There is a clause which provides for vacation of judgment for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order."

We are clear that the only remedy for vacation of judgments after the term at which they were taken is under section 5354, and unless the illegality spoken of is provided for in one of the subdivisions of that section, the remedy is not by petition to vacate, but by proceeding to reverse on error.

It is alleged and argued as proved that the judgment sought to be vacated below was entered on the journal without the knowledge of the plaintiff (Rockefeller) or his attorney, that such judgment was not examined by or submitted to Rockefeller's attorney for examination. Fliedner was not compelled to so submit on default by Rockefeller of reply, unless contrary to some law or rule of court; for every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true, section 5081, and in the language of the court, in *McKinzie v. Perrill*, 15 O. S., 168, he fails to reply, and by his default conclusively confesses the allegations and claims against him.

The question, however, remains, was the judgment obtained by Fliedner in violation of any of the rules of court? If so, such judgment was irregularly obtained, and could be vacated upon petition, as provided for in subdivision 3, of section 5354. The rule cited and proved is the rule of the court of common pleas in said county, adopted July 8, 1879, and is in the following words:

"No partial or interlocutory decree shall be granted to any plaintiff on his petition, nor to any defendant on his cross-petition, except on motion and notice to all the other parties interested in the same."

Now, if the judgment obtained by Fliedner was a partial or interlocutory decree, notice should have been given Rockefeller. If it was a

final decree, no such notice was necessary, and the judgment in that respect was regularly obtained.

Before deciding whether the judgment obtained by Flidner was partial or final, let us see what a final decree is, and what an interlocutory decree.

In 2 Ala., N. S., 171, held, "A decree is final which settles the rights of the parties, although there may be a reference to a master to compute damages."

In 85 Mich., 415, held, "Under a bill to recover dower in lands, a decree declaring the complainant entitled to dower is held to be a final decree, and appealable, though it directs a further inquiry as to damages for dower withheld, and to ascertain whether dower could be assigned by metes and bounds and if not, to compute the dower interest."

In the case of Hinde v. Whitney, 31 O. S., 58, held: "When a finding is made and decree rendered disposing of the whole merits of the case, and leaving nothing for the consideration of the court, the right to review such decree on error will, under sec. 523 of the Code of Civil Procedure be barred in three years from the time of its rendition. Where such decree is rendered in the district court on appeal, in a case for equitable partition, settling the rights of the parties respectively in the land, and ordering partition to be made, the remanding of the cause of the court of common pleas for execution of the order of partition, will not have the effect of prolonging the time within which proceedings in error to reverse the decree must be commenced."

In Teaff v. Hewitt, 1 O. S., 511, held, "A decree in chancery, which leaves the equity of the case, or some material question connected with the merits of the controversy, for determination, is an interlocutory and not a final decree."

On page 520 the court says: "A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no future questions or directions for further determination, so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision. It is true that after final decree defining and settling the rights of the parties, further orders or decrees may be necessary to carry into effect the rights settled by the final decree on the merits; such as a decree confirming a sale or confirming the proceedings or report of a master, carrying into effect the terms of the final decree. This, however, is a subsequent proceeding, and only auxiliary to or in execution of the final decree on the merits of the case. And an appeal from a decree in this subsequent proceeding brings nothing before court, except the proceedings which follow the final determination of the merits. An interlocutory decree is one which leaves the equity of the case, or some material question connected with it for future determination. Where the future action of the court is necessary to give the complete relief, contemplated by the court upon its merits, the decree under which the further question arises is to be regarded not as final, but as interlocutory.

And so are all the authorities. Freeman on Judgments, 24, and others.

In the case before us the decree settled all the rights of the parties, except as to the amount of damages sustained by Flidner on account of the breach by Rockefeller of the covenants in the warranty deed,

described in the sixth defense of said Fliedner, and for damages on contract as set forth in the seventh defense of said answer and cross-petition of said Fliedner.

The judgment directed that a jury be ordered and impaneled to assess the amount of damages suffered by Fliedner on said sixth and seventh cause of action, and that so much thereof as is necessary be applied to the payment of the balance of said note and account in Rockefeller's petition set forth, after deducting the payments herein adjudged to be credited and set off against the same, and that said defendant have judgment for the balance.

As the decree settled and disposed of all the issues in the case, reserving no further questions or directions for future determination, so that the cause would not again be necessary to be brought before the court below for further decision, we think the judgment below in favor of Fliedner a final decree, and as the judgment below left no equity of the case, or material question connected with the merits of the controversy for future determination, it is not a partial or interlocutory decree within the meaning of the rule of the court referred to.

It is true a jury was ordered to be impaneled to assess the amount of damages suffered by Fliedner on causes 6 and 7, but this was after the rights of the parties had been settled and defined, and the ascertainment by the jury of the amount of damages was simply necessary to carry into effect the rights settled by the final decree on its merits. This was subsequent proceeding and only ancillary to or in execution of the terms of the final decree.

The judgment obtained by Fliedner not being partial or interlocutory, but final, the said rule of court does not apply and therefore furnishes no ground for the vacation of the judgment so obtained.

The other irregularities complained of in the petition of Rockefeller to vacate the judgment obtained by Fliedner, do not come within any of the provisions of sec. 5354, but if available to Rockefeller, are available under sec. 6709, which provides that a judgment rendered or final order made by the court of common pleas (or any Superior Court) may be reversed, vacated or modified by the district court for errors appearing on the record, the only irregularities alleged, which do not appear on the record, if any there may appear, are:

1. Fraud practiced by Fliedner in obtaining the judgment.
2. Unavoidable casualty or misfortune, preventing Rockefeller from defending.
3. Wrongful and irregular obtaining of the judgment.

We think none of the grounds alleged for vacation are sustained, and therefore reverse the order of the common pleas, vacating the judgment obtained by Fliedner, and remand the cause to such court for further proceedings.

CONTINUING GUARANTY—EVIDENCE.

[Hamilton District Court, June 9, 1884.]

M. WOLF v. JOHN SHILLITO & Co.

A guaranty was in the following words:

"CINCINNATI, June 28, 1880.

"Messrs. John Shillito & Co., Cincinnati, O.

"GENTLEMEN: Please let Mr. Gabe Wolf, of Williamstown, Ky., have such goods as he may purchase in person or order from time to time, to amount of \$500, and I hereby guarantee the prompt payment of same, and will pay the same myself, if not met by him promptly when due.

(Signed)

"M. WOLF."

Held: 1. That it was a continuing guaranty. 46 Mich., 70; 44 How. Pr., 91; 1 Met., (Mass.) 24; 14 Neb., 158.

2. It appearing from the testimony that an agent of John Shillito & Co. had conducted the negotiations for them in procuring the guaranty, and that the guarantor had no knowledge of any limitation upon the power of the agent, and there being nothing to put him upon inquiry, it was error in the court to exclude testimony as to conversations between the guarantor and the agent, with reference to the guaranty in question upon the occasion of the procuring a second guaranty by the same agent, under the same state of facts as he procured the first.

ERROR to the Superior Court of Cincinnati.

MAXWELL, J.

The action in the superior court was brought by the defendants in error here, John Shillito & Co. v. The Plaintiff in Error, M. Wolf, upon a written guaranty, which reads as follows:

"CINCINNATI, June 28, 1880.

"Messrs. John Shillito & Co., Cincinnati, O.

"GENTLEMEN: Please let Mr. Gabe Wolf, of Williamstown, Ky., have such goods as he may purchase in person or order from time to time, to amount of \$500, and I hereby guarantee the prompt payment of same, and will pay the same myself, if not met by him promptly when due.

(Signed)

"M. WOLF."

Judgment was rendered in favor of the plaintiff for the full amount of this written guaranty.

The cause comes into this court upon a contention between the parties as to the admissibility of certain testimony offered by the defendant, Moses Wolf, and excluded by the court, the case being tried by the court without a jury.

It appears from the testimony that a subsequent guaranty was given to John Shillito & Co., by Moses Wolf for his brother, which was in the following terms:

"CINCINNATI, September 7, 1880.

"Messrs. John Shillito & Co.

"GENTLEMEN: Please ship the goods purchased by Mr. G. Wolf, amounting to say fourteen hundred dollars, and I hereby guarantee the prompt payment of the same, and will pay the same myself, if not met by him promptly when due.

(Signed)

"M. WOLF."

At the time this second guaranty was given, there was a small amount owing by Gabe Wolf to John Shillito & Co., which was not then due. The bill for which this second guaranty was given was paid in full,

and Gabe Wolf continued to deal with Shillito & Co., until some time in the spring of 1881, when he failed, and it is for goods bought during the latter part of the dealings between Gabe Wolf and Shillito & Co., that this suit was brought upon the first guaranty.

There are two questions arising in this case: first, whether this was a continuing guaranty so as to bind Moses Wolf so long as the guaranty might be in existence; and, second, whether the testimony offered by him was or not admissible.

First—As to the question whether or not this was a continuing guaranty. We think it was. A guaranty of payment of goods purchased "from time to time," to an amount not exceeding a specified sum, was held to be a continuing guaranty. 46 Mich., 70. "He wishes to buy his goods of your firm; you will give him a liberal credit; we will be his security to the amount of " (naming sum) was held to be a continuing guaranty. 44 How. Pr., 91. "I agree to be responsible for the price of goods purchased by you, either by note or account, at any time hereafter to the limit of \$100" was held to be a continuing guaranty. 1 Met., 24.

Second—As to the admissibility of the testimony offered by the defendant.

It appears from the bill of exceptions that one John Taylor was in the employ of John Shillito & Co. at the time this guaranty was given, and he says, in substance, that he had charge of the credit department and decided upon the credits to be given to the customers of the firm. Under him, next to him, and as it is sometimes stated in the testimony, acting for him in his absence, was one Merritt, whose testimony was not taken in this case, but who appears to have procured both guaranties from Moses Wolf at Wolf's place of business. It seems no communication was made to Wolf with respect to Merritt's powers in obtaining the guaranties. Wolf knew no one in relation to the guaranties except Merritt. Thereupon, with that state of facts, Wolf was asked at the trial what conversation he had with Merritt after he had given him the contract of June 20, 1880, and before he obtained the contract of September 7, 1880, in reference to the contract of June 20th. Plaintiffs objected, which objection was sustained. Defendants offered to show, in answer to this question, that "When Mr. Merritt came to my office and asked me to give him a guaranty for the \$1400, I told him I would not sign a new one until the other one of June was returned to me. I did not want that standing out against me. I said, 'Mr. Merritt, has my brother paid his debts to your firm, for which I gave you the other guarantee?' Merritt said 'that is all right; they are all paid.' I said, 'Why don't you send it down? You have several guarantees up there at your firm that I gave you before. You must send my old guarantees back before I will sign any more.' Merritt then said if I would sign this guaranty, he would send the others including the old one, back."

The court refused to admit this testimony on behalf of the defendant, to which the defendant then and there excepted. This is substantially the testimony offered. Did the court err in refusing to receive this testimony?

There is nothing in the testimony which shows clearly and conclusively whether or not Merritt was authorized, upon his own judgment, to accept Wolf upon this guaranty. There is nothing in the testimony which shows that any communication was made to Wolf except through and by Merritt. There is nothing that would show that Wolf had any

knowledge of Merritt's powers in respect to this guaranty, except what was communicated to him by Merritt. It appears that Merritt drew the guaranty himself, wrote it out in Wolf's presence; that they had a conversation about it, and for all that appears in the testimony, Merritt was authorized to accept or refuse it. From the fact that other guarantees had been procured from Wolf prior to that time, it might be inferred that the firm knew that Wolf was responsible, and would not refuse to accept from him a guaranty.

The question is, whether, under that state of facts, it was competent for Wolf to show that, at the time he made this guaranty, the giving of the second guaranty was conditional upon the surrender of the first. Of course, that involves the question whether or not Merritt, as agent of John Shillito & Co., had the power to agree that the first guaranty should be surrendered upon Wolf signing the second. We think, in substance, that from all the testimony, from the knowledge that Wolf had as to what Merritt's relations with Shillito & Co. were, and from the surrounding circumstances, Wolf was warranted in supposing that as Merritt had taken the first guaranty, and evidently had power to take the second, he had power given him by Shillito & Co. to do anything with respect to either of the two guarantees which came within the usual course of business in such matters.

We do not know what influence his testimony might have had. It is clear to us that the court should have admitted it and that it erred in excluding it.

Judgment reversed and a new trial granted.

Long, Kramer & Kramer, for plaintiffs in error.

Matthews & Shoemaker and Edward Barton, for defendant in error.

33

FRAUD IN DIVORCE—PRACTICE.

[Hamilton District Court.]

† WILLIAM RINE V. ISABELLA HODGSON ET AL.

1. While fraud in obtaining a decree of divorce may not, for reasons of public policy, be ground for setting it aside, the question of jurisdiction is open; and upon bill to set aside such decree by a husband who had no actual notice, the only service on him being by publication, and it being admitted by demurrer that the petition for divorce was filed by relatives of the wife without her knowledge and that she was kept away from the trial and never informed of the proceeding, the cause of action is made out.
2. Upon such bill by the husband, the wife being dead and the controversy being as to the inheritance of the property, no other parties are necessary but the next relatives of the wife, who would be her heirs if she died unmarried.

ERROR to the Court of Common Pleas.

AVERY, J.

Judgment in the court of common pleas was for the defendants upon demurrer to the amended petition. Its substantial allegations were, that plaintiff was married in 1873, that his wife acquired during marriage otherwise than by descent or deed of gift, and owned at the time of her death in 1873, certain specifically described real estate in the city of

† For common pleas opinion reversed by this decision, see *ante*, 000.

Cincinnati, which, she having no children, would under our law descend to him as her husband but would descend to the defendants as her nephews and nieces in case she died unmarried; that in 1880 the defendants without her knowledge filed in the court of common pleas a petition, setting forth that he had been absent from her more than three years and had wholly neglected to provide for her, and praying for a divorce, and that an affidavit for publication was filed and publication made and the cause heard by the court in her absence upon the evidence of the defendants, she having been purposely kept away by them and never informed of the proceeding; that the trial was without her knowledge and consent and upon testimony which was false, and that decree of divorce was rendered further ordering that he be divested of all interest by curtesy or otherwise in her real estate; that of the pendency of said suit and of the trial and decree he had no knowledge until bringing his action in the court of common pleas, and that both before and after said decree he corresponded with his wife, visited her, and that she died believing him to be her husband.

Remarkable as these allegations are, the question in the court of common pleas was not whether—they were true—the demurrer admitted that. But did they constitute a cause of action?

The contention is they did not, because of the holding in *Parish v. Parish*, 9 O. S., 534: "A decree from the bonds of matrimony, although obtained by fraud and false testimony, can not be set aside on an original bill filed at a subsequent term."

The decree there, however, was obtained by a party to the action. Here, the wife in whose favor it purported to be rendered was not a party. She had not filed the petition, the trial was without her knowledge or consent, she was not informed of the proceeding—these are the allegations. According to them she was not before the court in any way, there was no jurisdiction over her. *Edson v. Edson*, 108 Mass., 590; *Bradford v. Abend*, 89 Ill., 79.

In *Parish v. Parish*, *supra*, it was said (Peck, J., p. 537): "Indeed, if a case could be supposed in which a decree, *a vinculo*, by a court having jurisdiction over person and subject-matter could be vacated at a subsequent term by reason of its fraudulent procurement, it would seem that such a case is presented in the bill under consideration." This plainly indicates what was meant to be decided, namely, that with jurisdiction, fraud would be insufficient to set aside the decree; but not that the decree would be valid without jurisdiction. A judgment is binding only upon parties and privies; and inquiry into who were parties cannot be precluded by the names that are used. This would be to give the conclusive effect of a judgment to a fiction.

The cause of action was not in fact to set aside a decree in a divorce suit; but to declare the record of the suit a nullity. The jurisdiction invoked was in equity to remove a cloud upon title. The defendants were parties as was alleged to a fraud, by which a decree had come to be spread upon the court records, divorcing a wife who had never applied for it and did not know of or consent to the proceeding. Nothing is said in *Parish v. Parish*, *supra*, to give validity to such a supposititious decree. It is the same as would have been a decree falsely interpolated upon the record. There was the form of a suit, it is true, and parties—but as alleged, the whole was a pretense.

The court of common pleas erred, therefore, we think, in sustaining the demurrer. There could be no objection for want of necessary par-

ties. The plaintiff and defendants each claimed under the wife, and although the divorce was involved, the question in controversy was as to title. No other parties but themselves were necessary for the complete determination of that controversy.

In passing upon the case, the amended petition has been taken as a whole. There is an allegation that the wife shortly after marriage became and continued to the day of her death an imbecile. But this is not in terms connected with what follows, and we are not passing upon the case of a weak-minded woman induced by fraud to bring a divorce suit against her husband. The distinct and specific allegations are that the petition for divorce was filed by the defendants without her knowledge, and that she was not informed of the proceeding.

Judgment reversed and remanded.

Gasser & Spangenberg and Campbell & Bates, for plaintiff in error.

E. P. Bradstreet, for defendant in error.

34

COURT HOUSE COMMISSIONERS.

[Superior Court, Cincinnati, General Term.]

STATE OF OHIO V. H. C. URNER ET AL.

The commissioners to rebuild, enlarge and improve the courthouse of Hamilton county, appointed under the act of April 14, 1884, are not restricted in their adoption of plans for that work to such as may be entirely completed out of the fund provided by said act.

HARMON, J.

This action is brought by virtue of sec. 1277, Rev. Stat., to restrain defendants, the commissioners appointed under the act for rebuilding the courthouse, from an alleged misappropriation of the fund of \$300,000 provided by said act. It is reserved on demurrer to the petition whose allegations are that defendants having duly qualified and organized, have employed an architect and adopted plans for rebuilding, enlarging and improving the courthouse, which, in their judgment, are required by the present needs of the county, but that according to the estimates of said architect it will cost \$400,000 or more to complete the courthouse according to such plans, and that defendants are about to expend the fund provided by the act toward the completion of the work by such plans.

If the intention of the legislature was to limit the power conferred upon defendants to that of reproducing a complete courthouse from the fund provided by the act, the expenditure thereof for an uncompleted one would be a misappropriation which it would be our duty to enjoin. If such was not the intention it is not contended that we would be authorized to interfere, the discretion as to plans and expense being vested in defendants alone. The only question in the case is, was such limitation imposed.

The power to rebuild, enlarge and improve the courthouse conferred by the first section is absolute in terms. The only possible limitation is that contended for on behalf of plaintiff as arising from the provisions of the twelfth section, which authorizes the issue of bonds, not exceeding \$300,000, in amount, "to create a fund to defray the expenses to be incurred under this act."

This certainly is not expressed as a limitation of the power conferred by the first section, and if it be such limitation it must be by implication. Does the mere creation of a fund for a public improvement imply an intention to limit the entire cost of work directed to be done to the amount of such fund?

The cases of *Cincinnati v. Cameron*, 33 O. S., 336, 350, and *Foote v. Salem*, 14 Allen, 87, seem to us decisive of the question. In the former the reasoning of the court led to the conclusion that the fund provided for the erection of the hospital was not necessarily a limitation of its entire cost. The latter is almost exactly like this case. A law authorized the appointment of commissioners to build waterworks and the issue of bonds not exceeding an amount named, to create a fund to meet the expenses thereof. The action was to enjoin the issuing of the bonds because the commissioners had adopted and were proceeding under plans and estimates which would make the cost greater than the fund. The unanimous judgment of the court refused the injunction, because the power to build waterworks was not intended to be limited by the creation of the fund.

In this case, as in those, there is no charge of fraud or bad faith. The best judgment of the commissioners is that no cheaper plan than the one they have adopted will meet the wants of the county. They are required by secs. 2 and 5, to adopt plans and specifications. It is not provided that they shall in such selection be guided by anything but their own judgment as to the needs of the county, and while estimates may be made, experience shows that it is impossible to foretell the actual expense of such work. Whether they might lawfully contract for an amount greater than the fund, under sec. 11, is a question not raised, because it is not averred that defendants propose to do more than go as far as they can with the fund already provided.

It is matter of common knowledge that this act was passed before the ruins of the courthouse were fairly cold, when in the nature of things the legislature could have had no definite knowledge as to just what would have to be done to rebuild, to say nothing of enlarging and improving it, or as to what the expense would be, and that the work was expected to be commenced at once.

The expenditure of the fund in the completion of a courthouse, inadequate to the wants of the public, might be an actual misappropriation of it more serious in its effects than a technical misappropriation, such as that suggested here, and we should feel reluctant, upon general principles, to interfere unless the intention to limit the power and discretion should clearly appear. But in the light of the authorities cited our course is plain.

Demurrer sustained and petition dismissed.

FORCK and PRICK, JJ., concur.

W. H. Pugh, prosecuting attorney.

O. J. Cosgrave and M. F. Wilson, county solicitors, for plaintiffs.

J. H. Perkins, for defendants.

35

LIFE INSURANCE.

[Superior Court, Cincinnati.]

**GUSTAV TAFEL, ADMR., v. SUPREME COMMANDERY KNIGHTS OF
GOLDEN RULE.**

A policy of insurance issued by a mutual life insurance association in favor of the wife of the insured, which reserves to the latter the right to change the beneficiary at any time, confers upon the wife no right or interest which can pass to the administrator, in a case where the death of the wife precedes that of the husband, and the latter dies without designating any other beneficiary.

PECK, J.

During his lifetime, Adam Beyer became a member of the society known as the Knights of the Golden Rule. As such, he received a certificate from the society providing for the payment of the sum of two thousand dollars to his wife, as directed in his application for the certificate, "or as he should thereafter direct in an application for a change thereof under the laws of the order," upon due notice and proof of his death and of his good standing in the order at the time of his death. The wife, Sophia Beyer, died on December 12, 1880, and some two or three months afterwards Adam Beyer died in good standing in the order, without having designated any other person as the beneficiary of his certificate. The constitution of the society provided that any member might change his certificate upon petition therefor upon a form provided for the purpose, and the payment of a small fee. It also provided that when payment was to be made under a certificate, certain of the officers should "witness the payment of the same to the person or persons designated, or their legal representatives." Both husband and wife died without issue, and there appear to be no known heirs of either.

The plaintiff, administrator of the estate of Sophia Beyer, claims to be entitled to recover the sum named in the certificate, from the defendant society. The latter claims that plaintiff can take nothing by reason of the certificate because the death of the wife preceded that of the husband.

According to the rules of the order and the terms of the certificate, Beyer had the right at any time to designate a different beneficiary. What then were the rights of the wife after she had been designated as the beneficiary in the certificate? The weight of authority is to the effect that the beneficiary in an ordinary policy of life insurance has a vested right which may be assigned or transferred as other property. Bliss on Life Insurance, 2nd ed., 517, 554, *et seq.*; Fraternal Ins. Co. v. Applegate, 7 O. S., 293. That rule seems to rest upon the fact that no right of changing the beneficiary is reserved to the insured in such policies. The relations of the parties are unalterably fixed at the outset, so that the person for whose benefit it is issued is held to have the right of control over the policy, and of property in it. In the case at bar, the right to change the beneficiary, already pointed out, is incompatible with the proposition that there was a fixed relation of the parties, such as would have given Sophia Beyer in her lifetime the rights of a beneficiary under an ordinary policy of life insurance. The only interest she had in the policy was that of a mere expectancy dependent upon the will of her

husband. *Richmond v. Johnson*, 28 Minn., 447. It was not such an interest as could pass by assignment or inheritance, and her administrator can take nothing by virtue of the policy. But if this be so, we are asked what construction is to be put upon the words in the constitution of the society providing for payment in certain cases to the personal representative of the beneficiary. It seems clear that there might be cases in which it would be proper to pay to such representative. For instance, suppose the beneficiary survive the person insured so short a time that the amount of the policy cannot be collected before the death of such beneficiary; in that case the fact of survival would confer a vested right in the proceeds of the policy which would pass as a part of the personal estate, and could be collected by the administrator. Assume that the words above mentioned were intended to provide for such cases, the rule of construction that a definite meaning and application shall be given to all portions of such instruments, is complied with, and all the provisions of the constitution on this subject are found in harmony.

The judgment must be for the defendant.

Tafel & Lampe, for plaintiff.

A. W. Goldsmith, for defendant.

NUISANCES.

41

[Superior Court, Cincinnati.]

JAMES MORGAN & CO. V. (CITY) CINCINNATI, GEORGE THOMPSON ET AL

Under legislative acts empowering city councils to make all needful regulations to promote the public health, prevent the prevalence of disease and abate nuisances, city councils may enact ordinances prohibiting the removing or carrying through the public streets dead animals without a permit from the board of health; and may make contracts with persons for the removal of all dead animals from the public streets.

STORER, J.

The plaintiffs file their petition, alleging that they are engaged in the business of slaughtering hogs at their house in Cincinnati, receiving droves which have been transported by railroads terminating in this city, also droves driven through the city to their slaughter houses; that while thus pursuing their accustomed business, it habitually happens, from overloading on the cars and other casualties, that one or more animals from every drove is received dead; others drop down and die in the street from exhaustion; that it has been the custom of the plaintiffs, as it had been of those in the same business, to receive such animals, when recently deceased, before they have become offensive, and before decomposition had begun, and transport them on drays and wagons through the public streets to their tanks, where they are rendered, by the aid of steam, into lard, yielding to the parties a profitable result.

It is then alleged that the city has contracted with George Thompson to remove all the dead animals from within her limits beyond the boundary of the corporation, securing to him a monopoly of collecting together and removing all offensive animal and vegetable substances; that under this alleged authority the said Thompson assumes to take into his possession the carcass of every animal found dead in the streets,

without permitting the plaintiffs to use and appropriate the same in their ordinary business.

It is also charged that the city police have aided the defendant in asserting the right claimed by his contract, and the plaintiffs have either been summoned before the police court, or are threatened to be, for resisting and denying the defendants' power to take their property into his possession.

The ordinance under which the city council has granted the right to the defendant, which is denied by the plaintiffs to exist, prescribes the duties of the superintendents of cleaning the public streets, deputing to them full authority to abate nuisances, and requiring the owner of a dead animal to notify the proper officer of the fact within six hours, that the same may be speedily removed. All persons are also prohibited from removing or carrying in or through the public streets a carcass of such dead animals, unless they should have obtained a permit to do so from the president of the board of health, prescribing the conditions of removal.

The various ordinances that are now in force to secure the health of the people, as well as their comfort, in preserving the atmosphere from impure exhalations, which naturally arise from animal decay, are set forth in the petition; and, as a whole, it is claimed in argument as insufficient to sustain the contract made by the city with the defendant, Thompson.

It is proper to suggest that it is very doubtful whether the plaintiffs, whose interests are distinct, can be joined in an action like the present. This point need not, however, be discussed, as the court supposed the real question could be reached in this preliminary examination, which must finally determine the whole controversy.

Nor need they state anew what is the settled rule when an injunction is asked to restrain a municipal body, where the act complained of is authorized to be done, or where by the organization of the body, a large discretion is vested in its organic law. In such cases there is no equitable relief by the process now sought to be granted. The only relief is by *certiorari* in a court of law.

But where the power conferred could not have been vested by body corporate, for the want of authority in its organization, and the acts done are therefore merely void, there can be no doubt of the right, as well as the duty, of the court to interfere.

The only practical question is this: Have the city council exceeded their powers, either in enacting the ordinance, or in entering into the contract with the defendant, Thompson?

An affidavit of Thompson has been exhibited, which does not materially change the statement, though it qualifies it by the general assertion that all that he has done under his contract is strictly within the power it confers.

By the 62d section of the law of 1852, by which cities of the first class are empowered to legislate, the express authority is granted to the city councils to make all needful regulations to promote the public health and prevent the prevalence of disease. The means to reach that end must be left to the wise discretion of the body who enacts the by-law. Hence, it is to guard against ravages of fire, accident from gunpowder, the obstructing of public thoroughfares, whether a street or a water course, the most speedy exercise of preventive justice is not only permitted, but is demanded at the hands of the city authorities, as the

guardians of the public safety, whether it pertains to property, to person or to life.

Thus all substances liable to ignition by sudden contact with each other, or are dangerous from their explosive elements, may be interdicted from the corporate limits, and the power to require their removal is not to be confined to agents already known. The general principle may be laid down that no such substance, no matter what its form is to be excluded from municipal control, but by police regulation may be placed beyond the liability to produce injury to individuals or to endanger the public safety.

The necessity for the exercise of such power is its excuse. Without it there would be no protection of the citizen; no ability on the part of those who govern the corporation to maintain the purpose for which it was organized.

Passing from these ordinary subjects to the measures demanded for the public health, which include a pure atmosphere, pure water and general cleanliness, we are led at once to yield to the proper tribunal many privileges, even which we would gladly retain if the general welfare of those around us did not forbid their enjoyment.

Such a surrender may seem to be improperly required, yet the answer has ever been found in the maxim, as ancient as it is sound, *salus populi est suprema lex*.

On this admission the general assembly of Ohio have enacted a series of statutes, which apply throughout the state, where the population is sparse as well as where it is dense. In 1 Swan & C., 877 to 880, we find all the legislation that is necessary to meet every case, where it may be said a nuisance exists. Reference might be made specially to the second and third sections of the law of May 1, 1857, as well as to the first section to that of February 27, 1834. These define what will constitute a nuisance and forbid the deposit of any dead animal or offal from a slaughtering establishment upon a public street as well as on private property.

With these provisions before them the city council, in carrying into effect the power necessary to accomplish the purpose of cleansing the city and removing all causes of disease, have well ordained what substances shall be taken in charge by the superintendent of cleaning the streets, or the board of health, in order to their removal beyond the city limits.

And they may consequently cause this object to be accomplished by such instrumentality as may be proper and convenient, and does not interfere with private right. The city treasury must bear the expense incidental to the discharge of the duty; but if the offal or animal substances found on the public streets may be regarded as without an owner, the city authorities, who are bound to cleanse the highways, can dispose of all such substances, and, if they are valuable for tillage or other lawful object, such price as may be obtained from a purchaser can be demanded without assuming power not delegated, but on the contrary in perfect harmony with every just principle, whether applied to the public or to individuals.

This does not create a monopoly in any offensive sense, for it does not interfere with the exercise of any private right.

The defendant, Thompson, obligates himself to gather and remove from the city all the animal matter, garbage and offal, three times in each week. The mode of transportation is described, and in addition to the

performance of this duty, he obligates himself to pay to the city for the privilege \$3,000 per annum.

Comparing this contract with the ordinances, the court did not perceive that any fair or reasonable construction could lead to the conclusion that they are beyond the corporate power of the city officials, or are in derogation of private right.

They recognize the existence of municipal authority to preserve the health and the comfort of the citizens by the most prompt and effective means; to preserve, in a population so large as is to be found within our city limits, the full enjoyment of every lawful business, trade and employment, if carried on without contaminating the atmosphere, offending the senses, or impairing the functions of life.

They rest upon the assertion which is sustained by all experience, and of which the court is bound to take notice, that animals that die of disease, or are smothered on board a steamboat, or are found dead from any similar cause in the railroad car, whether from exhaustion or the effect of exposure to the cold, are unfit for human food, and therefore may well be prohibited, more especially as the law of the state forbids the offering for sale of all such animal substance in the market.

As preventive justice is more to be desired than merely punitive, the exclusion from our city of whatever may or will necessarily result in producing what it is the imperative duty of those who direct our police regulations to prevent, there must pertain to the proper exercise of these official duties a very large proportion of discretion.

It is very clear there is a corporate power to establish a quarantine where infectious or contagious diseases exist in other localities, which will restrict all travelers who have passed through the infected district, and by parity of reasoning, there must be a similar power to prohibit the introduction of animals already diseased.

But it is said there are certain conditions which occur in the removal of swine from a distance, which ordinarily frequently involve sudden disease and death, and there can be no cause of complaint, if the dead animal before decomposition, is carried to the tank, where the whole carcass is dissolved by the aid of steam and thus rendered into lard, a process differing entirely from that which is employed for the extraction of the same article for domestic purposes.

But the question may well be asked: Must actual or visible putrefaction be proved to have begun before the right of the city to interfere can be permitted? Must the substance which inevitably becomes loathsome by remaining above ground too long after death, remain until it is really offensive before the health officer can order its removal or its burial?

The statement of this question leads us to the physical fact that all such animals come within the proper police regulations of the city, as it must be granted, had they died from disease, exposure to cold, as a general rule decomposition commences when vitality ceases, not when the animal ceases to breathe, but when the functions of life have ceased their office, while yet the organic power to move is faintly perceptible.

We are brought to the conclusion then, that when animals of the description we have referred to are found anywhere within the city, it is the right and the duty of the proper authority to cause them to be removed without the corporation.

The owner, it must be admitted, may claim a permit from the board of health to convey his property beyond the city boundary; but he can-

not and ought not to be allowed to manufacture the carcass into any other substance; and there is provision in the contract for remuneration to the owner if he is not disposed to remove the carcass himself.

It was claimed by counsel that the city authorities cannot define what is detrimental to the public health or to the comfort of individuals, unless the legislature shall have first defined what may be regarded as a public nuisance. The court did not so understand the power delegated to municipal bodies by the general statute which organizes them, nor under the admitted principle which must be co-existent with the creation of the corporation, that it possesses the inherent power to protect the corporators in their health, lives and property.

It would be impossible to foresee what may become pestilential or noxious in the progress of scientific improvement. Formerly when animals were slaughtered, portions of the carcasses were thrown away as worthless; and when they died of disease, or were unfit for food, the same consequence usually followed. In the advance of science, chemistry appropriated what once was deemed worthless, and it is now made the subject of purchase and sale for manufacturing purposes. In all the changes which such substances undergo, there must be an escape of noxious gases; and if for any purposes a chemical agent is added to produce a peculiar result, there must be offensive odors, alike injurious to the health and comfort of the neighborhood—at least wherever the dead animal, just as it existed at death, with all its viscera, is dissolved in a common mass.

It is then the reasonable probability that these processes may produce an injurious result as well as an established fact that they generally do, that is to be taken into account when council legislates upon the subject of the public health.

There are some trades that are held to be nuisances if carried on in a populous community, without any proof of the fact whether they are injurious or not. Thus it has been decided that the chancellor will restrain the manufacture of nitrous and sulphuric acids unless such precautions are used as will conduct the gases generated away from the neighboring habitations. So slaughtering houses have been restrained from being appropriated for their intended purposes. This is well stated in the case of *Pedie v. Swinton and others*, on appeal from the court of sessions, in Scotland, to the House of Lords, 1 M'Lean and Robinson, 1019, Chancellor Wallworth takes the same ground, holding a slaughter house to be, *prima facie*, a nuisance, may be restrained by injunction; Paige's Ch., 9. In the case of nuisances, long admitted to be such, no particular legislation was required to make them more so. They are nuisances *per se*.

As new conditions arise in the mode of manufacture carried on, the application of an established rule is to be discreetly made so that no novelty in the arts, or unknown combinations of matter, shall be permitted to be used or employed, the result of which may annoy or produce discomfort to the public. As it is well said by Chief Justice Abbott in *Rex v. Neil*, 2 C. & P., 485: "It is not necessary that a public nuisance should be injurious to health. If there be smells offensive to the senses it is enough, as the neighborhood has a right to fresh and pure air." To vindicate this power, the councils of every large city in the Union have assumed the right to act speedily and decidedly wherever the contingency occurs; and though it may sometimes partake of harshness, or seem to produce a violation of individual rights, the protection of the whole community may

well demand the restriction. It grows out of the necessity that presses upon the legislator to acknowledge the maxim, so true in morality as in law : "*Sic utere tuo ut non alienum laedas.*"

The result arrived at is that the ordinances of the city referred to, when properly examined, are not open to the objection stated by the plaintiff's counsel. They must be construed in reference to the power granted by the legislature, as well as the object to be accomplished by its proper exercise.

The contract with the defendant is also valid, and it was expedient and just that the arrangement made with him should be entered into. The city authorities may well prohibit the bringing into the city all animals that have died from disease, exposure or exhaustion, whether on board a steamboat or rail car. The court finds that in other cities it is the duty of the authorities to require the removal, at once, of the carcasses without the city; and if found within the city, its streets, open lots or slaughter houses, the owner is compelled to carry the same in like manner beyond the corporate limits. The manufacture of such animal substance in tanks may, in like manner, be restrained, and it is the duty of the council to enact proper ordinances to effect the object.

The court was satisfied, however, that the owner has the right to remove them himself, or to procure it to be done, to some point without the city, at his own charge and without the intervention of the defendant, Thompson.

But if the duty is neglected or declined, he may then assume control, and carry the dead animal away.

Our population is now nearly a quarter of a million, if not more. The territory embraced within our municipal limits is small, and but little room left to accommodate private residences, warehouses or workshops. Our communication, by land and water, is with every variety of climate, and our own climate proverbially changeable, so that heat or cold cannot be predicted on past experience, it becomes, then, the duty of those entrusted with the health or safety of their constituents to omit no effort designed to reach and remove any cause of nuisance or discomfort; and the court hopes that all the parties to this controversy, as good citizens, would, on reflection, yield to the higher law, which in its proper application secures to them, as to all, a pure atmosphere, and comparative freedom at least from disease, in the assurance that all the causes that produce offensive or disagreeable odors, or impair the comforts of the people, are promptly removed from the city.

Under all the circumstances of the case, and with this intimation as to the right of the owner to remove his own animals out of the city, the injunction would be refused.

CUSTODY OF CHILD.

45

[Hamilton Common Pleas.]

†EX PARTE HESTER FIELD FOR HABEAS CORPUS.

A mother, undivorced but deserted by her husband, verbally gave her female child, then two and one-half years old, to respondents to raise, with the understanding that it should be baptized by them and receive their name. The child was accordingly cared for and supported by respondents for four years, when the mother, revoking the gift, sought to reclaim the child: *Held*, that the gift was revocable and being revoked, the mother, in the absence of any showing that she was not a proper person and that it would be prejudicial to the child's welfare, was entitled to the custody of her child, and on hearing of a writ of habeas corpus an order would be granted her for the custody of the child.

ROBERTSON, J.

The petition of Hester Field states that she is the mother of Hester Field, a minor of the age of six years, who is illegally restrained of her liberty by Wm. F. and Lizzie M. Gray, and prays that a writ of *habeas corpus* may issue and for the delivery of the child to her.

The respondents deny that the child is unlawfully restrained of her liberty and deny that the plaintiff is entitled to her custody. They say that about October, 1880, the plaintiff desiring to get rid of the child, gave the child to the respondents to be raised as their own, with the agreement that the child's name should be changed, and that she should be baptized. That her name has been changed with the plaintiff's knowledge and consent from Hester Field to Cecilia Gertrude Gray, and that during the past four years the child has been carefully and tenderly raised as their own flesh and blood; that the child has become estranged from the plaintiff, by reason of the plaintiff's indifference to and abandonment thereof; and that the child has transferred its love and affection to the respondents, regarding them as its parents, and that the health and interests of the child would be best promoted by allowing her to remain with the respondents.

The facts: Mrs. Field, the plaintiff, and Mrs. Gray, the respondent, have been intimate friends from their school-girl's days until interrupted by the present controversy. Mrs. Gray married happily; Mrs. Field unhappily. Mrs. Gray has no children of her own. Hester Field, the minor whose custody is now with Mrs. Gray, and is sought by Mrs. Field, was born on February 5, 1878. One year and nine months after her birth her father, who had become shiftless and probably worthless, deserted mother and child, and three weeks thereafter on November 18, 1878, another child (Jennie) was born to Mrs. Field. Shortly after the birth of the child Jennie, Mrs. Gray, in the fullness of her sympathy for Mrs. Field in her unfortunate situation, offered to care for the child, Hester, during the day time, and for many weeks the child was taken to Mrs. Gray's house in the morning and returned to her mother in the evening. This ripened into an attachment by Mr. and Mrs. Gray for the child, and soon the child was permitted to remain with them night and day. This continued up to about March 1, 1880, when Mrs. Field with her mother, Mrs. Pollock, removed to East Liverpool, Ohio, taking with them both children. At this time Mrs. Gray claimed that the child had been given to her to raise as her own, but yielded to the mother with the understanding that the child should be allowed to visit them as frequently as possible. From March to the latter part of September, 1880, the child was with her mother in East Liverpool.

About October 1, 1880, Mrs. Field with her two children came to Cincinnati and went to Mrs. Gray's house. Hester was then two years and eight months and Jennie eleven months old.

The occasion of Mrs. Field coming to Cincinnati at this time, it seems, was a difficulty between Mrs. Field and her mother, Mrs. Pollock, at East Liverpool, in regard to Mrs. Field's children. The youngest child was troublesome, and Mrs. Pollock had complained to her daughter of the trouble her children were causing.

Smarting under her mother's complaints about her children and dependent as she was at that time upon her mother, she came to Cincinnati with both children, as stated.

†This judgment was reversed by the District Court; see opinion, *post*, 19 Bull., 121.

During the week she was at Mrs. Gray's house, she spent her time in endeavors to find some suitable person to adopt the youngest child, but failing in that, she went to the Children's Home and there made affidavit that the child had been deserted by its father, that she was unable to support it, and that it would be for the best interests of the child that she should be committed to the care and custody of the managers of the Home, and voluntarily surrendered the child to that institution. On the same day, it is claimed, she gave the child, Hester, to Mrs. Gray. What took place is told by Mrs. Gray as follows: "When she gave me Celia (Hester) she had the baby on her arm ready to go out. She would have gone that morning but she waited for a lady to come to my house to adopt the baby. As the lady did not come, she thought she had better go after her. She knew where to find her; before starting she gave me Celia, or Hester. 'I did not tell what I came down for,' she said, 'but I came down to give you Hester,' and she said she was very sorry she had taken her away, and she said at the same time, 'I came down to give her to you as your own.' I said: 'I took her once, Hester, if I take her now I take her to raise as my own, change her name and have her baptized.' She said: 'Lizzie, there is only one thing that bothers me, I thought you did not love her as much as in the six months you had her, because I took her away from you.' I said: 'I love the child even more now, when I know the father has abandoned it and I know your mother did not want it and you are so determined and willing to give your child up.' * * * I took the child."

It is proper here to note within a week after Mrs. Field had left her youngest child at the Children's Home, she repented of her act, borrowed money, and returned to Cincinnati and reclaimed and repossessed herself of the child, Jennie.

From October, 1880, to the end of January, 1884, Mr. and Mrs. Gray had exclusive custody and control of the child, Celia or Hester, without any intimation or suggestion that her mother contemplated reclamation. They regarded the child as their own, and everything the most devoted parents could have done, they did for the child's best interests.

During this period of three years and four months, Mrs. Field visited Cincinnati three times, including the time she came to reclaim Jennie from the Home. The last visit was in August, 1883, and on her return, Mrs. Fields, writing to Mrs. Gray, alluded to the change in Celia's feelings towards her, saying that "Jennie told everybody her little sister would not come home with us."

In November, 1883, the child, Jennie, died, and Mrs. Fields wrote Mrs. Gray of her bereavement, and conveying her "dearest love and kisses to Celia," but said nothing about reclaiming Celia until in her letter of January 28, 1884, when she addressed Mrs. Gray as follows: "Dear Lizzie: It is now five months since we returned home from your city. You made the remark to me, 'now Hester, do not let it be another year deciding about Celia.' I thought, as I may have many times before, very seriously about it, and as yourself and Mr. Gray knows, left with the intention of securing my divorce, and coming to a final say about Celia. Now, dear Lizzie, you know without me telling you, what a great change death makes, and especially when the only one you have is taken from you. Another remark you made which I have often thought of since Jennie died, was this: You said, 'it is not as if you had none, but you have Jennie.' Oh, dear Lizzie, now I have none, and content in my mind I could not be. I know the love you all have for the child, and the hours of care you have had which both ma and myself appreciate very much indeed. * * * I will be down in March, and you must try and think the parting is not forever, for when I visit Cincinnati, I will bring her with me." * * *

From the reference by Mrs. Field in her letters to Mrs. Gray to the child's baptism, from the change of the child's name with at least the knowledge of Mrs. Field, from the testimony as to Mrs. Field's obtaining a divorce with a view of enabling her to give legal consent to the adoption of the child by Mr. and Mrs. Gray, and from all the circumstances, I am fully satisfied that it was Mrs. Field's intention to give the child to Mrs. Gray to be raised as her own, and that Mrs. Gray equally intended the formal adoption of the child as her own.

But the adoption has not been consummated by reason of Mrs. Field's legal incapacity to give consent. The child has been most tenderly and lovingly cared for by Mr. and Mrs. Gray; every advantage offered by social position and affluent circumstances, prompted by the most generous impulses, has been bestowed upon the child, and would no doubt continue. On the other hand, it appears that Mrs. Field is now fairly able to provide for the child's wants and education, and is in every regard a suitable and proper person to be entrusted with the education and care of her child.

The only matter claimed as showing unsuitableness on the part of the mother' is the acts of giving away her children and her conduct in that regard, which it is claimed, showed an absence of that motherly love, which taken in connection with the other circumstances, should preclude her from the right of reclamation.

Opinion: In this case, counsel in their arguments, have very fully, faithfully and pathetically expressed the delicacy and difficulties surrounding a decision of such import.

The case involves the present and future well-being of a bright, winsome little girl, one who would naturally draw even strangers tenderly towards her.

Her appealing innocent face in its artless dependency, would warm any heart into kindest sympathy, and far be it from one in this most delicate and responsible position to pronounce an opinion without feeling the deepest sense of its import to all concerned.

There is quite a uniformity in the decisions as to the rightful custody of infants and the general rules applicable are fairly well settled. The difficulty and delicacy in these cases arise in the exercise of that sound discretion which is left to the court.

That parents (the father first and the mother next) are entitled to the custody of their minor child or children as against any other person is well settled, and it is equally well settled that where the morals or safety or interests of the child strongly require it, courts of justice in their sound discretion may withdraw the custody from parent or parents, and place them in custody elsewhere. The parents' rights are not therefore absolute or uncontrollable. But while the courts exercise a control over parents in the interests of minors, it is contrary to public policy that parents should, by contract or otherwise, transfer to others, their natural rights and obligations towards their children, and I apprehend no well considered case can be found in the books where the contract of a parent to give away their child has been specifically enforced except where the relation of master and apprentice and the principle of legal adoption are parts of the public policy, and then only when the statutory formalities have been observed.

It is, however, the law that where parents have parted with the custody of their children, and afterwards seek to reclaim them, that the matter of primary importance is the interest and welfare of the child.

In a well considered case in the Supreme Court of Kansas, *Chapsky v. Woods*, 13 Cen. L. J., 494, the court says:

"Though the gift of the child be revocable, yet when the gift has been once made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then whether the courts will enforce the father's right to the custody of the child will depend mainly upon the question whether such custody will promote the welfare and interests of such child. This distinction must be recognized. If immediately after the gift, reclamation is sought, and the father is not what may be called an unfit person by reason of immoralities, the courts will pay better attention to any mere speculation as to the probability of benefit to the child by leaving or returning it. * * * The law of nature which declares the strength of a father's love is more to be considered than any mere speculation as to the advantages which possible wealth and position might otherwise bestow, but on the other hand, when reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thoughts, much attention should be paid to the probabilities of a benefit to the child from the change."

Such being the settled principles of law as applicable to cases of this nature, it remains but to apply these principles to the facts of this case.

If Mrs. Field made an agreement, and in pursuance of it gave the custody and control of her child to Mrs. Gray, the agreement and gift was revocable, and it would be contrary to public policy to specifically enforce it unless the welfare of the child requires it. It was by no legal act that Mrs. Field parted with her parental right to the custody of her child and its reciprocal duty to support and cherish it, and unless she is clearly unfit for the trust, or unless the relation between the child and the respondents has been of such duration and character that the happiness of the child would be endangered or its permanent interests likely to be sacrificed, on her petition and prayer therefor, she will be entitled to the custody of her child.

Is she then an unfit or unsuitable person? Has she the means wherewith to support and educate this child? Does she love her child? and if the child's love has been transferred for the time to others, can she regain it?

There is nothing in the record in this case in any serious matter reflecting on Mrs. Field; her moral character is unimpeached; she is earning a sum amply sufficient to respectably maintain herself and her child and supply all their wants.

Does this mother love her child? To no mother who is in a sane or normal condition should it be said "thou lovest not." Mother and love are synonymous terms, and the child's life—most especially if it be the first born, is so interwoven with the mother life that only those who have known the agony and the joy that comes with the wail of the first child can have any conception at the depth and intensity of that love. Poverty, sorrow and perplexities incident to an unfortunate woman's life may make her appear many times cold, calculating, and to those who have never experienced like conditions, as having no demonstrative love; but let her frenzied brain have time to rally, and the deep fountains of the mother's soul swell up again and overflow, and the cry of her heart appealing even to the throne of the Infinite, is my child! Oh! My child!

There are instances in the books where courts have refused to aid fathers in reclaiming their children from other relatives having their custody when new ties and attachments have been formed for the child with the father's long continued acquiescence, but I have found no instance where a mother, she being a fit and proper person, and where the interests of the child would not be manifestly injured, has been refused the custody of her minor child, and I believe it is a safe and salutary rule in such cases to recognize in the mother's love, the full equivalent of any speculative or probable benefit from superior social position or pecuniary advantages.

My opinion is that the gift of the child to Mr. and Mrs. Gray was revocable, and being revoked, that the mother is in every regard a fit and proper custodian of this child, and that it will not be prejudicial to the child's welfare that its custody be awarded to her, which is accordingly done and ordered.

W. T. Porter, for relator.

C. W. Baker, for Mr. and Mrs. Gray.

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PATENTED DEVICE.

†THEODORE F. CLARK, ADMR., v. BENTEL, MARGEDANT & Co.

1. R. and C. were the inventors and patentees of a device to adjust the tables of a wood-working machine vertically and horizontally, independently and conjointly for the reception of the wood material to be applied to the cutter-head. B. M. & Co. became the owners of C.'s undivided one-half interest therein, and made a written contract with R. by which they had exclusive right to manufacture machines with such patented device (using terms by which it was fairly inferable that they claimed the patent to be a valid one), and agreeing as to R.'s share in the profits. Thereafter, by a modified contract, R. agreed to take, and they agreed to pay a fixed royalty in lieu of an undivided interest in said profits, the sum of \$13.00 per machine made and sold embodying the said patented device; and B. M. & Co. continued to make and sell said machines, some with modified and additional improvements, but on all such machines stamping the date, etc., of the R. and C. patent, and representing to the public such embodied device, themselves earning and collecting all profits. *Held:*
2. That an invention patented *prima facie* has novelty; it establishes that the patentee was the first inventor. *Crouch v. Speer*, 1 *Banning and Arden's Patent Cases*, 145.
3. That the assignees and licensees, having covenanted as to the validity of the patent, and received profits in the manufacture and sale of machines embodying the device, were estopped from denying the validity of, or limiting the patent in an action by R., patentee, to obtain an account of royalty or license fees due him.

Opinion by Buchwalter, J.; citing *Bigelow on Estoppel* (1872 ed.), p. 423; *Kinsman v. Parkhurst*, 18 How. (U. S.), 289; *Magic Buffle Co. v. Elm City Co.*, 13 Blatchf., C. C. R., 157.

McDougall & Longworth, for plaintiff.

Lincoln & Stephens, for defendants.

†See also *Clark v. Bentel, Margedant & Co.*, 6 Ohio Dec. R., 1295.

DEFECTIVE ASSIGNMENTS.

53

[Hamilton District Court, June 9, 1884.]

ANTHONY PFRIFFER V. WILLIAM C. COOK ET AL.

A written instrument purporting to be a general assignment of real and personal property for the payment of debts under the insolvent laws of the state, but not acknowledged as required by the statute governing deeds and conveyances, does not pass title to real estate. Nor does it create in the assignee an equity for the conveyance.

APPEAL from the Court of Common Pleas.

AVERY, J.

This action was begun in 1881, by a judgment creditor of William C. Cook, to marshal liens upon his real estate. Among the parcels described was 85 feet on the east side of Race street, south of Thirteenth street. When the judgment was obtained at the May term, 1870, of the superior court of Cincinnati, the interest of William C. Cook in this parcel was as one of the five children of Catherine M. Cook, who held this and other property under a devise from her father to her for life, and, "after her death to her children forever."

In May, 1870, after the judgment was obtained, William C. Cook made what purported to be an assignment, under the state insolvent laws, of all his personal property to William E. Jones; which instrument of assignment was filed in the probate court, but was not acknowledged according to the statute governing deeds and conveyances.

In January, 1873, Catherine M. Cook and her children entered into an agreement, the object of which was that mutual deeds should be executed, so that one-half of each parcel held by her for life should vest in her in fee, and that the children should each have one-fifth in fee of the other half.

In July, 1873, deeds were executed in pursuance of this agreement, but not including the Race street property. The reason for not including it, as is testified, was that a portion had been sold in September, 1872, and another portion in April, 1873, and an amount estimated to be the share of William C. Cook in the whole had been allowed to him out of the proceeds. The details of the transaction would appear to be, that under a family arrangement the money was left in the hands of Catherine M. Cook, and was expended in improving property on Walnut Hills, set apart to William C. Cook and afterward sold by his assignees. The result of selling the Race street property, however, instead of dividing it, has been that, under conveyances in which William C. Cook joined, it is now held in various parcels by third parties. The assignee seeks to subject the interest of William C. Cook at the time of the assignment, notwithstanding these conveyances.

The question is one of title and involves inquiry into the want of acknowledgment of the instrument of assignment. In *McCullough's Heirs v. Roderick*, 2 O., 235, and *Rogers v. Allen*, 3 O., 488, it was held, that under the insolvent laws of Pennsylvania, an assignment by an insolvent debtor residing there did not pass land here, without a deed of formal conveyance. This was approved in *Sortwell v. Jewett*, 9 O., 181.

The opinion in this latter case, however, leads it to be inferred that the ground of the decision was that the assignment was under a foreign

aw. But an assignment is the transfer of title, and under the general law to transfer title to land requires acknowledgment. The statute, regulating the mode of administering assignments in trust for the benefit of creditors, determines the mode of administration merely and leaves the validity of the assignment to be determined by the general law. *Johnson v. Sharp*, 31 O. S., 611, 617, *McIlvaine, J.* And in *Kingman v. Loyer*, 40 O. S., 109, it is held by the Supreme Court Commission, that an instrument purporting to be an assignment of real and personal property, but not acknowledged, does not convey real estate.

The assignment being defective to pass the legal title, the question then is whether an equity was created. In *McCullough's Heirs v. Roderrick*, *supra*, this question is left undetermined; but in *Rogers v. Allen*, *supra*, the opinion was expressed that as no title passed at law, there could be no principle upon which to create an equity.

In the absence of statute, the general rule is that an assignment in trust for creditors is voluntary and revocable, unless and until the relation of trustee and *cestui que trust* is established between the assignee and some of the creditors. *Chitty Contracts*, 11th Am. ed., 577. But to establish the relation of trustee requires that the legal estate be in the assignee. The effect of the statute, regulating assignments, is to create the trust and at the same time make it irrevocable; but the assignee must still have the legal estate. Without this there could be nothing for the statute to operate upon.

An assignment, defectively executed so as not to pass the legal title, must leave the estate of the assignor in him subject to the ordinary legal remedies of his creditors. The only effect would be that of a covenant, or agreement, to transfer the title in trust. But a use or trust to be raised by covenant or agreement in equity must be founded upon some meritorious or valuable consideration, a mere voluntary trust will not be enforced. *Story's Equity*, sec. 973, sec. 1196; *Perry on Trusts*, sec. 96. Although for the payment of debts the benefit proposed is for the debtor and not for his creditors. *Garrard v. Lauderdale*, 3 Sim., 1, 6; *Bill v. Cureton*, 2 M. & K., 508, 511; *Adams' Equity*, 31.

We are of opinion, therefore, that the instrument of assignment, not being executed to pass the legal title, did not create an equity in the assignee. His cross-petition is dismissed and the title quieted.

Crossley, Coppock & Humphreys, for Cook et al.

W. E. Jones and Edwards Ritchie, for assignee.

TAXATION OF NATIONAL BANK STOCK.

[Hamilton District Court, July 23, 1884.]

† MILLER (TREASURER) V. FOURTH NATIONAL BANK OF CINCINNATI
ET AL.

1. Shares of stock in a national bank are taxed under the law of the state in the name of the shareholder.
2. The auditor of a county having reason to believe, that in the returns of the resources and liabilities of a national bank, under sec. 2765, Rev. Stat., there were false statements, proceeded to correct the same by additions going back

† This judgment was affirmed by the Supreme Court; see opinion, 46 O. S., 424.

not exceeding four years, secs. 2781, 2782, Rev. Stat., but placing the amounts upon the tax list against the bank: *Held*, that a petition by the county treasurer would not lie against the bank for the application of money and property of its shareholders to the payment of the taxes.

ERROR to the Court of Common Pleas.

AVERY, J.

The question in these cases is the same. It is whether shares of stock in a national bank are, under the laws of this state, to be taxed in the name of the bank or in the names of the owners of the shares. The question arises upon a petition which was filed in each case by the county treasurer, demurrer to which was sustained by the court of common pleas, and judgment entered. The allegation was in substance that, for the years 1877, 1878, 1880 and 1881, the report of resources and liabilities made by the cashier of each bank, under the provisions of sec. 2765, Rev. Stat., was false; and that in 1881 the auditor, upon notice to the cashier as required by sec. 2782, Rev. Stat., ascertained the omitted amounts which he placed upon the tax list against the banks respectively, and opposite thereto the taxes for the several years. The prayer was for an injunction against the payment of dividends, or transfer of stock, until the taxes were paid; and for an account of whatever money and property was held by the bank for its shareholders.

It is conceded for the plaintiff in error that, apart from the real estate which is to be taxed the same as of individuals, only the shares of the stockholders of incorporated banks of the state, or of the United States, can be taxed; but the contention is that these shares are listed for taxation by the bank; and that under sec. 1034, Rev. Stat., it is the duty of the auditor to set down in the tax list the value of the stock opposite the name in which it is listed.

The provisions for the taxation of bank stock, and enforcing payment of the tax are contained in the Rev. Stat., secs. 2762, 2769; secs. 2808, 2810; secs. 2839, 2840. The cashier of each bank, between the first and second Monday of May, is required to make a report to the county auditor of the resources and liabilities of the bank, as of the Wednesday preceding the second Monday of May, together with a statement of the names and residences of the stockholders, the number of shares owned by each, and the par value of each share. The county auditor upon receiving the report fixes the total value of the shares according to their true value in money, and after deducting from the aggregate the value of the real estate as it stands upon the duplicate, transmits the valuation to the county board of equalization with a copy of the report made to him by the cashier. When the county board has equalized the shares of the several banks in the county, according to their true value in money, it is then the duty of the county auditor to transmit such equalized valuation with a copy of the statement made to him by the cashier to the state auditor. The state auditor, treasurer and attorney general, constituting the state board of equalization for banks, are then required to examine the returns of the banks to the county auditors and the valuations reported, and to equalize the values of the shares. "The auditor of state shall forthwith, after such equalization shall have been made, certify to the auditors of the proper counties the valuation as equalized of the shares of banks situate in such counties, which valuations shall be put on the proper tax lists." Rev. Stat., sec. 2810.

The statement of the names and residences of the stockholders and number of shares owned by each, which it is now the duty of the cashier to make, was required by the act of 1867 ("to provide for the taxation of bank shares," sec. 4, S. & S., 763,) to be made by the president and cashier. But the value of the shares to be reported was the actual value in money; and by section 5, it was the duty of the auditor to deduct from the total value of the shares the assessed value of the real estate, and to enter the remainder of the total value of such shares on the duplicate, "in the names of the owners thereof, in amounts proportioned to the number of shares owned by each."

The act of 1876, 73 O. L., 251, repealed section 4 of the act of 1867, and required the cashier to make a report to the state auditor of the resources and liabilities of the bank as of the Wednesday before the second Monday of May, a duplicate of which was to be furnished to the county auditor, together with a statement of the names and residences of the stockholders, the number of shares held by each, and the par value of each share. It was then made the duty of the county auditor, after deducting from the total value of the shares the assessed value of the real estate, to transmit to the state auditor the valuation of the shares for taxation so determined, with a copy of the statement returned to him for the current year by the "president and cashier." The state auditor, treasurer and attorney general were

constituted a board of equalization of the value of the shares, and it was provided: "The auditor of state shall forthwith, after such equalization shall have been made by said board, certify to the auditor of the proper county the valuation of the shares of such bank or banking association as determined and equalized by said board and said shares shall thereupon be charged with taxes upon the duplicate at such valuation for said year."

The act of 1876 was repealed by the act of 1877, 74 O. L., 88, which provided as now, for a report and statement by the cashier to the county auditor, for fixing by the county auditor the total value of the shares according to their true value in money, and for equalization by the county and state boards. The provision of the act of 1876 was retained for certifying to the auditors of the proper county the valuation of the shares as equalized, and "said shares shall thereupon be charged with taxes upon the duplicate at such valuation for said year."

It is conceded that, as the law was left, the valuation was to be entered upon the duplicate in the names of the owners of the shares in amounts proportioned to the number owned by each. *Wagoner v. Loomis*, 37 O. S., 571, 579, *McIlvaine, J.* But the argument is, that this was because section 5 of the act of 1867 remained in force; and it is now contended that the entire act having been repealed by the Rev. Stat., without re-enacting section 5 to the extent that the shares were to be entered on the duplicate in the names of the owners—for the rest of the section would appear to have been already repealed by implication—a legislative intention to change the law is manifested.

Where a statute has undergone revision, the rule is that it is to be construed as before, unless the new act plainly requires a change of construction. *Conger v. Barker*, 11 O. S., 1, 13; *State v. Commissioners*, 36 O. S., 326; *Miller v. Oehler*, 36 O. S., 624, 627; *State v. Vanderbilt*, 37 O. S., 590, 640. This rule is peculiarly applicable to the revised statutes. "Where one or more of the sections of a statute are repealed and re-enacted in a different form, the fair inference is, in general, that a change in meaning was intended; though even in such a case the intention may have been to correct a mistake or remove an obscurity in the original act, without changing its meaning. But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed." *Allen v. Russell*, 39 O. S., 336, 337.

OKRY, J.

There is nothing in the nature of the tax to require that it should be in the name of the bank; on the contrary, as the shares only can be taxed, it should be rather in the names of the shareholders. The revised statutes have made no change for the enforcement of payment of the tax. The only provision is that it shall be lawful for the bank to pay "the taxes that may be assessed upon its shares in the hands of its shareholders respectively;" and that upon notice of "the non-payment of taxes at the time required by law by any shareholder," it shall be unlawful for the cashier or other officer to pay dividends or permit transfers of the stock.

Sections 2839 and 2840 contain these provisions, and are a literal transcript of sections 6 and 7 of the act of 1867. The sense of the words, "taxes that may be assessed upon its shares in the hands of its shareholders respectively," and "non-payment of taxes at the time required by law by any shareholder," was in the act of 1867 ascertained by the provisions of section 5, for entering the shares upon the duplicate in the names of the owners. The presumption is that in the revised statutes these words were used in their ascertained sense. Indeed it is the only natural sense. How could non-payment of taxes at the time required by law by any shareholder occur, or how could taxes be assessed upon the shares in the hands of the shareholders respectively if not in their names? And why should it have been necessary to make it lawful for the bank to pay the taxes, or to require notice to the bank of the non-payment, if taxed in the name of the bank?

The duty of the auditor, under sec. 1034, to set down the value of stock upon the tax list opposite the name in which it is listed, determines nothing. The return of the resources and liabilities of a bank is not the listing of its stock. Listing for taxation requires that the value be ascertained. Under the law for the taxation of bank stock this is left until final equalization by the state board. The language is explicit: "The auditor of state shall * * * after such equalization * * * certify to the auditors of the proper counties the valuation as equalized, * * * which valuations shall be put on the proper tax lists."

The argument from the language of sec. 2746, Rev. Stat., that investments in stock shall be listed in the name of the owner, except "shares of capital stock of

any company, the capital stock of which is taxed in the name of such company," pitches the exemption of the owner of bank stock upon the wrong location. It is not because of the exception in this section, that the owner of bank stock is exempted from listing it, but because of the definition given by the tax law itself to the term "investments in stocks." Section 2730, Rev. Stat., provides: "The term investments in stocks shall be held to include money invested in the capital or stock of any corporation which is or may be divided into shares for the taxation of which no special provision is made by law." The special provision by law for the taxation of bank stock places it therefore altogether without sec. 2748.

The further argument, that the valuation fixed by the auditor and transmitted to the county and state boards is in the aggregate, and that the auditor is not required to transmit the names and residences of the stockholders and number of shares owned by each, may be answered by the question, for what then is the statement of the names and residences of the stockholders and number of shares made to the auditor, and why should it be retained, but for entering the valuation when certified back by the state auditor, in the names of the owners of the shares in amounts proportioned to the number owned by each?

The judgment of the court of common pleas in the several cases is affirmed.

Foraker & Black and L. W. Goss, for plaintiff in error.

J. W. Herron; King, Thompson and Maxwell; Lincoln & Stephens; Ramsey & Matthews; Stallo and Kittredge, for defendant in error.

BILLS OF EXCEPTIONS.

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[Hamilton District Court, Tuesday, April 17, 1883.]

PATRICK KERR ET AL. v. MARY C. BURNS.

Papers not set out in or attached to the bill of exceptions or in some way connected therewith so as to make them a part thereof, cannot be taken as a part of the bill of exceptions.

ERROR to the Superior Court of Cincinnati.

The action below was commenced by Mary C. Burns, an infant six years of age, by her next friend, against the defendants, for damages, under what is known as the Adair liquor law.

The petition alleges that she was the daughter of one Mark Burns, and that the defendants, by the sale of intoxicating drink to her father after notice had been given, had caused his intoxication, and thereby diminished his ability to support his family, including herself, and by reason thereof, she was entitled to damages.

To this petition a general denial was filed. The case came on for trial before the superior court, and there was a verdict and judgment for the plaintiff in the sum of \$165. To reverse that judgment the petition in error is filed in this case.

SMITH, J.

The petition in error assigns numerous errors. First. That the court erred in not sustaining the demurrer to the amended petition. We think the amended petition set forth a cause of action. Another ground of error is that the court below erred in giving certain special charges asked by plaintiff below on the trial. The bill of exceptions does not show what those special charges were, and we are not in a situation to review them. There are certain special charges apparently among the papers, but not attached to the bill of exceptions, not marked, filed, nor in any way identified.

This court cannot presume that these are the special charges referred to.

Another ground of error is that the court erred in admitting testimony offered to the plaintiff, and rejecting certain testimony offered by defendants against their exception. In running over what was claimed to be the testimony, there appear many objections, taken on both sides, and certain exceptions. There was no brief, no oral argument, nothing presented by counsel to show what exceptions were relied upon. We hardly think it our duty to examine what purports to be a bill of exceptions carefully to see if there is possibly some error not pointed out by counsel.

Another objection is that the court erred in its general charge to the jury, and in overruling a motion for a new trial. In reply to that it may be said that there is no proper bill of exceptions before this court. What purports to be a bill of exceptions is a sheet of paper, commencing as follows: "Be it remembered that on the trial of this cause, plaintiff introduced the following witnesses (naming them), who are duly sworn to testify as shown by the printed testimony, as taken by the official stenographer and made part hereof. And thereupon plaintiff rested her case."

"Defendants to make out their issue, called a certain number of witnesses (naming them), as shown by the printed testimony, and then rested their case."

"Plaintiff in rebuttal called a certain number of witnesses, etc., and thereupon rested her case." This roll of testimony is not noted on the transcript as being a part of the testimony, not attached to the bill of exceptions, not identified by the court, nor by agreement of counsel, but is simply what purports to be a copy taken by the official stenographer, and left with the papers of the case. We think this practice comes in conflict with the rule enforced in *Hicks v. Person*, 19 O., 446, as well as *Busby v. Finn*, 1 O. S., 409, and *Wells v. Martin & Co.*, 1 O. S., 386, where it is stated that papers "not set out, or attached to the bill of exceptions, or in some way connected therewith as to make them a part thereof, cannot be taken as part of the bill of exceptions."

In *Busby v. Finn*, above cited, depositions and exhibits were referred to in the bill of exceptions, very much as in this case, but not in fact attached. The court did not consider that they were properly attached so as to form a part of the bill of exceptions. But were we to waive the rigid rule enforced by the cases above cited, there are numerous papers referred to in this bill which have nowhere been filed nor found among the papers. So far as we can judge from the description, they are important items of evidence for the plaintiff below.

It is not necessary to remind counsel of the rule that all the testimony must be in the record before a reviewing court can consider whether the verdict is against the evidence.

We have, however, read the testimony. It seems clearly proven that defendants sold intoxicating liquors in large quantities to Mark Burns, the father of the plaintiff, and that he was a man very much addicted to liquor.

The real conflict was as to the time notice was given. It was claimed by plaintiff the notice not to sell was given about February 1, 1880, and claimed by defendants that it was given about the middle of June, 1880.

Mark Burns died July 12, 1880. The defendants therefore claimed the plaintiff could not have sustained much damage, as her father died so soon after the notice, if given as they claimed.

This conflict of testimony was a question properly to be determined by a jury. This is also a case where the statute permits exemplary damages to be given. As the jury have found a verdict for \$165 only, we can hardly think it excessive in either view of the evidence.

Judgment affirmed.

W. W. Symmes, for plaintiffs in error.

Dustin, Diehl & McCarthy and Thomas A. Lane, for defendant in error.

AGREEMENTS—PRACTICE.

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[Hamilton District Court, April 17, 1883.]

W. C. FIEDELDEY, ADMR., v. JOHN REIS.

The ~~averment~~ in answer to a petition upon contract, of a material stipulation in addition to what is set forth in the petition as the contract, amounts at the most only to a denial of the contract set forth, and does not entitle the defendant to open and close.

ERROR to the Court of Common Pleas.

Plaintiff in error was defendant below. The action was for the price of putting on a tar and paper roof.

The petition alleged that the agreement was for \$2.50 a square, and that the work done and material furnished was according to the agreement. The number of squares was set out in the petition, and judgment was prayed.

The answer was, that in addition to the price of \$2.50 a square, it was provided by the agreement that the paper should be laid in three thicknesses, and tarred at the laps and joints. There was a reply; and upon the trial the jury rendered their verdict for the plaintiff.

AVERY, J.

One error assigned is that the verdict was against the weight of the evidence and that the motion for a new trial should have been granted. We have examined what is set forth in the bill of exceptions as the evidence, and are of opinion that the verdict was not so clearly against the weight of it, that the court can be said to have erred in overruling the motion.

The other error, and that mainly relied on, was the refusal of the court, upon the trial, to permit the defendant to open and close. The claim, as we understand it, is that the contract set up in the petition was admitted, but that the defendant pleaded an additional stipulation, as to which the burden was upon him and therefore entitled him to open and close the case.

This seems to us to be a misconception of the effect of the pleading.

If there was an additional stipulation, and it made the contract different from that set out in the petition, the effect of pleading it was to deny that the contract was as alleged.

The plaintiff could recover only by alleging and proving that he had performed. The allegation was made, by alleging the contract and

that he had complied with it. The answer set up an additional stipulation, and alleged that in that particular there had been no compliance.

The effect of such a plea is well stated in *Simmons v. Green*, 35 O. S., 104, where it is said, that in an action upon a contract, the averments of an answer setting up a different contract are immaterial except as a denial of the contract sued upon. Denying the contract sued upon, could not certainly entitle the defendant to open and close the case.

Judgment affirmed.

Coppock & Coppock, for plaintiff in error.

J. D. Henry, for defendant in error.

[Hamilton District Court, April 17, 1883.]

† *GEORGE G. MYERS V. E. KIRBY.*

One partner is not entitled to compensation for his services to his firm, unless there is a special agreement for it.

ERROR to the Superior Court of Cincinnati.

SMITH, J.

In 1873, Henry Myers and George G. Myers, father and son, entered into a copartnership to do the business, on Walnut Hills, of selling and hanging wall paper; the father contributing as his portion of the capital stock, \$1,054.13; the son, \$433.70. The partnership agreement was verbal. It continued until the fall of 1880, when it was dissolved by the death of Henry Myers, the father. After his death the surviving partner petitioned the probate court for an appraisement, for the purpose of purchasing the partnership stock. An appraisement was ordered and made. It does not seem that he purchased, but continued in possession of the assets until this suit was brought, by the administrator of the father, for the purpose of settling the partnership.

The petition set forth a statement of the account between them, from 1873 up to the death of the father, and shows that the son was much in debt to the firm, and had largely overdrawn his account.

On the trial it was admitted that that was a correct statement of the account, and a balance of \$2,608.15 was due from the son to the father's estate, unless the son was entitled to compensation for his services to the firm. This defense was set up in the answer and counterclaim filed by the son.

It was claimed by the son, defendant below, plaintiff in error here, that in 1877, three years before the death of the father, that the father substantially abandoned the firm; that he bought a farm in Warren county, where he went to reside, and that there was a special agreement between father and son that by reason of the absence of the father from the business, the son should be specially compensated for his services; but it does not state what was the compensation agreed upon. This alleged agreement is denied by the administrator of the father. Upon

† This case was affirmed by the Supreme Court, leave to file a petition in error being refused, September 25, 1883.

this issue the case was submitted to the court. The only witness was Belle Myers, the daughter of the son, and granddaughter of Henry Myers, the deceased. Her testimony is short. She says that in the spring of 1877 her grandfather bought a place in Warren county, where he moved and came down about once a month to give his attention to the business of the firm. But as an equivalent for his absence he employed her to take his place, paid her \$2 a week for the first year, \$3 per week for the second year and \$4 per week for the third year. She stated that he, from time to time, said to her when she was visiting him at his farm, that her services were no suitable equivalent for the services of the son; that the son was to have compensation, but she never heard any such conversation between father and son, never heard any agreement made. The result is, that the alleged agreement for compensation for services is not proven.

Such being the result of the testimony, the court below necessarily found against the counterclaim of the son, and entered judgment for the amount claimed in the petition, with interest. It is to review this finding that the petition is filed. It is a well established rule of law that in the absence of any special agreement, neither partner is entitled to compensation for his services. 1 Collier on Partnership, p. 392, n.; Story on Partnership, sec. 182; Phillips v. Turner, 2 Dev. & B. (N. C.) Eq., 123; Forrer v. Forrer's Exrs., 29 Grat., 184; Hellman v. Mendel, 6 Dec. R., 829 (s. c. 8 Am. Law Rec., 360); Caldwell v. Leiber, 7 Paige Chan., 483, and numerous other cases cited by counsel in their brief.

In Forrer v. Forrer's Exrs., *supra*, it was held in a well considered case, that "the law is well settled that one partner is not entitled to claim compensation for his services in the business without a special contract for such compensation. And although in that case one partner attended almost exclusively to a very large partnership business from 1844 to 1865, there having been no agreement for compensation to him, he is not, under the circumstances, entitled to compensation."

In fact counsel seems to admit that to be the law, because his counterclaim rests on a special agreement which he is not able to prove. But the facts and circumstances in this case rebut the presumption of any agreement for special compensation. The facts show that the father contributed largely in excess of his son to the capital stock, and placed a person in the firm for the whole three years, whose wages he paid. The further fact that there were no memoranda showing the agreement for compensation as claimed, tends strongly to negative his claim that there was a special agreement for compensation.

Judgment affirmed.

Campbell & Bates, for plaintiff in error.

R. B. Wilson, for defendant in error.

THE GREENLESS-RANSOM CO., A CORPORATION, ETC., v. W. J. BERNH.

1. An order in writing for \$100 in factory work, accepted "payable in new, manufactured work in our line," is not a bill of exchange, and in an action upon it the consideration must be alleged and proved.

2. Upon reversal of the judgment for plaintiff in such action, although no consideration is alleged in the petition and the special findings of fact contain nothing upon the question, the reviewing court, in the absence of anything to show what the evidence was will not render judgment for the defendant but will remand for new trial.

ERROR to the Court of Common Pleas.

AVERY, J.

The action brought was upon the following order:

"\$100. CINCINNATI, August 2, 1877.

Messrs, Greenless-Ransom Co., will please to pay one hundred dollars in factory work to W. J. Berne, or order, and charge to account of
ALEX. ROFF."

"Accepted, payable in new manufactured work in our line.

GREENLESS-RANSOM CO.,
Per RANSOM, President."

The petition merely set out the order and alleged that it had been drawn and accepted, and that payment had been demanded in factory work and refused. The answer denied the demand. Upon the trial separate conclusions of law and fact were found by the court as required under sec. 5205, Rev. Stat. The only facts found were, that the order had been drawn and delivered to the plaintiff and accepted by the defendant, and that demand had not been made at the defendant's factory, but personally of the president who declared positively the company would not honor the order. Judgment for \$100 and interest was thereupon rendered. The error assigned is the absence of any finding of consideration.

Promissory notes and bills of exchange import consideration, Chitty on Bills, ch. 111, sec. 1; and in *Dugan v. Campbell*, 1 O., 115, it is held that a written promise for the payment of money, if the payee does not take the amount out in store goods, is a promissory note upon which action may be brought and sustained without setting forth or proving the consideration. The origin of this practice upon notes payable in merchandise is traced in *Denison v. Tyson*, 17 Vt., 549, *Redfield, J.*; and from the forms of declaration in our earlier practice books, (*Wilcox*, p. 54; *Swan Pr. & Prec.* 389,) would appear in this state to have been settled. But it was confined to notes, and seems not to have extended to accepted orders.

An order payable otherwise than in money is not a bill of exchange. *Edwards on Bills*, sec. 299; *Chitty on Bills*, 91. It is of the essence of such instruments that they should be for money. Their origin was in the necessities of commerce, requiring some convenient means of shifting funds from place to place. The very name, "bill of exchange," indicates their object. "An instrument is shown of its character as a bill of exchange if made payable in a different medium than money." *Daniel on Neg. Instr.*, 161. An order for a given sum payable in goods or specific articles is not a bill of exchange or equivalent to one. *Atkinson v. Manks*, 1 Cow., 691, 707; *Jeffries v. Hager*, 18 Mo., 272; *Gwinn v. Roberts*, 8 Ark., 72; *Gushee v. Eddy*, 11 Gray, 502.

The accepted order payable in factory work became, upon default of payment according to its terms, a money demand. *Newman v. McGregor*, 5 O., 849, 852; *Sperry v. Johnson*, 11 O., 458. But it was not in the beginning for money. There was nothing upon the face of

the order to indicate consideration—no such words as “value received” or other equivalent expression. To “charge to account of Alex. Roff,” was no more than a direction to debit the drawer. The acceptance of course was a promise to do so, but no consideration appeared for it; and so far as the petition and findings went there was no estoppel. It was not alleged or found that the plaintiff had been induced to part with value. The drawer had not been debited. The direction to charge to his account was not, of itself, an expression to imply there were credits in his favor. And in an instrument of this kind, unless there are expressions inconsistent with any other theory than that it is upon consideration, the consideration must be alleged and proved. *Daniel on Negotiable Instruments*, 161.

For the absence of any finding of consideration the judgment must therefore be reversed. But when a judgment is reversed, “the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment.” Section 6726, Rev. Stat. Although limited to judgments on the pleadings, or where there has been an agreed statement or special finding of facts, *Emery's Sons v. Irving Bank*, 25 O. S., 360, the language seems imperative. The question arises then, whether to render judgment or to remand for new trial.

A fact not found it is said must be presumed not to exist. *Van Syckel v. Stewart*, 77 Penn. St., 124; *Graham v. State*, 66 Ind., 386, 395; *Parker v. Hubble*, 75 Ind., 580, 585; *McKeen v. See*, 4 Rob., 449. But there is an apparent distinction between maintaining a judgment upon the findings and rendering a new judgment. The provision for special findings of fact, is to enable exception to be taken to “the decision upon the questions of law.” Section 5205, Rev. Stat. The findings accordingly must be in sufficient detail for the reviewing court to pass upon the law. *McCandless v. Kelsey*, 16 Kas., 557; *Biggs v. Eggan*, 17 Kas., 589, 591; *Adams v. Champion*, 31 Mich., 238.

The general rule is that all material issues should be disposed of by the findings, and if uncertain or defective no judgment can be entered. *Blake v. Davis*, 20 O., 231, 249; *Whiteside v. Russell*, 8 W. & S., 44, 47; *State v. Duncan*, 2 McCord, 129; *Loew v. Stocker*, 61 Penn. St., 347, 352. It was so held in *Dogge v. Ins. Co.*, 49 Wis., 501, 503, where the issue being upon the assignment of a policy, the finding was there was no “sufficient” assignment; and in *Kennedy v. Berry*, 52 Cal., 87, where, in an action upon contract, the consideration was denied and the court failed to find on that issue.

It is true that here there was no issue as to the consideration. The petition did not allege it, and the answer merely denied the demand. Upon the pleadings there was nothing to try. Nevertheless, there was a trial, and for all that appears there may have been evidence of consideration. It would have been competent afterward to conform the pleadings to the proof. In the absence of a bill of exceptions, to show what the evidence was, there is no certainty as to this. To render final judgment for want of consideration would be giving the force of a finding of fact to an omission to find, which after all may have been merely clerical. See *Pike v. Vaughn*, 39 Wis., 499, 506; *Lumber Co. v. Plummer*, 49 Wis., 666.

Judgment reversed and remanded for new trial.

Wilby & Wald, for plaintiff in error.

N. Bird, for defendant in error.

SUSPENSION OF SENTENCE.

101

[Hamilton Common Pleas.]

JAMES BIRD V. (CITY) CINCINNATI.

Where, upon plea of guilty of a misdemeanor under a city ordinance, the accused, after judgment of imprisonment is pronounced, requests the court to suspend the execution of the sentence that he may leave the city limits, and is released from custody, but fails to leave and is arrested and confined as provided in the judgment, the suspension of the sentence, if erroneous, was not prejudicial to him, and he is not in a position to complain.

APPLICATION for leave to file petition in error to the Police Court of Cincinnati.

JOHNSTON, J.

The bill of exceptions shows that Bird, having been arrested for loitering, waived trial by jury in the police court and in open court pleaded guilty; and it was adjudged by the court that he be confined 30 days in the work-house and pay a fine of \$50 and costs. The record shows that thereupon, at his request and with his consent, the execution of such judgment was suspended until 9 o'clock P. M. of the same day, that he might leave said city and remain away therefrom and avoid imprisonment, and thereupon he was released from custody. The record further shows that upon being released he did not leave the city—and thereupon he was arrested and taken to the work-house to comply with such judgment, and he is now serving his time there under the judgment referred to. It is claimed that because of such order suspending said judgment and release of the accused, it became null and of no effect and that the police court without authority has imprisoned him thereunder—also that the ordinance is void.

That the police court had jurisdiction of the offense and of the person of Bird, there can be no doubt. It had power to pronounce the judgment. The judgment is regular up to the point wherein the order of suspension occurs.

The suspension is not upon the holding or finding of the court, but "upon the request and consent of the accused." Being "by consent," it is questionable if the validity of such order of suspension can be called in question, even if irregular or erroneous. *Jackson v. Jackson*, 16 O. S., 163, 166; *Wells v. Martin*, 1 O. S., 386. He was released from arrest, he accepted the benefits of the order of suspension. It was misdemeanor only for which he was arrested. A party ought not to be permitted voluntarily to take the benefit of a judgment and then attempt to reverse it. *Tabler v. Wiseman*, 2 O. S., 207, 216.

In a criminal case the accused may be bound by action taken upon his request or by his consent, even in felonies. *Stewart v. State*, 15 O. S., 155, 160; *Hughes v. State*, 35 Ala., 351; *Bishop's Criminal Law*, vol. 1, sec. 995, *et seq.*; *Bishop's Criminal Procedure*, sec. 118. In *People v. Robinson*, 46 Cal., 97, the statute providing that a defendant could not be sentenced until six hours after the return of the verdict, the defendant requested the court to disregard that provision and sentence him immediately for the crime of manslaughter. The defendant seeking to take advantage of this departure from the express letter of the statute, the court say: "He requested the court to disregard it (the statute) in

his favor and cannot now be heard to say that the court erred in granting his own request."

The order of suspension, if erroneous, did not affect the judgment, and hence while it might be reversed, the judgment valid from the beginning remained enforceable. *Lougee v. State*, 11 O., 68; *Bonsal v. State*, 11 O., 72. In these cases say the court, "so far as the sentence is in conformity with law it should be affirmed; so far as it is against law, it should be reversed." A reversal as to the suspension would be of no benefit to the accused. Our statute does not in terms require sentence of imprisonment to commence *in presenti*, *Williams v. State*, 18 O. S., 46, and in the same case it is decided that where the error is in the sentence, the validity of the conviction is not affected, p. 49. The offense being the violation of a city ordinance, a misdemeanor—the accused having pleaded guilty, and obtained at his request and by his consent the order suspending the execution of the judgment, and having thereby obtained his liberty—having voluntarily made his election to enjoy freedom outside the city's limits, rather than endure servile imprisonment therein—should not be heard to complain of error in such judgment and order.

This is not the case of a court *sua sponte*, suspending its judgment against the protest of the accused and ordering him beyond the city's limits or the confines of the state. The record presenting no error to the prejudice of the plaintiff in error, leave to file is refused.

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STREET RAILWAY CONSENTS.

[Hamilton Common Pleas Court.]

†CHRISTIAN RAPP V. CINCINNATI AND STORRS AND SEDAMSVILLE
R. R. CO.

1. The written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public highway along which it is proposed to construct a street railway or extension of one, as provided for in sec. 3439, Rev. Stat., means the consent of all the owners of property along the route, no matter whether it be upon one street or upon several.
2. The "owner" must be the owner of at least a freehold estate in the property in order to give the consent.
3. The "written consent" provided for cannot be given by an agent, the power given by the legislature cannot be delegated to another.
4. A person holding a life estate under a will may consent. A father cannot consent for a daughter. The president of a corporation cannot consent without authority from the board of directors. Husband cannot consent for his wife. Tenant by curtesy or dower may consent. One of tenants in common cannot consent. Guardian for minors cannot consent for minors. Executors with power to sell cannot consent.
5. *Quere*, whether council may consent for a municipal corporation.

APPLICATION for Injunction.

LONGWORTH, J.

The substantial facts of the case are the same as those in the case of *Kilgour & Sommers* against the city and the railroad company, decided at the last term of this court, and it is not necessary to make a restatement of the facts now. These suits differ from that of *Kilgour & Som-*

†See also *Tone v. Columbus*, 1 Circ. Dec., 168; *Simmons v. Toledo*, 4 Circ. Dec. 69; and *Columbus v. Dohl*, 44 O. S., 479.

mers in that, in these the claims are urged on behalf of property holders in their own rights; whereas, in the case of *Sommers & Kilgour*, the claim was urged by taxpayers under the statute in behalf of the corporation.

Christian Rapp is the owner of property on Walnut street, Uphoff on Seventh street, and Burdick on Twelfth street. The ordinance gives the railway company a choice of several routes, and was passed in January last. Section 3489, Rev. Stat., provides that no such grant as the one contemplated by this ordinance shall be made until there is produced to council, or the commissioners, as the case may be, the written consents of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public highway along which it is proposed to construct the railway or extension thereof.

The Supreme Court has decided that a provision like this is made for the benefit of the property owner; that it either creates in him a right, or recognizes a right as previously existing, and that the property owner has a right to insist that the condition of the passage of the ordinance shall be strictly fulfilled, and that this condition, that the consent of a majority shall be first obtained in writing, is a condition precedent to that ordinance.

The consent must not only be obtained, but it must be obtained in writing, and that writing must be produced to council prior to their right to pass the ordinance, or make the grant. Whether such a condition be reasonable is a question for the legislature, and not for the courts to determine. The legislature has seen fit to make this a condition and prescribed the form. They have, however, left it in a state of very troublesome ambiguities, which make it almost impossible for me to decide with reasonable certainty, what the real intent of the legislature was, if, peradventure, it had any intent at all. In the first place it provides that the written consent shall be the consent of a majority of the owners along the street or public way along which it is proposed to construct such railway.

Now, the extension in question is not constructed along a street or public way. Neither is any other extension. They are constructed along various streets. And whether the statute intends to require the consent of a majority of the owners along all the streets, taking the route as though it lay upon one street, or whether it intends to make requisite the consent of the owners upon each street over which the road is to pass as a condition to its right to pass on that particular street, is a question which it is by no means easy to determine. My own view is this: that the reasonable construction of the section is that the street or public way mentioned is the route of the railroad, and that the consent required is a majority of the consents of all the owners of property upon that route, no matter whether it be upon one street or upon several, and that, if a majority of the consents is given along the whole route, as provided by statute, the terms have been sufficiently complied with. Very strong arguments exist upon the other side, but I believe that to be the proper construction of the section.

Again, a still more difficult and much more important question arises upon the words, "written consent." In many instances in those cases the owners themselves have not given any written consent, but there is a written consent given on their behalf by an agent, and the question is whether, in the contemplation of the statute, that is the written consent of the owner.

The statute of frauds provides that the memorandum in writing therein required shall be signed by the owner or his agent thereunto duly authorized. This statute providing for consents makes no mention of agents, and, in terms, does not provide that the consent may be given by them. The question is whether or not that is implied.

Now, as I understand the current of modern decisions, it has been to increase the application of the maxim, "*Qui facit per alium, facit per se.*" It is not many years ago since the old doctrine that a corporation could act only under its seal was rigidly enforced in almost every case, whereas, to-day, almost all the acts of corporations are performed through agents, and the doctrine of ratification, or some other doctrine is brought in to bear out these acts and to give them validity. There is one exception to the maxim, "*Qui facit per alium, facit per se.*" which is founded in justice and in reason, and which is, though not of as extensive application as the other, as certain in the application, and its limitations are as well understood as the maxim first spoken of, and that is that a delegated power cannot be redelegated. If the act to be performed is an act requiring the exercise of personal judgment, or personal skill or discretion, that act cannot be delegated to another party to be performed by him. If one employs an artist to paint a picture and the artist agrees to paint it, he cannot employ somebody else to paint it for him. If the legislature provide that a judge shall decide a question, the judge cannot, in the absence of special authority, allow somebody else to decide it and ratify his decision. If the legislature intended, by requiring these consents, to call upon the property holders for an expression of their opinion concerning the advisability of the extension, clearly they cannot perform that act by delegation to another.

The object of this statute, as I read it, is two-fold: First, to require that the city council, speaking on behalf of public interest, shall determine that such an extension is for the public benefit, and that being determined, to prevent any grant until private interest has also had its say—to leave to the property owners the question whether or not it is for their interest.

The location of a street railroad through a city may be a great public benefit. It may be a great benefit to the private owners of property. On the other hand, it may be a great damage, and the question whether it is a benefit or a damage depends upon the facts of each particular case. The test which the legislature has seen fit to adopt is by leaving first to the council the question of the public benefit, and to the property owners the question of private benefit. If a majority of the property owners vote in favor of the road, the road is located, no matter what the minority may choose to say. If the object of obtaining the consent was to obtain from the consenting property owner a right which the owner of the property had, then the consent of all would have to be required in reason and justice, for it would be utterly unjust to allow one man to consent away the rights of another. If, however, this consenting is a vote, an expression of opinion, then, in reason, we would expect the majority to determine the question, and it is only a majority vote which the statute requires.

I am very clear in my own mind that that is the object and intent of the statute; that it calls for an expression of the opinion of the property owners as to whether or not this extension ought to be made, and, if that is so, it follows or necessitates that the act must be performed in the manner pointed out by statute and in no other. It is their consent which is

required, and which is required in a particular way, to-wit: by writing. It is an act which cannot be performed by delegated authority. It can be performed only by the person mentioned in the statute, and, if the legislature had intended to enlarge the right so as to permit the property owner to delegate this authority, or to appoint an agent to perform it for him, they could have said so, which they have seen fit not to do.

In 45 N. Y., 783, this same question, as I understand it, arose. Under the laws of New York many of the acts which our county commissioners perform are performed by an officer there known as county judge. The statute authorizes him to encumber the property of the county, by creating a debt, upon the petition of a majority of the taxpayers in writing. A petition was filed and a majority of the property holders actually petitioned, but the signatures were the signatures of others in their behalf made, and the question was whether, under that statute, the property owner, or taxpayer, must himself sign, or whether he could delegate that power to another, and the court of appeals of New York decided that the maxim, "*Delegatus non potest delegare*," applied and that none but the taxpayer himself could be recognized as signing the petition.

"Like the elective franchise," says the court, "it must be exercised in person and is not the subject of agency. If another may write the name of a petitioning taxpayer, it must be under a special power for that purpose, so that the act will be the act of the taxpayer and in the exercise of discretion.

The act is of a personal nature, involving a personal trust or confidence and is incapable of being delegated."

Now, I can not see why these two cases are not governed by precisely the same principle. It is argued by the counsel for the defendant that the case in New York was a case where a burden was to be imposed upon a taxpayer, and for that reason the law should be construed with greater strictness than in this case, where not only no burden is to be imposed, but a public benefit is to take place. With all respect to the argument of the counsel, it strikes me that it is reasoning in a very vicious circle. To build a railroad without warrant of law and against the contemplation of law would not be, in contemplation of law, a public benefit. It is in contemplation of law a public benefit when built in such manner as provided by statute.

Now, to say that it is a public benefit first, and therefore that the law of consents shall be determined in one way or the other, seems to me unreasonable. It is the consent which determines the fact first whether it be a benefit or not; but, until the consents have been given, no presumption arises that this is a benefit. But I do not myself believe that this is the true test. The true test is whether or no the object of the statute is to call upon the property owner, or taxpayer, as the case may be, for an expression of judgment, or whether it asks him to grant property. If it calls upon him for an expression of personal judgment, it is a personal trust and can not be delegated, and that that is the intention of this statute I have no doubt.

The question then is: Have these consents been obtained? I must thank counsel for furnishing me with very elaborate briefs, which have, to a certain extent, facilitated my investigation of the facts in this case which are very voluminous, and I have been a good deal assisted by these briefs.

The extension begins at a terminus, the corner of Fourth and Walnut streets, in this city, and then runs over the lines of other roads and through streets where it has to construct a line of its own. The statute requires the consent of the owners along the streets where such road is to be constructed. It does not require the consent of owners along the streets where their cars are to be run on other tracks and no construction of any kind is to take place. The streets on which this extension is to be constructed are Walnut, Twelfth, Central avenue, Hopkins street, Dalton avenue, Gest street and McLean avenue.

The company, as I say, have the right to take either of the routes, one of which would include Seventh street, in which Uphoff's property is, and an additional distance on Walnut street.

Taking the first route, the first street upon which consents are required is Twelfth. Now, on Twelfth street 1,236.83 feet of property have consented. Concerning these consents, which are given by the owners in writing, there is no dispute. One thousand, one hundred and sixty-one feet have not consented. Concerning these there is no dispute. But certain property is counted as consenting which is disputed. In the first place, A. Doscher owns 37.50 feet. His consent is signed by Gesina Doscher, his wife. A. Doscher, it appears, is dead, and under his will his wife holds a life estate. Without stopping to give reasons which would make my opinion interminably long, and from necessity it has to be almost interminably long, I simply give my conclusion with very few reasons. I am of the opinion that the wife, holding a life estate in the property, is in contemplation of law, owner of this property in contemplation of this statute, and she is the proper person to give consent. For that reason I count the consent of Doscher.

Mary Meyers owns twenty feet, signed F. Rauth, her father, and has authority to consent for her. This is a case of signing by an agent and must be thrown out for the reasons given.

The German Mutual Insurance Company own 100 feet. The president signed the consent. There was no meeting of the board of directors; no resolution of the company to get its consent, or a majority of them individually approved of it and afterward ratified the act of the president. The question is whether this is a consent. A corporation can only act by its board of directors. If the president, as agent, has authority to perform an act, then it is neither here nor there in this case. Assuming that he had authority, it is still the act of an agent, and therefore can not be counted. If the board of directors had passed a resolution and the president had, in pursuance of that resolution, signed the consent of the corporation, then it would be the act of the corporation. In one view of the question it is the act of an agent. A corporation which is not an existing thing, in reality never can perform any act except by the act of another; but, in contemplation of law, it would be directly the act of the corporation, whereas, the president having signed without any meeting, without any action on behalf of the directors, acted on his own authority. Now, whether he had authority or not, is immaterial. If he had no authority, it is not a consent at all. If he had authority, it is the consent of a corporation through its agent, and can not be counted.

Euretta Gilpin and certain tenants consented as follows: The signature is Euretta Gilpin by W. H. Gilpin. Euretta Gilpin appears to be the owner of the fee, and the others to be her tenants. This is signed by an agent, and for that reason must be disregarded. Mrs. Gilpin owns 174 feet

Jonathan Emerson ninety-nine feet, and the signature is Mary Emerson. Jonathan is dead and Mary Emerson holds a life estate in the property. As in the case of Doscher, this consent will be counted. I am of the opinion that the owner of a life estate, as a tenant by the curtesy, a freehold, is, in contemplation of this statute, at least, the owner of the property.

Wm. Cameron's estate owns sixty feet on Central avenue. Wm. Cameron is dead and his widow is the owner of a dower interest in the tract, rather not in the tract, but dower in the whole of the tract, dower having been assigned to her. Being the tenant in freehold, her consent will be counted.

The Cincinnati Hospital owns 109.87 feet. No consent is given for that, unless the action of the city council be a consent on behalf of the hospital by the city. The question is somewhat doubtful as to whether this consent should be counted or not. And for the present, I will count it, reserving what I have to say with reference to it, if necessary.

Among the consents which are disputed on Clark street, are those of Joseph Scheve, who owns twenty-three feet. This consent should not be counted. It turns out that the person who signed the name of Scheve had no authority for doing so. Whether he had or not is immaterial. It was by the agency, if agency existed at all.

The consent of Martha G. Mills was signed by an agent, her husband, who signed for her.

The consent of A. B. McCrea was signed by her husband also.

The consent of J. B. Purcell was signed by Robert F. Doyle for J. B. Purcell and ratified by J. B. Mannix, assignee.

The consent of B. J. and Theo. Moorman was signed by B. Moorman & Co. That was a piece of property owned by two tenants in common and one dissented. If the consent is to be counted at all, it is impossible to see for what. The tenant in common is seized of an undivided interest in this property, *per my et per tout*. In contemplation of law the two men are one man. Unless the consent of the two men was obtained, there was no consent at all. No part of the property is owned by either one until partition is made and partition can not be made of consent. I will have to throw that consent out.

Chris. Hamann's property is signed by Mrs. Hamann. Mrs. Hamann is the widow and guardian of the children of Hamann. It does not appear that she has any freehold life estate in this property. The children are the owners. As guardian of the children, I am of the opinion that she has no authority to sign for them. In most cases the guardian of the children has the authority to represent them, but it is always where there is special statutory provision to that effect. The common law guardian has no such authority. In the absence of any statutory provision, I can not see where such authority can be found.

The Stephenson estate owns 409.01 feet, signed by one executor, there being several. The will of Stephenson does not devise to his executors any of his real estate, though it gives them the most ample powers to deal with it and control it. Undoubtedly under this will, as between these executors and devisees, they have authority to sign the consent, as they have authority to deal with the property in other ways, but the question of authority is neither here nor there. The question is are they the owners? If they act as agents, their act can not be counted.

If they act as owners, and are owners, it can. Now, neither in contemplation of law, nor by theory in fact, can these executors be said to be the owners of this property. The only theory upon which they can be called owners is that they have power to exercise control over it, but for the benefit of another, and as the agent for another and in his behalf. The devisees are the owners.

The same may be said of the Longworth estate in another street as to which the executors have consented. The executors have, under the will, most ample power, but they are not the owners, for there is no devise to them. They have, as between themselves and the devisees, consented undoubtedly, but this is not the consent for which the statute calls—the written consent of the devisees themselves. It is they who are to exercise the judgment and not the executors. For these reasons I will have to throw out the Stephenson estate on both streets.

Now it is insisted by the defendant's counsel that the husband is the proper person to sign where the wife owns the property and a very ingenious argument is advanced in support of the claim that, under the law of Ohio, the birth of issue is not necessary to an estate by the curtesy initiate; that the husband, therefore, is seized as a tenant by the curtesy initiate of a freehold in his wife's estate, and, for that reason, is the owner of the property in contemplation of law.

This point has been often decided, and it has been often decided that he is the owner by virtue of this freehold estate, but, although by the law of Ohio, birth of issue is not necessary to sustain this tenancy, whatever it may be, the statute of Ohio provides that where separate property is owned by the wife, it shall be free from control of her husband. If it is free from his control, if he can not grant it away without her consent, then she is the one to give consent and not he. If, therefore, by the common law of Ohio, this would be the rule, the statute of Ohio would change it. The wife is the one, where she owns the land, who is required by the statute to give written consent.

Phillip Emig, trustee, signed Phillip Emig. I suppose they are the same person. The word trustee is certainly not a part of his name. It is a description of the man. The same man exists in both places. He is described as a trustee in one place and not in the other. I have no reason to suppose that Phillip Emig is not the Phillip Emig mentioned as the owner of the property, and therefore count his consent.

The aggregate of these non-consents was 837.33 feet. This made it manifest that it was unnecessary to investigate the question raised in the case as to whether or not the action of the council in passing the ordinance was a consent on behalf of the Cincinnati Hospital and Washington Park. The court had some doubt as to whether those consents ought to be counted, but whether counted or thrown out, they did not aggregate sufficient to overcome the majority of non-consent.

Seventh street, the court continued, comprises no portion of this route. Other routes are given to the company among which they may take their choice. Whatever route is chosen, the same objection will apply. Taking the route as a whole, there is a failure to obtain a majority of consents. Mr. Uphoff is entitled to an injunction against the construction of the extension upon the route which passes over Seventh street, but is not entitled to an injunction over any other route. The other plaintiffs are entitled to an injunction against the construction over any route which their property abuts until the consents have been properly obtained.

Decree accordingly

CONSTRUCTION OF A WILL.

135

[Hamilton District Court.]

STOKES v. STOKES ET AL.

1. A life estate given by will is not enlarged to a fee by a power of sale coupled with it, unless such appears to have been the intention of the testator.
2. In the construction of a will its words are to be taken in their primary or ordinary sense, in the absence of anything to show a contrary intention on the part of the testator; "sons and daughters" do not include granddaughters.

APPEAL from the Court of Common Pleas.

Wilby & Wald, for plaintiff.

1. That Mrs. Stokes took but a life estate and not a fee is too clear for argument, therefore we do not argue it.

2. "Children" in a will does not mean "grandchildren." *Hallowell v. Phipps*, 2 Whart., 376; *Feit's Exr's v. Vanatta*, 21 N. J. Eq., 84; *Brokaw v. Patterson*, 2 McCarter's Ch., 194; *Willis v. Jenkins*, 30 Ga., 167; *Boylan v. Boylan*, 1 Phillips Eq., 160.

A. G. W. Carter, for defendant.

AVERY, J.

The question is upon the construction of the last will and testament of Samuel Stokes, deceased.

Two of his granddaughters, survivors of a deceased daughter, claim to share the estate with the other sons and daughters.

The first consideration is what estate was taken under the will by the widow. She has since deceased, and if the entire estate went to her, these granddaughters in the right of their mother take by descent.

The devise is: "To my wife, Mary Stokes, all my real, personal and mixed property of whatsoever kind, to have and to hold for her own use and benefit during her lifetime, and if my executors hereinafter named, in conjunction with my wife, should think it best to sell said property and invest the proceeds of such sale in good real estate security, it is my will that they should do so, and at the decease of my wife the balance of the estate to be divided and distributed after the following directions:" Then follows the devise over.

It is a general rule in the construction of wills, that an estate given for life will not be enlarged by a power conferred to sell and convey in fee, unless the intention of the testator requires it. Rules of construction always give way to intention. 2 Jarman, 5th ed., 268.

The contention nevertheless is that the power of sale here, of itself, implies such intention. But the power of sale conferred is not for the benefit of the widow. The proceeds are to be invested in real estate security; nor is it a power to be exercised by the widow alone, but by the widow and executors.

The contention again is, that the devise over is of the "balance," which implies that the entire estate was for the use of the widow for her support.

In *Snow v. Snow*, 123 Mass., 323, the will was as follows: "I give to my beloved wife, Lucinda N. Snow, all my estate, both real and personal, that shall remain after the payment of my debts and funeral charges, for her comfortable support and maintenance during her life,

with full power and authority to dispose of the same as she may find needful for that purpose. I give, devise and bequeath to Rowland W. Snow all the estate, both real and personal, of which I shall die seized and possessed, that may remain after the death of my said wife, Lucinda N. Snow, to him, his heirs and assigns forever, if he shall then be living." *Held*, that the widow took only an estate for life with a power to sell, and that power not having been exercised in her lifetime the devise over took effect.

In the matter of Thompson's Estate, 14 Ch. D., 263, the devise was "to my widow for the term of her natural life to be disposed of as she may think proper, for her own use and benefit according to the nature and quality thereof;" and, "in the event of her decease should there be anything remaining of the said property or any part thereof," then a devise over. *Held*, that upon the death of the widow the estate went to the ulterior takers named in the husband's will. (James, L. J.: "My own strong inclination of opinion is that the widow took nothing but an estate for life with a full power of enjoying the property in specie.") And see *Cockrill v. Maucy*, 2 Tenn. Ch., 49.

The remaining consideration is, as to the terms of the devise over upon the death of the widow. The provision is as follows: "At the decease of my wife the balance to be distributed, to-wit: To my son, Isaac Stokes, the sum of one thousand dollars. To my daughter, Elizabeth Stokes, the sum of two hundred dollars. To my son, Weadon Stokes, the sum of fifteen hundred dollars, and to my daughter, Emma Carter, the sum of five hundred dollars. Should there be anything left after the above devise the same to be divided equally between my sons and daughters; and I give and bequeath to my granddaughters, Mary S. Brooks and Caroline Shawk, the sum of four hundred dollars, each, to be paid them out of the proceeds of a note I hold against Abel Shawk."

It is contended that the granddaughters are included by the designation "sons and daughters," in the clause, "the same to be divided equally between my sons and daughters." But the rule is, that such words in a will are to be taken in their primary sense, unless the intention to use them in a different sense appears. Children, it is said, do not include grandchildren, unless from the context of the will it appears that the testator so intended, or unless such meaning is necessary to carry out his manifest intent. 2 Jarmon on Wills, 5th ed., 147; *Low v. Harmony*, 72 N. Y., 408; *Castner's Appeal*, 88 Penn. St., 478; *Feit v. Vanatta*, 21 N. J. Eq., 84.

So far from it appearing to be the intention of the testator to include granddaughters, within the description, "sons and daughters," the contrary appears. There is a specific legacy to them, and they are named in it not as daughters but as granddaughters.

We are of opinion with the court of common pleas that under the provisions of this will the widow took only a life estate, and upon her decease that the devise over took effect in the sons and daughters, excluding the two granddaughters, to whom \$400 each was given.

ATTACHMENT.

136

[Hamilton District Court.]

JOHN B. SLOUGH V. JOHN COSGROVE.

1. The statute requires that an attachment on the ground that defendant is a non-resident must be upon a claim arising upon a contract, judgment or decree, and not otherwise.
2. The affidavit for attachment must allege that the property is exempt from execution.

ERROR to the Common Pleas Court.

The petition in error is filed to reverse the judgment of the court below for not reversing the order of a magistrate in discharging an attachment.

John Cosgrove brought a suit before a magistrate against John Slough, in which he garnished the Pullman Palace Car Company.

The affidavit for the attachment is as follows :

"STATE OF OHIO, HAMILTON COUNTY.

"CINCINNATI TOWNSHIP.

"Before H. Hayne, a justice of the peace in and for said township.

"John Cosgrove v. John Slough and The Pullman Palace Car Company.

"The said plaintiff, John Cosgrove, makes oath that the claim in this action is for money and other consideration; and he also makes oath that the said claim is just, and he ought, he believes, to recover thereon fifty-one 25-100 dollars. He also makes oath that the said John Slough is a nonresident of Hamilton county, Ohio. He further makes oath and says, that he has good reasons to and does verily believe that the Pullman Palace Car Company, etc., of and within said county, has property of said defendant, John Slough, in its possession in this action, to-wit: moneys, etc.

(Signed)

JOHN COSGROVE."

"Subscribed and sworn to before me this 14th day of December, A. D., 1882.

"HENRY HAYNE,

"Justice of the Peace."

The defendant moved to discharge the attachment by reason of the insufficiency of the affidavit. The motion was overruled, and he took exceptions.

SMITH, J.

It seems to us that the motion should have been granted. Section 6489, Rev. Stat., which authorizes proceedings in attachment before a magistrate defines what the affidavit shall contain and is as follows :

"The plaintiff shall have an order of attachment against any property of the defendant (except as hereinafter provided) in a civil action before a justice of the peace for the recovery of money before or after the commencement thereof, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing the nature of the plaintiff's claim, that it is just, the amount the affiant believes the plaintiff ought to recover, and that the property sought to be attached is not exempt from execution, and, if the personal earnings of the defendant are sought to be attached, that the defendant is not the head or support of a family, or that such earnings are not for services rendered within three months before the commencement of the action, or, that being earned within that time the same amount to more than one hundred and fifty dollars, and that only the excess over that amount is sought to be attached; and

also the existence of some one, or more of the following particulars, also the ground of the attachment."

In this case the ground of the attachment was that the defendant was a nonresident of the county.

The affidavit must state that the property sought to be attached is "not exempt from execution," etc., and the statute also requires that where the attachment is on the ground that the defendant is a nonresident of the county, it must be upon a claim arising upon a contract, judgment or decree, and not otherwise.

In the first place it is not alleged that the property sought to be attached is exempt from execution, which in the justices act is now required. It is an amendment of the original act. It must be recollected that the original act was like the act providing for attachments in court, and that allegation was not required. The fact that the amendment has been made by the legislature is evidence that the legislature regarded that as an important and essential allegation.

Secondly, where the attachment is on the ground that the defendant is a nonresident of the county, it must be upon a claim arising upon a contract, judgment or decree.

This nowhere appears either in the transcript or evidence. It is called "a claim for money and other considerations." This may describe an action arising out of tort, out of trespass, or any action for the recovery of money.

The affidavit being insufficient, and defendant not waiving it, but on the contrary having at the proper time moved to discharge the attachment by reason of said insufficiency of the affidavit, the court having overruled the motion, and exception being properly taken at that time, we think the judges erred in not discharging the attachment. The court of common pleas erred in affirming the order of the justice.

The judgment of the court of common pleas is therefore reversed with directions to discharge the attachment, and so certify to the justice.

Dustin, Diehl & McCarthy, for plaintiff in error.

K. F. Topp, for defendant in error.

LAYING OUT COUNTY ROAD.

[Hamilton District Court, February 19, 1884.]

JOHN E. MILLER V. HAMILTON COUNTY COMMISSIONERS ET AL.

1. Proceedings to lay out a county road, where the petition recites that the twelve signers thereto are freeholders, and the record shows that the board of commissioners are satisfied that the papers filed were regular and in compliance with the law—held that the fact that the petitioners were freeholders will be presumed to have been established by competent proof.
2. When the record shows that the commissioners in their order appointing viewers and surveyor to lay out such road, "are satisfied that the notices required by law have been given" after application therefor, it will be presumed that they made their finding and order upon competent proof. And even if an imperfect affidavit in proof of publication of such notice appear to have been filed, it will not negative the presumption that other proof, competent to establish the fact, was given.

3. The word *published*, as used in sec. 4641, does not mean *printed*.
4. If to the bond required to be given by sec. 4638, Rev. Stat., the same names appear to be signed as to the original petition, they will not be presumed in the absence of recital or proof to that effect to be the same persons, and if they were, it would only be a defective, and not a void bond; if such defect be waived by the commissioners without objection, a landowner cannot thereafter avail by such defect.
5. When such commissioners find that the viewers by them appointed "are disinterested freeholders resident in the county," the proof on which their finding is made need not appear of record, it will be presumed to have been competent and sufficient.
6. Notice to John Miller of the meeting of the board of viewers: *Held*, to be notice to John E. Miller, if he in fact be the same landowner, and if he be not, then John E. Miller is not prejudiced by the record and order.
7. The notice to the landowner, if personally served on him by the principal petitioner, is good even if it be not signed by such petitioner.
8. The commissioners are not required to incorporate in the record of their proceedings the proof on which their judgments are founded; nor need they sign the minutes or seconds of their sessions and proceedings.
9. A change of twenty feet in final location of road from that originally laid out and surveyed, when it appears to have been by the consent of those affected thereby, does not avoid the proceedings upon the objection thereafter made by landowner whose lines are not affected by such change.

ERROR to the Court of Common Pleas.

BUCHWALTER, J.

The proceeding is in error seeking to reverse the judgment of the court of common pleas in affirming the proceedings of the board of commissioners in the matter of laying out a county road in Miami township. The errors complained of are, first, that it does not appear that the board of county commissioners were authorized to take any action on the petition inasmuch as the record does not show that the twelve signing petitioners were freeholders. Their petition recites they are freeholders and avers all of the facts required by statute to bring the subject-matter to the attention of the board, but it is claimed that it does not appear that there was *proof* before the commissioners that they were *freeholders*, that the petition itself signed by them would not be sufficient. The board of commissioners are not required to record the evidence upon which they make their judgment; it does not appear from the record by any facts that any person signing the petition was not a freeholder as described therein, and as to the second showing "that the papers filed herein are regular and according to law," we do not think that such ground is well taken for the reversal of the judgment.

It is claimed that legal notice was not given plaintiff of the filing of the petition asking the commissioners to locate this road; that the notice was not published as required by the statute. Section 4641, Rev. Stat., requires that the substance of the notice be published for four consecutive weeks in some newspaper published in the county. Published does not necessarily mean printed in the county. Under sections 5385, 5393 and 5394, providing for the sale of property on the order of the court or in execution, the language is specific as to the publication and as to the printing within the county. We take it, therefore, that it is sufficient when the affidavit shows that this notice was published for the required time in "*The Harrison News*," a newspaper of general circulation in the county. Besides the record need not contain the evidence and by the record it appearing that the commissioners were satisfied that proper notices were given, it is not to be presumed that the only

proof before them was the one affidavit which appears in the record. The notices were duly posted at the auditor's office and in three public places in the township as required by statute.

Again, it is claimed that it does not appear that the plaintiff in error residing along the line of the said proposed road had any notice of the time and place of the meeting of the said viewers, or of the time and place of filing claims for damages, or that the road was to go through his land. The statute does not require that it be stated in the notice to him of the meeting of the viewers, that a part of his land is to be taken. First, the notice, published and posted, had been given, as above stated, on the beginning of these proceedings before the board of commissioners, which described the route which the road was to take, along the creek where plaintiff's land lies. The notice in question also recites an order of the board of commissioners of December 6, 1882, appointing viewers and surveyors to lay out and survey the said county road, "for the purposes set forth in said order." If the paper before the plaintiff was not specific in all respects, it directed him to the official record for further information. This notice dated December 13, 1882, gave him the time and the place of the meetings of the viewers and surveyors and stated "that claims for compensation must be filed with the viewers by December 28, 1882, and was headed, "Notice to Land Owners." It is claimed the notice is not signed, only the words "Principal Petitioner" appear at the bottom of the notice, and the record shows proof of service on John Miller of a copy of such notice by Andrew J. Cox, principal petitioner.

But it is not necessary to sign the notice when it is served personally on the landowner by the petitioner or person who should have signed it. 42 Wis., 317.

Again, the plaintiff in error relies upon the fact that notice to John Miller is not sufficient notice to John E. Miller. In the first place if he be not the Miller described he will not be prejudiced by this record; he is then a stranger to it. However, we are satisfied that it is not such misnomer as to avoid the jurisdiction.

Another error assigned is that it does not appear that the viewers as appointed possessed the statutory qualifications. It does appear that they were appointed by the board of commissioners, that they were disinterested freeholders, residents of the county, and took their oath before a justice of the peace to faithfully and impartially discharge their duties under the order of their appointment. It is not necessary that the record disclose the evidence to establish their qualifications. It is sufficient that the commissioners found them qualified under the statute.

He claimed that the bond given by the petitioners, preliminary to the order to survey and view the road, was insufficient, because the signers were all *petitioners*, and hence none *surety*.

If that were so, it would only be a defective bond waived by the board of commissioners, and besides while the names so put to the bond are the same as those of the petitioners, there is no recital of record to show that they in fact are the same men.

It is again objected that the record does not show any order was made by the commissioners of date December 13, 1882, as recited in the report of the viewers. The record does show that the order was made on December 6th, and that when the clerk drew notices to be served on the viewers and landowners, including this plaintiff in error, he dated them December 13, 1882, and when the viewers made return of their proceed-

ings, they referred to said order pursuant to which they acted mistakenly, recited the date as of December 13th instead of December 6th. Had the order in fact been either December 6th or 13th, it would have been in sufficient time under the statute.

It was not necessary that the date of the order should appear in their return; if they had stated that they proceeded pursuant to the order of the county commissioners it would have been enough. A return of an order of sale passing title to real estate need not specify the date on which the clerk issued the order to him nor even the date of the judgment of the court if it appears that the judgment was given, and the order issued. It is manifest that it is clerical error and that they confused the date when the clerk *issued* the order to them, with the reference in the body thereof, to the date when the board of commissioners *made the order appointing viewers*.

Finally it is claimed that there was a change in the termini of the road made by the final order therein. The record shows a variation of twenty feet at the junction of the road, with the levees and Bridgetown pike, without any additional costs and without the variation thereby of the line of the road at plaintiff's land. No prejudice to him appears thereby.

Citing *McClelland v. Miller*, 28 O. S., 488; *Anderson v. Conors*, 12 O. S., 642; 42 Wis., 817; *Frevert v. Finrock*, 81 O. S., 621.

Judgment affirmed with costs.

J. R. Von Seggern, for plaintiff in error.

O. J. Cosgrave, for defendant in error.

CONTRACTS FOR SERVICE.

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[Hamilton District Court.]

JOSIAH CREASEY V. AMAZON INS. CO.

1. Plaintiff entered into the service of defendant company for one year from November 1, 1877, to November 1, 1878, as insurance agent at a salary of \$150 per month and traveling expenses, with the understanding that either party might terminate the engagement on giving ninety days' notice. At the expiration of the year's service plaintiff continued in the employ of the company without objection on their part upon the same terms until November 30, 1878, when the company notified plaintiff that he must consider the engagement at an end on December 31, 1878. Plaintiff sued for salary for the balance of the ninety days. There was a verdict for defendant. The testimony showed that the president of the company gave the agent to understand in the beginning of the employment that the company had a custom of employing agents by the month which they almost invariably observed, that the only employment, which they recognized was a monthly employment, but that in this case, as the agent had an engagement with another insurance company and did not desire to give it up they would set aside the custom so far as to enter into an agreement with him for one year only, with a right to terminate the contract by giving ninety days' notice. *Held:*
2. The matter was properly submitted to the jury and as the court could not find from the evidence that there was clearly the absence of any proof to show that the parties acquiesced in the terms of a former hiring, there was no error in overruling a motion for a new trial.

ERROR to the Superior Court of Cincinnati.

The petition filed in the court below alleges that on or about October 20, 1877, the defendant, The Amazon Insurance Co., through its authorized officers and agent, requested Josiah Creasey, the plaintiff, to enter into its employ in the capacity of special agent for the period of one year, from October 1, 1877, to November 1, 1878, at a salary of eighteen hundred dollars (\$1,800) per annum and traveling expenses as such agent, the salary to be paid in installments of one hundred and fifty dollars (\$150) each at the end of every month during such employment, with the understanding that either party might terminate the engagement by giving ninety days' notice.

The petition further alleges that the proposition made by the insurance company was submitted to the plaintiff on or about October 20, 1877, by its duly authorized agent, by letters sent through the mail at Cincinnati, Ohio, to the plaintiff at Van Wert, Ohio; that on receipt of said proposition and before the same was withdrawn, canceled or modified, he accepted the same by letter, mailed and addressed to the insurance company at Cincinnati; that on November 1, 1877, the plaintiff entered the service of the defendant and discharged the duties of his position faithfully and diligently from November 1, 1877, to November 1, 1878; that upon the expiration of the one year as stated, the plaintiff continued with the knowledge and assent of defendant to serve said defendant as special agent in the same capacity and on the same terms and conditions until November 30, 1878, at about which time the defendant notified plaintiff by letter, mailed to him at Steubenville, Ohio, that he must consider the engagement ended on December 31, following; that the plaintiff was ready and willing to perform and offered to perform all the engagements on his part to be performed, and that the defendant refused to permit the plaintiff to continue in its employ for the period of ninety days after notice as stipulated.

The plaintiff further alleges that he received his salary in monthly installments of \$150 each, which was paid him at the end of every month, up to December 31, 1878, and that by reason of wrongful discharge on the part of the defendant, and in failing to give him ninety days' notice under the terms of the contract, he is entitled to two months' salary at the rate of \$150 per month.

The defendant filed an answer denying a continuance or extension of the agreement of employment beyond one year, and alleging a failure on the part of the plaintiff to perform services beyond the end of the year, as stated by him, or that during the period of two months for what he claims pay, he was not performing any services whatever for the defendant. The cause was submitted to a jury, and a verdict returned for defendant.

John D. Gallagher, for plaintiff in error.

Grover & Baker Sewing Machine Co. v. Butler, 48 Ills., 192; Bixby v. Moor, 51 N. H., 403; Horu v. West. Land Assn., 22 Minn., 233; Burke v. Knickerbocker Ins. Co., 24 Wis., 638; Sedgwick on Damages, 2-83; Jeffray v. King, 34 Md., 217.

Bateman & Harper, for defendant in error.

I. Verdict against the weight of the evidence.

To authorize the court to set aside the judgment on this ground, it is not enough that the judges would have rendered a different verdict. They must find that the verdict is so overwhelmingly against the evi-

dence as to suggest prejudice or some other improper motion. *Bills v. R. R. Co.*, 10 Rep., 783; *Pope v. Allen*, 10 Rep., 783; *Park v. Conner*, 11 Rep., 274.

The credibility of the witnesses is a matter exclusively within the province of the jury. *Lyford v. Marcy*, decided by this court June 19; *Hammond v. Mahams*, 5 Mass., 353.

Three defenses were interposed to the plaintiff's claim, upon any of which the verdict may be supported:

(a) The plaintiff was not continued upon the same contract for the second year. "From all the evidence the jury must determine, as an inference of fact, what was the understanding with which the parties entered upon the second year." *Tatterson v. Suffolk Manufacturing Co.*, 106 Mass., 56, 60.

(b) The plaintiff was guilty of gross misconduct and bad faith toward the defendant. See *Wood's Master and Servant*, p. 209, *et seq.*, 228, sec. 119.

(c) Plaintiff suffered no damage from the alleged breach of contract. If he established the contract claimed he was entitled to recover only his *actual loss*, "which is the amount he would have received if he had been permitted to complete his contract, less what he has earned in the meantime, or what he might have earned by due diligence in seeking employment." *Wood's Master and Servant*, 239.

What he did earn and what he had an opportunity to earn equaled what he would have received under his contract.

II. None of the exceptions to the exclusion of testimony are well taken as to what is a custom and how it may be proved. See *Lorson on Usages and Customs*, pp. 3 to 7, *et seq.*

MOORE, J.

The errors assigned are, first, the refusal of the court to grant a motion for a new trial, for the reason that the verdict was contrary to the evidence; and second, the action of the court was prejudicial to the interest of the plaintiff in the exclusion of certain testimony.

The correspondence forms the evidence by which the contract of the parties was proved. The testimony shows that a day or two before October 20, 1877, plaintiff appeared at the office of the Amazon Insurance Company and had an interview with its president, and agreed on the terms of the employment as they appear in a letter dated October 20, 1877, written by the president of the company to the plaintiff at Van Wert, Ohio, which letter is in the following words and figures, to-wit:

"OFFICE OF THE AMAZON INSURANCE COMPANY,

"CINCINNATI, October 20, 1877.

"Josiah Creasey, Esq., Van Wert, O.:

"DEAR SIR: Referring to the conversation had yesterday regarding your employment as special agent for this company, I have the following proposition to make. We will make an engagement for one year from the first of November next, at a salary of \$1,800 per annum and pay your traveling expenses, for services in such territory as we may direct—but to be devoted principally to the field in this state. With the understanding that either party may terminate the engagement by giving ninety days' notice, and with the further understanding that we do not in any way interfere with the interests of the company you are now serving by making this engagement.

Yours respectfully,

"GAZZAM GANO,
President."

To which the plaintiff responded as follows:

"OFFICE OF THE JEFFERSON FIRE INSURANCE COMPANY, STEUBENVILLE, O.

"VAN WERT, O., October 23, 1877.

"Gazzam Gano, Esq., Pres't Amazon Ins. Co., Cincinnati, O.:

"DEAR SIR: I am in receipt of your favor of the twentieth inst. And in reply would say, accept the same with its various conditions. I have written the Jefferson resigning my present position, and unless I hear from you again, will run down to Cincinnati on the first of November, ready for active work.

"Very respectfully and truly yours,

"JOSIAH CREASEY."

There is no dispute between the parties as to the first year's services, but the plaintiff claims that he had entered upon another year's employment at the same terms and that his services beyond the first year were accepted without question on the part of the defendant.

There is testimony to the effect that Creasey was directed by the insurance company, as their special agent, at different times beyond the end of the year, to do certain things as he had been doing during the year before.

The principle contended for by plaintiff in error is that as nothing was said, and as silence was maintained between the parties, there was a continuation of the service beyond the end of the year, and that there was an implied contract, between the parties for a second year.

Plaintiff in error cites the case of *Bulkley v. The Grover and Baker Sewing Machine Co.*, 48 Ills., 199, as an authority for the position he maintains. In that case Bulkley was in the employ of the sewing machine company under a contract that stipulated definite terms, and before the expiration of the year the company wrote to Bulkley stating that they desired him to continue his services for the coming year, but nothing was said as to terms. It was held as there was nothing said between the parties, a contract was to be inferred for another year, under the terms and conditions of the former agreement. As stated in that case, there was a virtual assent upon the part of the company, and in fact upon the part of the employee, that the terms prescribed under the former notice created a privity of contract between the parties, and entered into the contract for the second year.

In *Vail v. Jersey Little Falls Manufacturing Co.*, 32 Barb., 544, there was a contract for hiring for a specified period at a fixed salary, and a person employed continued to render service beyond that period. It was held that he was entitled for services for the additional time, and a continuance in the employment of the company after the expiration of the fixed period was equivalent to a new hiring upon the same terms.

But an examination of the facts in that case shows that as silence was maintained, nothing was said after entering into the first contract.

The same principle is recognized in the case in 60 N. Y., 106, although the plaintiff in the case at bar may claim an extension of his employment for an additional year.

He sues for the balance of the ninety days. He does not sue for the value of his services for a year or part of a year.

It remains to be determined whether there is anything in the facts and circumstances surrounding the parties, to show whether there was any variation in the contract, or an understanding that there was to be a continuation of the service, under the former terms and conditions.

The testimony shows that at the time of the first employment, the president of the insurance company gave Creasey to understand that

they had a custom of employing agents by the month, which they almost invariably observed, that the only employment they recognized was a monthly employment, but that in this case, as Creasey had an engagement with another insurance company and did not desire to give up his engagement with that company, they set aside the custom, so far as to enter into an agreement with him for one year only, with the right to terminate the contract by giving ninety days' notice.

Therefore, from the conversation of the parties before the settlement of the terms of the employment, there is evidence to show that the company notified Creasey that an exception to the enforcement of the rule would be made in his case, excluding the idea that there was any necessity for any action to rebut the presumption ordinarily arising by silence, or of having new terms or conditions or understandings after the expiration of the year.

The case of *Buckingham v. Surry & Hauts Canal Co.*, 46 L. T. Rep., 845, was an action brought by the plaintiff to recover the sum of £125 for a quarter's salary as consulting engineer to the defendants, a canal company, from May 23d to August 23d. From the evidence at the trial before Huddleston, B., it appeared that at a meeting of the directors of the company, held on August 23, 1880, the plaintiff was appointed the engineer by resolution to the following effect: "Resolved, that Mr. J. Buckingham be appointed engineer to the company at a salary of £500 per annum." This resolution was confirmed at a subsequent meeting of the directors.

The plaintiff entered the employment of the defendants and on February 23, 1881, he received three months' notice to determine the engagement on May 23d, which he refused to accept, and continued after its expiration to tender his services to the company, which were rejected. Thereupon he brought this action for the recovery of the quarter's salary, from May 23d to August 23d. The defendants did not offer any evidence as to any custom, and the learned judge directed a verdict for the plaintiff on the ground that, in the absence of evidence to the contrary, the engagement was *prima facie* an engagement for a year certain. The defendants obtained a rule *nisi* for a new trial on the ground of misdirection. Pollock, C. B., there said: "Each particular case must depend upon its own circumstances. From much experience of juries, I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by a three months' notice."

Gore, J., said: "I am of the opinion that this rule must be discharged. Here the evidence was that, by a resolution of the directors, which was duly confirmed, the plaintiff was appointed engineer to the company at a salary of £500 per annum. As a general rule, where the hiring is a yearly hiring it cannot be put an end to by either party before the end of the year. This rule, however, is subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice. Now, at the conclusion of the plaintiff's case, no evidence was offered on behalf of the defendants of any custom to determine such a hiring as this by a three months' notice. It seems to me, therefore, that the judge was bound to direct the jury that in the absence of any such evidence the hiring was a hiring for a year. There is nothing to show that the plaintiff accepted the engagement upon any other terms than those expressed in the resolution. The plaintiff estab-

lished a *prima facie* case of a yearly hiring and therefore, in the absence of any evidence of custom to rebut that *prima facie* case, I think the verdict ought to stand." Mathew, J.: "I am of same opinion."

But in the case at bar there is a manifestation on the part of these parties, outside of the terms of the contract, notably in the notice of the company to Creasey, that they would depart from their custom in this instance as an exception to the general rule. In *Elevator Co. v. Brown*, 36 O. S., 660, it was sought to charge the elevator company with rent for premises for the reason they had continued a few days beyond a stated term, or in the words of the syllabus: "Whether temporary and partial occupancy of premises by lessees after the expiration of the term mentioned in the lease, should be regarded as consent to or in effect a renewal, under a clause in the lease by which the lessees agreed to renew in case the lessor purchased the title in fee during the term, is to be determined, not merely from proof of such occupancy, but from the facts in connection with such occupancy." There it was claimed that because a small portion of coal was left in a bin of the elevator, that was sufficient to create an occupancy and an assent to the former tenancy, but it appeared that immediately after the expiration of the term, the elevator company had surrendered or given to some parties interested with the opposite party, the rights of the elevator company, thereby manifesting an intention to surrender and not comply with the former terms. So, in this case, the instruction of the court to the jury not being a part of the record, we infer that it would have been reasonable on the part of the jury to have accepted this view of the position of these parties under the law.

After all the matter is to be determined by the facts and circumstances to be gathered from the testimony, it was properly a matter to be submitted to the jury, and we cannot find from the evidence that there was clearly the absence of any proof to show that the parties acquiesced in the terms of a former hiring, therefore we think in that respect there was no error on the part of the court in overruling the motion for a new trial.

There are three exceptions to the exclusion of testimony, and they are only made in the light that the jury consider the second defense set up by defendants to the effect that there was a failure on the part of the agent Creasey to perform services for the company in the manner required by the terms of the contract, for the period for which compensation is claimed. A question in a deposition excepted to is as follows:

"Please state whether or not it is a customary incident of insurance business, that men that are engaged therein, as you were, although they may be in the employ of one particular insurance company, control the placing the line of insurance like that of Mears & Co., referred to, and also whether it is not a fact that the ability of an insurance man to control the placing of insurance in this manner that gives value to his services as agent."

This is a question tending to excuse the plaintiff from the effect of a setoff claimed by the insurance company for money earned in the service of other companies. If the contract ended in a year the company claims no setoff. Besides it appears in the record that Creasey had the benefit of this testimony in another place, not excepted to.

Question 18, of the same deposition excepted to, is as follows: "When the Amazon Insurance Company continued to address letters to you as their special agent up to and including October 31, 1878, sending

you the orders and directions contained in the letters attached to exhibits 'A,' etc., did you rely upon that course of conduct on the part of the company as an assurance that it was the purpose of the company to continue you in their employ, after the expiration of the term of one year, the same as before?"

The jury are to judge from the facts and circumstances, and not by the assertion of Creasey that he did in fact rely upon the conduct of the company. His assertion is merely the expression of an opinion.

Question 24, of the same deposition excepted to, is as follows :

"Was it an objection to your giving up the idea of obtaining such a salary and instead thereof, entering into the local agency business, that in such local agency business, the long experience and the accurate acquaintanceship which you possess of insurance men and insurance matters throughout the state of Ohio, would be to a very great extent lost?"

This is merely an attempt on the part of Creasey to show that he had an honest intent in seeking other employment in the light of his business.

The exclusion of the testimony is not prejudiced because he was allowed to show what in fact he did do.

We are of the opinion that the court below did not err in rendering judgment for the defendant.

Judgment affirmed.

ESTATES OF MARRIED WOMEN.

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[Hamilton District Court.]

†W. R. CORWIN V. ISABELLA C. COOK ET AL.

The presumption of the intention of a married woman, to charge her separate property for the debt of her husband, follows her from signing a promissory note as his surety, and the presumption is not rebutted by her want of knowledge of the legal consequence of so signing; it appearing that she signed voluntarily with knowledge that she was signing a promissory note, and without fraud or imposition on the part of the creditor.

AVERY, J.

This is an action to charge the separate property of a married woman, upon a promissory note signed by herself and husband.

The note was given for an indebtedness of the husband for lumber used in his business. His testimony is that the plaintiff offered to give him time, if he would give security; that he proposed to give the endorsement of his wife, which the plaintiff accepted and had the note prepared, which he took to his wife and she signed.

The testimony of the plaintiff is in substance the same, except he says he refused to let the husband have any more lumber unless he would give security for what he was owing; and that the note being given, he let him have more lumber, which remains unpaid for.

The testimony of the wife is not that she did not sign the note, but that she did not know it contained the clause, "this note to be binding on the separate property of C. Cook."

The liability of the separate property of a married woman for her contracts depends upon her intention to charge it; but it is held that

†For common pleas decision which this opinion affirms, see 8 Ohio Dec. R., 432.

"where a married woman having separate property, executes a promissory note as surety for her husband or for a stranger, a presumption arises that she thereby intended to charge her separate property with the payment." *Williams v. Urmston*, 35 O. S., 296.

This is not a rebuttable presumption. The reason is, that she could not charge herself personally by the note, the intention is to be inferred that she intended to charge her property; otherwise the transaction would be meaningless. *Tallett v. Armstrong*, 4 Bev., 828; *Johnson v. Gallagher*, 2 DeGex, E. & J., 494, 515. The latter case being much quoted from, and relied on, in *Williams v. Urmston*.

Fraud or imposition, in affecting the voluntary character of an act, may defeat any interference of intention. But it is not fraud or imposition when a married woman voluntarily signs a note, that she did not know it would bind her separate property.

A married woman is incapacitated, in respect to binding herself personally by contract, but not in any other respect. She is charged with the knowledge of legal consequences, and the same inferences of intention follow, as in the case of any other intelligent being.

Judgment for the plaintiff.

L. H. Swormstedt, for plaintiff.

A. A. Ferris, for defendants.

APPEALS FROM JUSTICES.

[Hamilton District Court; decided May 1, 1883.]

C. C. ALLEN V. WALNUT HILLS, MADISONVILLE AND PLAINVILLE TURNPIKE CO.

Upon appeal from a justice of the peace a bank check was deposited with him by the appellant payable "to the justice of the peace, appeal or order," and thereupon the ordinary form of an undertaking for appeal was written out by the justice on his docket, without being signed by any one, with a certificate added and signed by the justice, that the check was received "as bond" and was approved: *Held*, that this did not constitute an undertaking for appeal and that the court of common pleas had no authority, under sec. 6595, Rev. Stat., to allow the filing of a new undertaking; but was without jurisdiction.

ERROR to the Court of Common Pleas.

The case came into the court of common pleas by appeal of the Turnpike Company from the judgment of a justice of the peace. In the court of common pleas the Turnpike Company obtained judgment. Among the errors assigned, is the overruling of a motion to dismiss the appeal for want of an undertaking, and the allowing by the court of a new undertaking.

The only security of any sort given upon the appeal, was a bank check, as follows:

"The National Lafayette and Bank of Commerce, pay to the Esquire Geo. Reiter, appeal or order \$75.

"W. A. GOODMAN,
"Treasurer."

This was deposited with the justice of the peace, who, thereupon, as the transcript shows, entered upon his docket the ordinary form of an undertaking for appeal, beginning, "I, W. A. Goodman, resident of Hamilton county, as bail for appeal," etc., but without signature by any one; below which the following was added: "Received from W. A. Goodman, check on the National Lafayette and Bank of Commerce for \$75, signed by said W. A. Goodman as bond; approved by me the sixth day of December, 1881.

"GEO. REITER, J. P."

Wallace Burch, for plaintiff in error:

"The right of the appeal rests solely upon statutory provisions, and unless those provisions are complied with, the right cannot be made available." *Dennison v. Talmage*, 29 O. S., 433, 435.

Second—A check made payable to the magistrate and signed by the treasurer of the appellant does not contain any of the conditions or requirements of a bond. It is not sufficient to give the appellate court jurisdiction to permit an amendment, or a new bond to be given under sec. 6595. *Shamokin Bank v. Street*, 16 O. S., 1.

Edward Gurney, for defendant in error.

AVERY, J.

The Rev. Stat. concerning appeals from a justice of the peace provide, sec. 6584: "The party appealing shall within ten days from the rendition of the judgment, enter into an undertaking, etc."

In *Dennison v. Talmage*, 29 O. S., 433, it is said "the right of appeal rests solely upon statutory provisions, and unless those provisions are complied with, cannot be made available." And it is held, that where an appellant "neglects to give a statutory bond for appeal within the time limited for that purpose, the fact that the court below made an order to the effect that no bond was required, will not authorize him to perfect his appeal by afterward giving such bond."

Section 6595, Rev. Stat. provides: "In proceedings on appeal, when the surety in the undertaking shall be insufficient, or such undertaking may be insufficient in form or amount, it shall be lawful for the court, on motion, to order a change or renewal of such undertaking, and direct that the same be certified to the justice from whose judgment the appeal was taken, or that it be recorded in said court."

There is a similar provision in cases of appeal from the court of common pleas to the district court; and in *Church v. Nelson*, 35 O. S., 638, such provision is held to be a remedial one, and one to be liberally construed. But to confer jurisdiction to enable a change or renewal of undertaking to be ordered, an undertaking of some sort must exist.

The "second trial act" contained substantially the same provisions, for change or renewal of the undertaking when insufficient in form or amount. In a case, prior to the amendment which authorized the deposit of money in lieu of the undertaking, a bank certificate of deposit was filed with the clerk and memorandum of the fact was made by him on the journal; the entry reciting that the money was to be "restored if the party should abide and perform the judgment and order of the court, and pay all damages and costs against him consequent upon the second trial, otherwise to be applied to the payment of the same." It was held that neither the certificate nor the journal entry was an undertaking, nor would it justify the filing of a perfect undertaking, so as to give the court jurisdiction. *Shamokin Bank v. Street*, 16 O. S., 1.

There was certainly, said the learned judge who delivered the opinion, no "undertaking in any admissible sense of the term. The entry on the journal was made by the clerk, as clerk, and not as an obligor or surety. It is a mere memorandum of the fact that money had been deposited in lieu of an undertaking. It has none of the elements of an undertaking, such as the statute requires. It is *ex parte*. * * * It is neither an undertaking nor a proceeding for the purpose of filing an undertaking. It cannot be amended into an undertaking."

This ruling would appear to be conclusive upon the question before us. We have but to follow it. There was error in overruling the motion to dismiss the appeal, and in allowing the new undertaking to be filed.

The judgment is reversed and cause remanded to the court of common pleas, with direction to dismiss the appeal. The plaintiff in error is entitled to his costs. *Burke v. Jackson*, 22 O. S., 268.

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PATENTS—RESTRAINT OF TRADE.

[Hamilton District Court.]

W. J. M. GORDON v. F. C. DECKEBACH.

1. The fact that plaintiff would have a remedy in a circuit court of the United States for the infringement of a patent does not deprive him of his remedy in the state courts for the violation of the terms and conditions of a contract for the manufacture of such patent.
2. In an agreement in restraint of trade the fact that the agreement is indefinite or unlimited as to time does not necessarily invalidate it, if it is valid and limited in all other respects.

MOTION for an Injunction.

The petition in this case alleges in substance that Gordon was interested as part owner in a certain patent secured by one Eccles, containing a new and useful invention for the manufacture of crude glycerine from soap, and for making soap from fats and oils; that he had made a contract with the defendant to manufacture for him certain tanks and attachments to be used for the manufacture of soap at a certain price therein named; that this agreement contained a clause which prohibited the defendant from making any other tanks for the manufacture of soap for any other person whatsoever, and from disclosing to anyone the mode of making said tanks or the secrets in relation to such matter; that in violation of said contract the defendant had manufactured certain tanks similar in character and form to the tanks named in the contract and was about shipping them elsewhere for other persons and prayed for an injunction to restrain defendants from shipping said tanks. When the petition was filed a restraining order was granted by the court of common pleas, and afterwards a motion was made to dissolve the injunction, which was done July 31, after a hearing on the testimony. The plaintiff immediately appealed from that order to this court, filed a transcript, gave bond, and filed a new motion in this court for a restraining order.

SMITH, J.

It is claimed by the plaintiff that defendant is acting in violation of the alleged contract.

On the hearing before this court certain facts were agreed upon: First, that the contract was a written contract entered into between the parties; second, that when the contract was made, no patent had been obtained for the alleged improvement, but after the contract was made and before the end of a year a patent was obtained for Gordon and his assignor. Again, that the defendant was in fact making the same kind of tanks as mentioned in this contract. The real question presented to us is the construction of this contract. The contract reads as follows:

"Memorandum of an agreement between F. C. Dekebach and William J. M. Gordon, both of the city of Cincinnati, made this 12th day of August, 1881, witnesseth:

"That the said F. C. Dekebach hereby agrees to make for the said W. J. M. Gordon or any company or association hereafter to be formed by him and to which he may assign this contract, a copper tank eighteen and one-half feet long from end to end, four feet diameter, sides five-eighths inches and bottoms three-fourths inches double row rivets three-fourths inches thick, the brass manhead and all the copper work and brass attached on tank, excepting the pump-engine and the foundations and connections from tank, same to be delivered at the railroad depot at Cincinnati, Ohio, ready for shipment, for the sum of thirty-eight hundred and twenty-five dollars, the work to be done in the best workman-like manner, for which said F. C. Dekebach is to receive said sum of \$3,825 payable as follows: One thousand dollars cash when work commences, and the balance when said tank and attachments are ready for shipment.

"And said F. C. Dekebach further agrees not to construct any tank for any soap manufacturer either in Cincinnati or elsewhere or for any other person or persons for the purpose of making soap except the said Wm. J. M. Gordon or any company or association which may be formed by said Gordon. And he further agrees not to give any information or instruction as to the manner of constructing said tank so that a similar tank may be constructed by any other person or persons, and he further agrees that he will, if called upon by the said Wm. J. M. Gordon or any company or association hereafter formed by said Gordon, construct in the same manner, of like dimensions and materials and at the same price ten additional tanks if needed by said Gordon or his assigns within the next succeeding twelve months. And the said W. J. M. Gordon for himself or any company or association hereafter to be formed by him and to which he may assign this contract, hereby agrees to pay the said F. C. Dekebach or his assigns for each of said tanks and attachments the sum of thirty-eight hundred and twenty-five (\$3,825) dollars as above provided, that is to say one thousand dollars in cash when the work commences and the remainder of said \$3,825 as soon as such tank is ready for shipment; and he further agrees that if he or the company or association heretofore referred to shall require ten other tanks or any less number to order the same of said F. C. Dekebach and from no other person and pay therefor as hereinbefore provided for the payment of the tank now ordered.

"In witness whereof the said F. C. Dekebach and Wm. J. M. Gordon have hereunto set their hands and seals in duplicate on the day and year first above written.

"F. C. DEKEBACH,

"By Geo. E. Dekebach.

"By P. of Att'y,

"W. J. M. GORDON."

"Witness: HENRY HECKEL, HENRY STRAUTMAN."

"By the above contract Mr. F. C. Dekebach is allowed to make tanks for candle factories as heretofore.

"W. J. M. GORDON."

It is claimed by plaintiff that the defendant, by constructing tanks similar to the tanks named and referred to in that agreement, has violated that agreement and that he is suffering irreparable injury and is entitled to a restraining order.

The defendant claims that this contract is limited to one year in its effect and operation and no longer; and that after the patent has been issued for said invention referred to in said contract, the secrets of the invention were disclosed by the very act of obtaining the patent, and if defendant has thus infringed the plaintiff's patent, his remedy is in another forum, viz: the circuit court of the United States.

It seems to us that if this contract is clear and explicit in its terms, the mere fact that the plaintiff would have a remedy in the circuit court for the violation of a patent, does not deprive him of his remedy in the state courts for a violation of the terms and conditions of the contract: for the courts of the state would have jurisdiction to determine the violation of the contract, although the construction of the contract might involve the validity or invalidity of the patent. *Tod v. Wick Brothers*, 36 O. S., 370; *Nash v. Luell*, 102 Mass., 60.

And we might also say that in an agreement in restraint of trade the mere fact that the agreement is indefinite or unlimited as to time does not necessarily invalidate it if it is valid and limited in all other respects. The rule perhaps is best laid down in a collection of authorities found in Vol. 1, *Smith's Leading Cases*. Hare & Wallace's notes, p. 726, under the case of *Mitchell v. Reynolds*: "A contract in restraint of trade to be valid must be partial and there must be such a valuable consideration for the contract as is necessary in other contracts, but if the restriction as to place is not unreasonable the circumstance that it is indefinite as to time does not of itself invalidate the contract." *Pollock on Contracts*, (Wald's edition, 315) has a collection of cases showing what circumstances, facts or provisions will invalidate a contract in restraint of trade. And the rule also is well stated in *Rousillon v. Rousillon*, 14 Ch. D., 351, as follows, viz: Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law and a contract to enforce it void; and this is substantially the doctrine of *Lange v. Werk*, 2 O. S., 519.

We think that these definitions as to what will make the contract invalid as being in restraint of trade are properly to be considered in construing this contract. For this contract upon its face is not plain and unambiguous. For example, it is said *Deckebach* "agrees not to construct any tank for any soap manufacture nor to engage in the business of manufacturing tanks either in Cincinnati or elsewhere." That clause is an entire restraint of trade as to him. In this contract there is a certain provision for the defendant to manufacture within a year, if the plaintiff desires it, ten more tanks at the same price and of the same kind, and the plaintiff agrees, that if he wants within a year ten more tanks that he will employ defendant to do it on the same terms, at the same price, thereby showing that there is some clause limiting some portion of the contract for a year. The defendant claims that this limitation clause applies to the whole contract, and has no force at all beyond the year. It was admitted by plaintiff's counsel at the trial that there must be some limitation. He does not claim as we understand from the agreement, that the defendant is limited to all time, but he construes the limitation to be the lifetime of the patent, seventeen years, and not one year as claimed by the defendant. It is a well known rule that we should put ourselves in place of the parties at the time the contract was made, and the first controlling fact is this, that when the contract was made, *Gordon* acting for *Eccles*, who claimed to be the inventor, had filed an application for the patent in the patent office. This application was pending, a *caveat* filed, and during the pendency of that application, the secrets of that invention or the secrets of the manufacture might well be preserved for his benefit. At the time this contract was made, it would not be known how soon the patent would be issued; it might never be issued; the commissioner of patents might refuse to grant it.

It might require an appeal which might be pending some time, so that during the pendency of the application for a patent a contract which in its terms provided that whoever manufactured for the inventor any machine named in the patent should preserve all the secrets of the invention would be proper. As soon as the patent is issued, then the invention ceases to be a secret. The very purpose of patents when issued is to publish the secrets of the invention to the world; and one of the conditions of obtaining a valid patent is, that the inventor shall state in his specifications the nature of the improvement in such plain language that a mechanic of ordinary skill will be able to construct a machine like that named in the patent. Therefore, if the purpose of this contract was to preserve the secret mode of manufacturing the tanks, then its purpose was fulfilled when the patent issued, for then it ceased to be a secret, and it became public information. The object of congressional legislation and the rules of the patent office seems to be that as soon as a patent is issued to give the fullest public notice of the patent itself and of the improvements claimed to be made, by publishing in the official bulletin of the patent office, every week, every new patent and the nature of the improvement. That is one fact to be taken into consideration in ascertaining the object of this clause as to the length of time. It appears that the patent was issued in six months after the contract was made so that this secret information became public information.

Another consideration is, that if this agreement extends beyond the manufacture of one machine, or beyond the time claimed by defendants, there is no consideration for it, no consideration moving to Deckebach; none moving from Gordon; for all Deckebach gets is, simply the manufacture of one machine. There is no other consideration unless we say that the manufacturing of that machine is the consideration for that other covenant in the agreement.

But in determining what protection the party is entitled to under a clause, that the defendant will not manufacture any tanks, we are to look to the object of the agreement, and also what will be a protection to the party himself; for if the agreement covers more than is necessary to protect the party himself, to such an extent the agreement is void as against public policy. That is one of the primary principles laid down in all these English cases and some of the American cases in considering these contracts in restraint of trade. He is entitled to what is necessary to protect him in the business referred to in the contract, and when it exceeds that, to that extent the contract is illegal and void.

What protection does the party need in this case? It was only to the time of obtaining the patent. Beyond that, if it was a valid patent the plaintiff has his remedy for the protection of the patent itself, and that it seems to us, must have been in contemplation of the parties at the time the contract was entered into in view of all the circumstances. We think, therefore, without going any further into an examination of the cases cited, that plaintiff is not entitled to a restraining order as prayed for.

Injunction refused.

E. P. Bradstreet, for plaintiff in error.

Von Seggeru, Phares & DeWald, for defendant in error.

NOTICE TO ENDORSER.

[Hamilton District Court, May 1, 1883.]

MARY A. LUCKETT V. W. F. GOODRICH.

The rule respecting notice to indorsers is merely that reasonable effort be made to give notice. Notice by mail to an indorser, so addressed as to denote the locality of the residence, although no post-office be at that place, and although in fact not received, will be held sufficient, upon it appearing that in ordinary course of mail the letters of the indorser reached her by that address, and that upon reasonable inquiry it was the only address to be ascertained.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

The judgment complained of was against the plaintiff in error, as indorser of a promissory note. Her residence was on what is known as the "Turkey Bottom Road," about half a mile beyond the eastern limits of this city. The note was payable at a bank in this city, and notice of non-payment was placed in the post-office, postage prepaid, addressed, "Mary A. Lockett, Turkey Bottom Road, East Columbia, Hamilton county, Ohio."

"East Columbia" was a name given to a cluster of houses just beyond the residence of the plaintiff in error. There was no post-office there, or at the place of her residence.

Her post-office, she testified, was at "Station C, Columbia." In another place she calls it, "Station C, Cincinnati," presumably one of the delivery stations of the Cincinnati post-office toward the eastern limits of the city.

The notice mailed never reached her, and it is contended was not properly addressed, for the reason that it was not to her post-office or indeed to any post-office.

The general rule as to notice by mail, where the indorser lives elsewhere, is to mail the notice to the place of the residence if a post-office is there, and if not, to the nearest post-office. But the rule is not unbending.

Where there is no post-office at the place of residence, notice by mail, addressed there, has nevertheless been held good, when the evidence of the indorser's habit of receiving letters justifies the inference that, for the purposes of delivery by the post-office officials, the address sufficiently identifies him.

In *Bank of United States v. Carneal*, 2 Peters, 543, the indorser living a few miles back of Newport, Kentucky, and being well known both there and in this city, a notice addressed to him, "Campbell county, Kentucky," and mailed here, postage prepaid, was held good.

In *Follain v. Dupre*, 11 Rob., (La.) 454, notice directed generally to the "Parish of St. Landry, Louisiana," the indorser living in that parish, when coupled with evidence that the notice would ordinarily be sent to the principal town of the parish, was also held good.

The question is one of fact, to be determined by the circumstances of the particular case. The requirement is not that notice shall be given at all events, but only that reasonable care shall be taken to give it.

There is no question that the plaintiff in error lived on the "Turkey Bottom Road." "East Columbia," as the name of the few houses just

beyond her residence, fixed the locality. It would appear that she received letters by the same address. At least, taking her testimony in form and substance, we cannot say that it did not warrant such inference by the trial court.

Among the questions and answers in the cross examination are the following: "Mrs. Luckett, did you ever receive letters addressed to you, 'Turkey Bottom Road, Hamilton county, Ohio?'" Answer: "I received letters in all sorts of shapes." "Do you think a letter addressed to you in that way would be apt to reach you?" Answer: "Yes, sir, I think it might." "Isn't that the address you gave in the directory?" Answer: "I didn't give any address in the directory." "Did you give that address to be put in the directory?" Answer: "No, sir; I was not at home when the directory man was around, I did not know anything about it."

Each case must depend upon its own circumstances. The transactions involving commercial paper are so numerous and varied that it is impracticable, even were it desired, to do more than announce general rules. Where there was evidence to warrant the inference that the only result of inquiry, in any quarter where it might reasonably be made, would have been that the address was as found in the city directory, and that, in the ordinary course of mail, letters reached the plaintiff in error by that address, we cannot say the court erred in its finding.

Judgment affirmed.

A. M. Warner, for plaintiff in error.

W. Austin Goodman, for defendant in error.

NEW TRIALS.

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[Hamilton District Court, April 3, 1883.]

STRAUSS & BRO. V. FINDLEY DASHNEY.

1. An expression by a juror, during the progress of a trial, that his opinion is formed, is not necessarily a ground for a new trial.
2. Although the practice should be condemned, it is not erroneous to permit the plaintiff in rebuttal to restate a portion of the examination in chief.

ERROR to the Court of Common Pleas.

For about fourteen years, prior to 1878, Dashney was employed from time to time, as an outside hand, to make up clothing, by Strauss & Bro., a firm doing business in the city of Cincinnati, as manufacturers and wholesale dealers. During one of Dashney's visits, to get material to be made up, and while going to an upper story upon the elevator, it fell to the basement floor, inflicting great bodily injury upon him.

In his action below, Dashney alleged that the elevator was deficient in construction and was managed with gross negligence on the part of Strauss & Bro.; that the elevator was used by all persons going into the house, not only by persons engaged in and about the house, but by customers and others resorting there for the purpose of transacting business. Strauss & Bro. denied omission or negligence in the construction or maintenance of the elevator or that the elevator was used generally, and averred that it was kept for the exclusive use and accommodation of their

customers and for the accommodation of certain persons engaged in and about the house. They further assert that Dashney was notified by a notice posted on the cab of the elevator to the effect that all persons not employees in and about the house were not to use it. On the trial below the jury rendered a verdict for plaintiff for the sum of four thousand dollars. A motion for a new trial was made and overruled.

The plaintiffs in error rely for reversal of the judgment upon three of quite a number of assignments of error. First, misconduct of a juror during the trial of the cause. Second, admission of testimony in rebuttal which would properly be evidence in chief. Third, that the verdict was contrary to the evidence.

MOORE, J.

As to the first assignment of error, the record shows that during the progress of the trial the jury were ordered to inspect the premises, and while examining the machinery in the basement and by which the elevator was operated, a juror said in the presence of his fellow jurors, the deputy sheriff in charge and counsel for defendant, that he was "satisfied" and that he had "made up his mind."

When the jury was returned to the court the following morning, counsel for defendant moved that the juror be withdrawn and the cause continued. The court overruled the motion and the cause proceeded.

An expression by a juror during the progress of a trial that his mind was made up or that he was satisfied, is not necessarily a ground for a new trial. An expression must be such as to indicate that the party has finally determined the verdict he will return. In the case at bar, the opinion was expressed during the progress of the trial, and before the conclusion of the testimony or the charge of the court had been given. The juror certainly was guilty of misconduct, and it amounted to a contempt of court and should have been punished. Courts have frequently recognized errors of this class, for instance, where before conviction and after all the evidence has been submitted, or even before the trial of the cause, a juror has so expressed himself as to give the court to understand that he had formed an opinion. But in cases where it appears that there was further evidence and further instructions from the court upon the law, the presumption arises that the juror was not prejudiced at the time of rendering the verdict; and we are of the opinion that the court exercised the proper discretion in overruling the motion to discharge the juror.

The next assignment of error, is the action of the court in permitting the plaintiff to be called in rebuttal and to restate matters which he had testified to upon his examination in chief. One of the questions was, "whether Dashney was rightfully upon the elevator at the time he was injured." The defendant below claimed that the plaintiff was expressly prohibited from using the elevator and having used the elevator without permission and against the prohibition of defendant he was guilty of contributory negligence. It became necessary to ascertain whether or not plaintiff was guilty of contributory negligence, and to introduce testimony to relieve himself from a charge of that kind; he therefore testified upon his examination in chief, that at different times when he went to the house of defendant in the course of his employment, he went on the elevator with the knowledge of and without question on the part of the proprietors, Strauss & Bro., or their employees in the house; that at times a member of the firm sent him up, and personally set the machinery in

motion, that all the tailors (and there were a great many in the employ of the house), were in the habit of using the elevator when taking their work to the upper stories of the building. The defendant below introduced evidence to show there was no such custom on the part of persons in their establishment, that plaintiff in error was not allowed to go on the elevator, that he was expressly prohibited, and that they had a rule that the elevator was not to be used unless by permission of some person in charge. In rebuttal the plaintiff below was recalled and testified about as before in reference to his use of the elevator. A restatement of evidence by way of rebuttal already received on an examination in chief, is a dangerous practice and should not be resorted to except in exceptional cases; for a witness having testified in chief, and having heard the defense, is in a much better position to reply and improve his former statement. Section 5190, Rev. Stat., Ohio, provides that: "The party who would be defeated if no evidence were offered on either side, must first produce his evidence; and the adverse party must then produce his evidence," and that "the parties shall then be confined to rebutting evidence unless the court for good reasons in the furtherance of justice, permit them to offer evidence in their original cause." Courts often permit a re-examination of matters of fact which are properly evidence in chief; but in the case at bar the plaintiffs were permitted to go one step further and introduce testimony which had already been given. In *Graham & Co. v. Davis & Co.*, 4 O. S., 362, the general rule is stated to be, that where the evidence appears to be simply cumulative, any relaxation of the rule must always be an appeal to the sound discretion of the court to be determined with a view to all the circumstances, and however determined not reviewable on error. This is supported by *Webb v. State*, 29 O. S., 351; *Brown v. Finney*, 67 Pa. St., 214; *Hemmens v. Bentley*, 32 Mich., 89. This question has been given a wide discussion and in all cases it appears to have been the opinion of the court that where fairness lies under any ground of suspicion, a witness will not be permitted to restate a point, but in furtherance of justice, witnesses are granted the privilege. It is dangerous practice and should be allowed if at all, with much caution. The testimony was proper upon examination in chief and was admitted. It may have been irregular to have admitted it in rebuttal, but to recognize this as an error and to set aside the verdict and grant a new trial, would simply permit the parties to reintroduce the evidence in its proper order as was done on former trial and omit it in rebuttal. We cannot see that this course would place the parties in a different position from that in which they now appear. We are of the opinion there was no error in the action of the court below in that respect.

The remaining assignment of error is, that the verdict is contrary to the evidence. The issues presented the question of contributory negligence, on the part of plaintiff. Contributory negligence is peculiarly a question for the jury. In all cases testimony is offered to show negligence on one side and contributory negligence on the other, and if conflict arises, the matter is always left to the jury.

We have made a careful examination of the whole record, and cannot find that the proceedings below are erroneous.

Judgment affirmed.

Long, Kramer & Kramer, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

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PLEADINGS AND RECORD.

[Hamilton District Court, May 8, 1883.]

ISAAC MARKS V. MARSHALL HARRIS.

1. The substitution of copies of lost pleadings does not require notice to the opposite party.
2. The question of error of record, in an entry, is to be determined by transcript of the entry itself and not by what is shown from the appearance docket.

ERROR to the Court of Common Pleas.

AVERY, J.

This case appears to have very little in it, notwithstanding nine errors are assigned.

The first and second of these are that a copy of a second amended petition, the original being lost, was allowed to be substituted on the trial day without notice. But the statute authorizing the substitution of copies of lost pleadings, sec. 5084, Rev. Stat., does not require notice, and there is no reason why it should.

The third assignment is that the verdict was against the weight of the evidence, in that, "the record nowhere discloses that any witness giving his name was sworn." But it has not hitherto been supposed that the sufficiency of the record of a judgment depended upon the names of the witnesses.

The fourth and fifth assignments are submitted by counsel, without argument, as aulogous to the first and second; and may be disposed of by the same analogy, without argument.

To the sixth assignment of error, in overruling a motion to make the petition definite and certain, it is enough to say there was no exception noted. To the seventh assignment of error in overruling the demurrer, the demurrer was not well taken. To the eighth assignment that a suggestion of diminution of record was disregarded, the suggestion being that the appeal transcript was defective, the answer is sufficient, without discussing whether the defect existed, that the objection was not made until after jurisdiction had been taken of the cause by the court of common pleas, and a judgment indeed rendered which, upon a former petition in error, was set aside by this court for defect in the original petition.

The ninth and last assignment rests, for support, upon what appears in the transcript of docket and journal entries of the court of common pleas, as follows: "1883, January 29, minutes 86, copy of record amended petition substituted and filed."

The question presented, argue counsel, concerns the action of the court in allowing "copy of the record" to be filed; besides, the entry also states that "amended petition substituted and filed," while leave only was given to file "a copy of said second amended petition." So that, as the argument contends, "it appears the case was tried upon a petition never filed by leave of court, and which has been superseded by a 'second amended petition.'"

But this ingenious superstructure has at its bottom only the transcript from the appearance docket. The journal entry itself, as indeed the first and second assignments of error complain, is of the filing of a "copy of second amended petition." And even to read the transcript of the appearance docket, as indicating that "copy of record" was filed, is to stick altogether in one miswritten word of the line, to the disregard of the rest.

The judgment is affirmed.

BANK CHECKS.

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[Hamilton District Court, January 30, 1883.]

†JUNIOUS A. BOWDEN V. THIRD NATIONAL BANK OF CINCINNATI.

A bank check, payable in blank, on which the drawer had indorsed "Pay Fourth National, or order," and signed his name, but afterward struck out the words of the indorsement, leaving only his name, was left by him during an absence of some days, upon a desk, at which he and his partner did business in an office occupied by others. The partner took the check, without authority in fact, and caused it to be presented on the bank on which it was drawn, the person presenting it being known to the officers of the bank, and informing them it had been handed him for that purpose by the partner: *Held*, that as between the bank and the drawer, the payment of the check was properly charged to his deposit account.

ERROR to the Court of Common Pleas.

Sayler & Sayler, for plaintiff in error.

Storer & Harrison, for defendant in error, cited: *Cornish v. Abington*, 4 H. & N., 556; *Combes v. Chandler*, 33 O. S., 178; *McNeil v. Natl. Bank*, 46 N. Y., 325; *Davis v. Bechstein*, 69 N. Y., 442; *Cowdry v. Vandenburg*, 11 Otto, 572; In the matter of *Brower*, 2 Story, 512. A person writing his name on the back of a non-negotiable bill or note, becomes not an indorser, but a "new maker," a "joint maker," or a "guarantor," according to the various states of facts in the several cases. *Penny v. Innis*, 1 C. M. & R., 439; *Burmester v. Hogarth*, 11 M. & W., 97; *Matthews v. Bloxsome*, 33 L. J. Q. B., 209; *Irving Natl. Bank v. Alley*, 79 N. Y., 536; *Van Staphorst v. Pearce*, 4 Mass., 258. Where a person signs or endorses his name on a blank paper, and either by actual delivery, or such conduct as enables a third person to appear to the world as a holder, authorizes, or *seems* to authorize, *the filling up*, either as to amount, or date, or name of endorsee, by any one, he is estopped as against another acting *bona fide* on the faith of his signature to deny it. *Ins. Co. v. Leavenworth*, 30 Vt., 11; *Cowdrey v. Vandenburg*, 101 U. S., 572; *Bank of Limestone v. Penick*, 5 Mon., 25.

AVERY, J.

The action by the plaintiff in error was to recover \$262.45, claimed to be due him as a depositor from the bank. The question was whether, a check for that amount should have been charged to him in his account with the bank. It had been drawn by him payable to himself, without the words "or order;" and he had endorsed it "Pay Fourth National or order," but afterward struck those words out leaving only his name. It was paid by the bank on presentation by a third person, to whom it had been handed by one Hayes, a partner of the plaintiff, to draw the money, Hayes not being known at the bank, and the bank being told by the bearer who was known, that it had been so handed to him.

Whether the check had, in fact, been given to Hayes by the plaintiff was in conflict. But his own testimony was that he had drawn it, as was his custom, payable to himself, and had endorsed it to the order of the Fourth National Bank; and then, the penmanship not suiting him, had drawn another which he gave to a messenger from the bank who was waiting with a draft for payment, and after striking out of the

†For common pleas decision, which this opinion affirms, see 8 Ohio Dec. R., 304.

endorsement the words, "Pay Fourth National or order," left it on a desk at which in an office occupied by others, he and Hayes did business as partners, and went away from the city for a few days; and that it was taken without authority by Hayes, who had returned meanwhile, from a trip, to occupy the desk during his absence.

Upon this the question arising was the apparent authority conferred by possession of the check; and whether having left it where his partner on returning to the city must, in taking charge of the desk, have had custody of it, could, as against the bank, deny having placed it in his possession.

Negotiable instruments enable one entrusted with the possession to transfer title, although involving breach of confidence and fraud. The same rule has been applied to instruments not negotiable. *Combes v. Chandler*, 33 O. S., 178; *Moore v. National Bank*, 55 N. Y., 41.

The possession of a bank check is not like the ordinary case of a chattel. The possession of the chattel may be held for temporary use, and the mere fact of possession does not therefore imply authority to transfer title.

Bank checks are made for payment. *Fegley v. McDonald*, 89 Pa. St., 128. Their use is to enable the depositor to withdraw his deposit. The apparent authority of the holder, unless restricted by the paper itself, is to receive payment. This arises from the undertaking of a bank to its customers to pay their checks on demand. *Dodge v. National Bank*, 20 O. S., 284, 245.

The check, on its face, was not drawn so as to be payable except to the plaintiff himself, but his endorsement was added. As written, "Pay Fourth National or order," this made it negotiable, since what is on the back as well as on the face of paper is to be read together. *Bank of Kentucky v. Ewing*, 78 Ky., 264. The words "Pay Fourth National or order" were afterward stricken out, but his name was left there.

What is meant by a man's name on the back of a check depends upon circumstances. *Keene v. Beard*, 8 C. B. N. S., 371, 381. "One of the best receipts is the placing on the back the name of the person who has received payment."

BYLES, J.

Something must have been meant by plaintiff leaving his name after striking out the rest of the endorsement, else why was the name left? His custom had been to draw checks payable to himself, like this one, and endorse them. The very check that he gave at the same time, in payment of the draft, was so drawn and endorsed to the order of the holder of the draft. The bank had nothing but the appearances; the check drawn to himself, with his name on the back and in the possession of his partner.

Estoppel by negligence, as it is sometimes called, arises from the neglect of a duty toward particular individuals, or the public, by which they are misled into trusting to appearances. The neglect, it has been held, must be in the transaction itself, that is, in the matter respecting which the duty exists, and must be the proximate cause of misleading. *Arnold v. Cheque Bank*, L. R., 1 C. P. D., 578; *Baxendale v. Bennett*, L. R., 3 Q. B. D., 525. But there is a duty owing to a bank from its depositors, *Young v. Grote*, 4 Bing., 253, 258; and for proximate cause, the check had been left on an open desk in an office occupied by other persons accessible to any one, the plaintiff absenting himself from the

city under circumstances making it reasonable to anticipate that his partner, coming back meanwhile, must necessarily have charge of the desk and its contents. This brings the case within *Burson v. Huntington*, 21 Mich., 415, 432, cited for the plaintiff.

The collection of the check was, in direct and natural sequence, the result of plaintiff's leaving it where it would come into the possession of his partner. It was a result reasonably to have been anticipated. The broad principle applies that wherever one of two innocent persons must suffer by the act of a third, it shall be him who has enabled the act to be accomplished.

As to errors in admitting and excluding evidence, the custom of banks of the city to consider such checks negotiable was their own interpretation and could not affect the legal relations of the parties. *Dodge v. Nat. Bank*, 30 O. S., 1, 8; *Nat. Bank v. Burckhardt*, 100 U. S., 686, 692. But the plaintiff, on the admitted facts, not being entitled to recover, any such erroneous admission of custom was immaterial. *Cook v. Slate Co.*, 36 O. S., 135, 139.

As to excluding evidence to the correctness of the items of an account, upon which the plaintiff was called in rebuttal, the account itself was not, so far as shown by the bill of exceptions, put in evidence by the defendant, and did not, therefore, call for rebuttal.

Judgment affirmed.

SCHOOL SUPPLIES.

186

[Cuyahoga Common Pleas, September 20, 1884.]

JAMES PARKER V. BOARD OF EDUCATION OF CLEVELAND.

1. A board of education has no authority to purchase material, such as copy books, ink, etc., for free distribution among pupils without regard to the ability of parents to provide them.
2. Section 4026, Rev. Stat., permits the board to furnish such supplies to indigent pupils and the payment for such supplies will not be enjoined in the absence of proof that the contracting parties knew they were for distribution to other than indigent pupils, but the improper distribution only will be enjoined.

HAMILTON, J.

The plaintiff, in substance, says that he is and has been for a long time a resident of the city of Cleveland, and the owner of a large amount of property in the city, and pays a large amount of taxes for the support of schools therein. He has brought this action against the board of education of the city, its president, clerk and treasurer. He avers that the defendant, the board of education, has entered into contracts with three different firms for the purchase of several thousand dollars in value of material, consisting of ink, sponges, crayon pencils, penholders, slates, rubbers, spelling pads, copy books, and pens to be distributed free by said board among all the pupils in the public schools in the city of Cleveland; and he also says that said articles are to be given away to said pupils, and that said materials were not purchased for distribution among the indigent pupils of said school. He therefore says that said board had no authority to make said contracts for, or such distribution of said materials, and that the same are in violation of law.

Plaintiff also says that the board is about to order a payment of a portion of the bills presented by said firms under the contracts aforesaid,

and the same will be paid out of the school funds of the city by the defendants, unless they are restrained from so doing. Therefore, he says that, for the purpose of protecting the interests of himself and other citizens of said city, he brings this suit in order to prevent the misappropriation of funds in the hands of the defendants, and averring that he has no adequate remedy at law, asks that the board of education, pending this action, be enjoined from authorizing the payment of any portion of said bills, and the president and clerk of the board from issuing any orders for such payment, and the treasurer from paying any money upon said bills or any of them, and upon final hearing that the injunction be made perpetual, etc.

To this petition the defendants have filed their joint answer, and in substance say:

First—They deny that the articles contracted for by the board are to be given away to the pupils of said schools.

Second—They deny that the contracts for or contemplated distribution of said materials as averred in the petition are unauthorized or in violation of the laws of the state.

Third—They aver that the articles or supplies contracted for as alleged are required for the proper conduct and management of said schools; that they are part and parcel of the equipment of said schools, and necessary to provide for the free education of the youth of school age within the district under control of the board, and to secure a thorough system of education.

Upon the filing of the petition in this case a restraining order was allowed to the extent of enjoining payment by the defendants of any money on the contracts named until a hearing could be had upon the application for a temporary injunction. Upon that hearing I think it may be said to be established by the admissions of the parties in the pleadings and in open court, and the facts stated in the affidavits, and papers submitted:

First—That the alleged contracts were made as averred.

Second—That the materials contracted for were purchased and intended for free distribution among the pupils of said schools, for use by said pupils without charge to any of them, and of course without reference to the ability of any of them or their parents or guardians to pay for such supplies.

Third—That the materials were not given away, the title to them still remaining in the board—yet that they were of such a nature as to be consumed in the use.

Fourth—That a portion of the materials have been received under said contracts, and so distributed for use, and it is designed to so distribute the balance.

Fifth—That the defendants are about to pay from the contingent school funds under their control, for the articles received and for the balance from time to time when received.

Sixth—That some thousands of dollars are thus about to be expended.

Under this petition and with these facts, to what relief, if any, is the plaintiff entitled? If the board has by law delegated to it the power to thus obtain such materials, and also to make such use or disposition of them, then the plaintiff can have no relief, there being no complaint in the petition that the board has exercised the powers which it has, either unwisely, unnecessarily, or improperly, but only that it has no such

power. Indeed, in the exercise of its delegated authority in all matters, we suppose its judgment is supreme, and its acts not reviewable in the courts, whether wise or unwise. I assume that the legislature of the state has under the constitution the power to provide, if it so wills, free supplies, including such materials as are here in controversy, to all the pupils in the public schools of the state, and that it can authorize by appropriate legislation our boards of education to so provide. If the legislature has authorized our board, either expressly or by necessary implication, to do what we find in this case it has undertaken to do, then that undertaking is justified. But to the extent its acts are not thus authorized, they are unlawful and void. The question is not what authority the board ought to have, but what has been given it.

Section 1, article 1, constitution of Ohio, provides: "It shall be the duty of the general assembly to pass suitable laws to encourage schools and the means of instruction."

Section 2, article 6, constitution of Ohio: "The general assembly shall make such provisions, by taxation or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."

Under these provisions of the constitution the general assembly has required, in sec. 3958, Rev. Stat., boards of education to meet each year and determine the entire amount of money necessary to be levied as a contingent fund for the continuance of the schools of the district after the state funds are exhausted, to purchase sites for school houses, to erect, purchase, lease, repair and furnish school houses, and build additions thereto, and for other school expenses.

It is argued that the phrase "for other school expenses," is broad enough to authorize the furnishing of books and material for the individual use of all the pupils, and that these would be properly school expenses, while the other items above enumerated would be school house expenses as distinguished from the school itself. But if the items so enumerated were not school expenses within the meaning of the statute, why then the words "other school expenses" used, if none other had before been mentioned. Again the well-known rule of construction requires that where specific items of expense are named in relation to a given subject, followed by a general clause covering expenses, such expenses must be construed to be of a like nature with those that were so specified.

Section 3987, Rev. Stat., says: "The board of education of any district is empowered to build, enlarge, repair, and furnish the necessary school houses, purchase or lease sites therefor and make all other necessary provisions for the schools under its control. Directors of subdistricts shall, under such rules, etc., as the township board of education may prescribe, provide fuel for schools, build, enlarge, repair, and furnish school houses, purchase or lease sites therefor, rent school houses, and make all other provisions necessary for the convenience and prosperity of the schools within their subdistricts." It is claimed that this section gives the boards unlimited authority within their discretion to do anything which, in their judgment, will promote the "convenience and prosperity of the schools." It will be noticed that the heading of the chapter, of which the above section is the first, is "School Houses," showing that it relates to that subject. The same rules of construction and the same remarks are applicable to this section as already made in

reference to section 3958. And I cannot think that it authorizes either expressly or by any fair implication the purchase of such materials as those in question for the use of all pupils. Again it might well be questioned whether the general assembly ever intended to transfer the duty which is enjoined upon it by the constitution in reference to securing a thorough and efficient system of schools throughout the state to the various boards of education by general language authorizing them to do anything they might see fit to promote the prosperity of the schools.

Especially is this so when such explicit legislation has been had limiting the amount of the tax which boards may levy for the various school purposes, especially authorizing them to buy sites for and erect and repair school houses, establish school libraries, but without school books, buy philosophical and other school apparatus to a limited extent, employ teachers, provide how long they must keep schools open, empower them to furnish books for poor pupils when satisfied their parents or guardians are unable to do so, and various other details. It seems to me all this is a remarkable amount of wholly unnecessary legislative authorization, if the general clauses already quoted give full authority for the boards to do whatever they may think best to promote the prosperity of the schools. Section 4007 provides, among other things, that each board of education shall establish a sufficient number of schools to provide for the free education of the youth of school age within its district, etc. It is said that free education is here contemplated, and that the education will not be free unless the books and materials, such as are here in controversy, are not furnished. But the only provision in this section for free education is that a sufficient number of schools shall be established to provide for it; education never was and never will be free in the abstract—it always did and always will cost an expenditure of food, raiment and much hard labor. Free schools furnish free education in the sense of this statute, as it seems to me. Section 4026, provides that when it is shown to the satisfaction of the board that the parent or guardian is unable to purchase for his child or children the necessary school books, the board may furnish the same free of charge, etc. By fair implication this would seem to imply that school books may not be bought by the board except as herein authorized. Because, if it possessed the power without or independent of this section, the section itself was unnecessary. The term school books in this section has been construed by the state school commissioner, to include copy writing books, pens, ink, paper, pencils, etc., and it seems to me rightfully so. But it is claimed that "may" in this section means "shall," and the section is therefore mandatory and not permissive, and so interpreted this section would not negative the existence in the board of a discretionary authority to buy books and supplies, the difference being that under this section the board may be compelled to furnish and may do so or not in other cases. I do not concur in this view, yet I shall not stop to discuss the validity of this claim, inasmuch as if no authority is found to exist in the statute of the state to make purchases and distribution to all pupils, it is unnecessary to call to our aid the negation of the right to so purchase and distribute which the opposite construction of this section to that claimed by defendants would imply. I have now considered all the sections of the statute that I remember as cited by defendants as giving authority for the acts in question, and I know of no law that in my judgment warrants the board in making the use contemplated by it of the aforesaid articles. But the board had

doubtless the right to purchase materials of the kind in question for certain purposes to-wit, to furnish indigent pupils. True, it did not buy exclusively for, or with any reference to such pupils. It advertised for proposals to furnish them supplies without disclosing therein the use they were to be put to—beyond the fact that they were for the schools—and no specific amount was named, but that was to be determined by the board as it should order. The three parties with whom these contracts were made, so far as appears by allegation or proof, were not cognizant of the illegal unauthorized use to which they were to be put. But, on the contrary, the board being authorized to buy such materials, they would be justified in supposing it was so buying for an authorized and legal purpose, and they are not made parties to this action so far as anything is known to the court. I know no reason why they might not sue the board at once and recover for the articles already furnished by them, payment for which is now due by the terms of their contracts; and if this is so the same court which would be compelled thus to render a judgment against the board ought not to enjoin it from paying that judgment.

The facts may be that these furnishers of materials may have known all about their intended dispositions, but it does not so appear, and I cannot, therefore, enjoin the payment as prayed for, but will enjoin any further distribution of supplies to the pupils, except such as come within the provisions of sec. 4026, upon bond being given in \$1,000, and the prayer of the petition may be so amended as to specially ask for the relief granted.

FAILURE TO INSTRUCT JURY.

197

[Hamilton District Court, April 24, 1883.]

WILLIAM R. JOHNSON V. MATTHEWS & BELL.

It is no sufficient ground to reverse a judgment, that during the trial the jury were permitted to separate without being admonished by the court not to converse about the case on trial nor to form or express any opinion on its merits until it was finally submitted to them, if counsel was present at the time the jury thus separated and failed to call the attention of the court to its omission and took no exception at the time.

ERROR to the Court of Common Pleas.

The court did not admonish the jury in accordance with sec. 5198. This is only directory. No *exception* was taken to the failure. If the plaintiff wished to avail himself, he should have excepted at the time. The object is, I take it, to prevent the jury being talked to or tampered with.

I am unable to find this exact question decided any place but in *Stewart v. Randolph*, 2 S. C. R., 182, where one admonition at first separation was held sufficient, the court had failed to admonish on subsequent separations. There are cases where the jury has been talked to, and yet the verdict was allowed to stand.

See *R. R. Co. v. Porter*, 32 O. S., 328; *Stoppel v. Woolner*, 7 Dec. R., 576; 1 Cl. Law Rep., 89; *Koons v. State*, 36 O. S., 195, 201; *Armleder v. Lieberman*, 38 O. S., 77.

If such misconduct is not ground for setting aside the verdict, surely the failure to admonish which might prevent is not—for I suppose in all these cases the jury was admonished. The failure did not deprive the defendants of a substantial right. *Bear v. Knowles*, 36 O. S., 43; *Bush v. Critchfield*, 5 O., 109; *Buck v. Waddle*, 1 O., 358.

By failing to except, he waived the irregularity. *Lowe v. McCorkle*, 1 Dec. R., 64 (s. c. 8, W. L. J., 64); *Kenrick v. Reppard*, 23 O. S., 333.

The reason of a law, the purpose provided for and the intention of the law-making power, are all to be considered in the interpretation of the law. *Hubble v. Renick*, 1 O. S., 171, 175; *Sifford v. Beaty*, 12 O. S., 189.

SMITH, J.

The only assignment of error in this case is, that during the trial, the jury were allowed to separate for dinner, and also for the night, without being cautioned by the judge, as required by sec. 5193, Rev. Stat., not to converse about the case or to form or express any opinion about it until it was finally submitted to them. There is no evidence that the jury did talk about the case or form or express any opinion about it. There is no evidence that the party complaining was prejudiced by the omission of the court. It does appear that counsel was present when the jury were allowed to separate, and took no exception at the time, and he candidly admits that had he called the attention of the court to this accidental omission, the court would have given the usual caution.

As counsel was present and did not except to the alleged oversight of the court at the time it happened, and when it might have been corrected, he ought not to be allowed to take advantage of it now.

Judgment affirmed.

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GUARDIAN'S BOND.

[Hamilton District Court, May 8, 1883.]

MARIA SCHWAB V. WILLIAM RAPFOLD ET AL.

1. Although a delinquent guardian, whose debt to his ward has not been ascertained by the probate court, is absent from the state and his residence is not known, yet this does not constitute an exception to the rule that his bond cannot be sued without such ascertainment until the court has made an attempt to compel him to account or put him in default for failing to account by citing him.
2. Although the provisions of the act of 1857 (S. & C., 620), in so far as they relate to citing non-resident guardians, were omitted from the Revised Statutes, yet citation may be made under sec. 6406, Rev. Stat.

To maintain an action upon a guardian's bond, against the sureties, for money of the ward not paid over by the guardian, the amount must first be ascertained by the probate court upon the settlement of his accounts. The probate court has power to compel such settlement by a nonresident guardian, or on his default to ascertain the amount upon evidence. Notice to him may be, as provided, sec. 6406, Rev. Stat.

ERROR to the Superior Court of Cincinnati.

AVERY, J.

The errors assigned are, that the defendants were allowed to withdraw their answer and file a demurrer which the court sustained and entered judgment, refusing the plaintiff leave to amend.

The only question is whether the demurrer was properly sustained. The withdrawal of the answer, and filing the demurrer was not to the prejudice of the plaintiff, for the reason that the ground of demurrer was that the petition itself did not state facts sufficient to constitute a cause of action; and the refusal of leave to amend after the demurrer was sustained, being a matter of discretion, cannot be reviewed, it not appearing what amendment was desired.

The action brought was against the sureties upon a guardian's bond, the principal not being found. The bond, set forth, was for the discharge of the duties of guardian of the plaintiff in error and her brother, minors; and was further conditioned "to render an accurate statement of his transactions with a just account of the profits arising from the estate of said minors, and to deliver up the same to the court at any such time as they may require."

The petition alleged that \$480, of the money of the plaintiff when she was of the age of sixteen, came into the hands of the guardian, and that payment was demanded when she became of age and since, but had been refused; that no inventory had been filed by the guardian, and that before the minor had become of age, he had become a non-resident of the state and was still a nonresident, his place of residence being unknown. The prayer was for \$480 and interest.

The court referred to, in the condition of the bond "to render a just account of the profits arising from the estate of said minors and deliver up the same to the court," is the probate court. "The jurisdiction of probate courts over the settlements of the accounts of guardians is exclusive. A right of action on a guardian's bond, to recover from the sureties the amount remaining in the hands of the guardian, first accrues to the ward when such amount is ascertained by the probate court on the settlement of the guardian's final account." *Newton v. Hammond*, 88 O. S., 430.

In that case, however, it is said: "If an accounting cannot be obtained from the guardian in the exercise of the power and jurisdiction of the probate court, we do not deny that an action on the bond against the makers may be prosecuted in a court of equity for an account and other relief."

It is insisted that the non-residence of the guardian; and that his residence could not be ascertained, placed this case within the exception, and without the power and jurisdiction of the probate court. But what was meant by the exception was not power and jurisdiction as depending upon service of summons, but power and jurisdiction of the probate court as distinguished from a court of equity. If the probate court would have no power and jurisdiction because service could not be made there, service could not be made in the court of common pleas, and one would have no more jurisdiction than the other.

In fact, however, the probate court is not without power to compel an accounting by a non-resident guardian, or at least to put him in default for failing to account. The power is inherent, being the general power that may be exercised by any court over a trustee of its own appointment.

The provision for the publication of citations against guardians, in the act of 1857, "to provide for the more speedy collection of claims as distributees against executors, administrators and guardians (S. & C., 620, sec. 2), has been apparently omitted from the Revised Statutes. Section 6195, Rev. Stat., which provided originally for service of citations upon executors or administrators, without naming guardians, by amend-

ment now provides for service upon guardians as well (78 O. L., 76). Section 6196 remains however as it was, and the publication there provided for is against executors and administrators only, omitting guardians. But by sec. 6406, it is provided, that "when notice of any proceedings in a probate court shall be required by law or be deemed necessary by the probate judge, and the manner of giving the same shall not be directed by statute, the probate judge shall order notice of such proceedings to be given to all persons interested therein, in such manner and for such length of time as he shall deem reasonable.

Judgment affirmed.

Gasser & Spangenberg, for plaintiff in error.

Davidson, Conway & Gabler, for defendants in error.

CONDITIONAL SALES OF CHATTELS.

[Hamilton District Court.]

LOUIS & CO. v. R. HOGAN AND J. H. LOOMIS.

1. Upon a so-called renting (which was in fact a sale of chattel property on weekly payments) to two persons, one of the conditions was that it should be used by them in their residence, giving the street and number. Afterward one of the two gave up his residence there and moved out, leaving the other in possession of the property. *Held*, there was no breach of the condition.
2. Another condition was, that the renting might be terminated at option, "by any other circumstances that may give the 'lessors' reason to fear for the safety or proper treatment of their said property." *Held*, that mere fear was not sufficient; there must be reason for it.

ERROR to the Court of Common Pleas.

EVERY, J.

Replevin was brought by the plaintiffs in error for a lot of bar-room furniture alleged to have been rented by them to the defendants. The right of possession was found in defendants, and the value having been agreed upon, judgment was rendered for the amount.

The so-called renting was by written instrument acknowledging \$50 paid before delivery, and fixing the rent at \$5 a week, payable weekly in advance; with a privilege of purchase any time during the renting for \$860, less the amount of payments. One of the conditions on which the renting might be terminated by option was "the use of said goods in any manner other than that provided for." The use provided for by the written terms was the use "by R. Hogan and J. H. Loomis in their said residence, No. 329 W. 5th St., Cincinnati."

No. 329 W. 5th St. had been rented by the defendants of the owner, but afterward, to secure him his rent promptly, an arrangement had been made with his consent, by which a third person paid the rent and they became tenants under him. The occasion for bringing the replevin was a judgment in forcible entry and detainer he had obtained against them, under which one went out of possession, but the other was permitted to carry on the business. There was a question besides whether a bill of sale had been given of the furniture, but the evidence conflicted and the finding on that point was not against the weight.

The so-called renting was in fact but a sale upon weekly payments. The condition for the use meanwhile, that it should be by the defendants, "in their said residence," was for security merely. A condition of the kind ought not be extended by construction beyond the reasons for its adoption, especially where the result would be to defeat the contract. *West v. Ins. Co.*, 27 O. S., 1, 11. The chief reason here was to keep the property in a known place, so as to be readily retaken upon default, and to exclude others than the defendants from the use in the meantime. But no others had been admitted; the place remained the same; all that had happened was that one had gone out of possession. To the argument that the object was to secure the fidelity and watchfulness of both, and would be defeated by the retirement of either, answer may be made, as in *West v. Ins. Co.*, *supra*, that the contract itself reposed confidence in each, and it would be a strained construction that both were to keep possession, so that one might watch the other. Another condition was, "said renting may be terminated at any time at their option * * * by any other circumstances that may give said Louis & Co. reason to fear for the safety or proper treatment of their said property." It is insisted that the fear they felt—and they testified to it—was enough of itself.

Reliance is upon the construction of the clause in chattel mortgages, that the mortgagee may take possession "whenever he deems himself insecure," the general rule being that his reasons are not open to inquiry, that he is the sole judge. *Jones on Chattel Mortgages*, 431; *Werner v. Bergman*, 28 Kas., 65; *Huebner v. Koebke*, 42 Wis., 810; *Cline v. Libby*, 46 Wis., 123; *Evans v. Graham*, 50 Wis., 450; *Braley v. Byrnes*, 21 Minn., 483; *Boice v. Boice*, 27 Minn., 374; *Hall v. Sampson*, 85 N. Y., 274. See *Botsford v. Murphy*, 47 Mich., 536; *Furlong v. Cox*, 77 Ill., 293; *Davenport v. Sedger*, 80 Ill., 574. But assuming that between a contract of this kind and a chattel mortgage there is no difference in principle, although here the possession is by virtue of delivery and in a chattel mortgage by virtue of the mortgagor reserving it, the language nevertheless is different. For a man to have reason to fear, and for him to deem himself insecure are, different—he may deem himself insecure without having any reason. The distinction is expressed in *Werner v. Bergman*, *supra*: "The mortgagor, by having a clause inserted in the mortgage that he shall have the right of possession until the mortgagee shall deem himself insecure, may secure himself such right. If he wishes to go still further and retain the possession until the mortgagee have reasonable grounds to deem himself insecure, he can insert a stipulation to that effect in the mortgage. * * * But if he chooses only to have inserted the clause that he shall have the right to the possession until the mortgagor shall deem himself insecure, he can only retain the property until the mortgagee does in fact deem himself insecure, and he has no right to question the grounds."

Whether there was reason to fear for the safety or proper treatment of the property, being open to inquiry, the finding was not against the weight of evidence. The judgment of the court of common pleas is affirmed.

S. M. Johnson, for plaintiffs in error.

J. A. Corbin, for defendants in error.

SUBROGATION.

[Hamilton Common Pleas.]

PULLAN, ADM'R, V. DECAMP, TRUSTEE.

1. A surety on paying the debt of his principal is entitled to be subrogated to all the securities, liens and equities which the creditor holds against the principal debtor or as a means of enforcing payment from him.
2. A guardian against whom a judgment was recovered for a balance due, being financially embarrassed, conveyed by deed of trust certain property, real and personal, for the benefit of certain classes of his creditors, making an express condition that it should "not include any benefit to or security for any of his liabilities other than those debts or liabilities in which as between him and the holder, maker, endorser, drawer or acceptor, he was the real debtor." The guardian subsequently became bankrupt, but before his liability on his bond was reduced to judgment the deed of trust had been executed and an assignee in bankruptcy appointed: *Held*, that not only existing debts, but existing liabilities were intended to be satisfied from this trust, and the surety on the guardian's bond having paid the judgment was entitled as against the assignee in bankruptcy to subject the property remaining in the hands of the trustee to the payment of his claim.

ROBERTSON, J.

On June 10, 1871, Sylvester Hand was appointed guardian of three minors, Charles, Hattie and Katie Featherling, giving bond in the probate court for \$8,000, with Samuel Froome and Wm. Rankin as sureties on the bond.

On December 11, 1875, Hand being financially embarrassed conveyed by deed of trust to Daniel DeCamp certain property, real and personal, for the benefit of certain classes of his creditors, making an express condition in the deed of trust that it "shall not include any benefit to or security for any of Hand's liabilities *other than those debts or liabilities* in which as between Hand and the holder, maker, endorser, drawer or acceptor, the said *Hand* is the *real debtor*."

And which seem to be the only kind of his liabilities for which the benefits of the trust are not intended to extend.

The deed also provides that when the said Hand's indebtedness is fully paid off and satisfied, the trustee shall reconvey the residue of the property to Hand or his representatives. But if all his debts are not paid by November 10, 1876, then the trustee shall make such disposition of the residue of said property as a majority of his creditors may require.

Subsequently on June 20, 1878, Hand was declared a bankrupt, and Charles A. Hoyt was appointed his assignee in bankruptcy.

In November, 1881, the minors having attained their majority, a suit was brought by them against Hand, their former guardian, in which it was found that he was indebted to them as such guardian in the sum of \$1,538.98, interest and costs, and for which they recovered judgment, but finding him at that time without real or personal property subject to levy or sale, their judgment could not be satisfied.

Having obtained judgment against Hand, which remained unsatisfied, they afterwards brought suit against the administrator of Froome on account of his suretyship on the guardian's bond of Hand, and obtained a judgment against his administrator; Wm. Rankin, his co-surety, being dead, and his estate insolvent.

In June, 1883, the administrator of Froome brought this suit against Daniel DeCamp, alleging that DeCamp has title to and is in possession of certain real estate and other moneys, goods and effects of great value, which he holds in trust for the debts of Sylvester Hand, under the deed of trust referred to above.

In a supplemental petition filed November 13, 1883, the administrator of Froome says that since the bringing of this suit he has paid in full from the estate of Froome the judgment obtained against him on account of his suretyship for Hand, and prays to be *subrogated* to the rights of the Featherlings in their judgment against Hand, and says he is now the owner of that judgment against Hand, and prays this court to decree the amount he has had to pay as surety for Hand a lien upon the property and effects in the hands of the trustee, DeCamp.

DeCamp makes no answer, but Hoyt, Hand's assignee in bankruptcy, in March, 1884, files his answer, in which he claims that "if the purposes of the trust have been carried out and completed, that he, as assignee of Hand, is entitled to the residue, and denies that the plaintiff is entitled to share in the benefits of the trust property, or is entitled to a lien upon it."

To this answer the plaintiff demurs.

On behalf of the assignee in bankruptcy it is claimed: First—That the trust deed to DeCamp was not for the benefit of Hand's creditors generally, that it only applied to then existing creditors and debts then due, and that this debt was not then due. Second—That if the trust is at an end, that the assignee in bankruptcy is entitled to receive the residue in the hands of DeCamp. Third—That the plaintiff cannot recover because Hand's debt has been reduced to judgment and that judgment satisfied by the surety, while Hand had been discharged in bankruptcy, and the Featherlings not being in a position to recover, the plaintiff, claiming under them, cannot. That there exists no fiduciary relation between principal and surety. Fourth—If the plaintiff's claim is good at all against Hand, it can only be against property acquired after his discharge in bankruptcy.

The determination of two questions will cover all the points made by the assignee in bankruptcy:

First—Whether the plaintiff is subrogated to all the rights of the Featherlings against Hand. Second—Whether the property held in trust by DeCamp could be subjected to the satisfaction of the Featherlings, claim or judgment.

The doctrine of subrogation is broad enough to include every instance in which one party pays a debt for which another is primarily answerable and which in equity and good conscience should have been discharged by the latter, and in this state as elsewhere a surety on paying the debt of his principal is entitled to be subrogated to all the securities, funds, liens and equities, which the creditor holds against the principal debtor, or as a means of enforcing the payment from him. *Dempsey v. Bush*, 18 O. S., 376; *Neal v. Nash*, 23 O. S., 488; secs. 4994, 5375 and 5845, Rev. Stat.; In *Liddendale v. Robinson*, 2 Brock., 159, Chief Justice Marshall says:

"When a person has paid money for which others are responsible, the equitable claim which such payment gives him on those who were responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted to every equitable intent and purpose in the place of the creditor whose claim he

has discharged. The principle of substitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor as completely as if the instrument had been transferred to him, or to a trustee for his use."

Chief Justice Marshall in *Liddendale v. Robinson*, 2 Brock., 159; also 82 Pa. St., 80. And in *Fox v. Alexander*, 1 Iredell Eq., 340, a case quite analogous to the case at bar, the court says:

"And the sureties on the guardian's bond have the same right as the ward when they have paid the surety money. They stand in place of the ward, notwithstanding the legal extinguishment of the judgment." *Neilson v. Fry*, 16 O. S., 553.

Without pursuing this principle, which seems so well settled, it is clear in the case at bar that the plaintiff having been compelled to pay the debt of Hand to the Featherlings, stands for all purposes in the place of the Featherlings as against Hand, and entitled to all the rights and equities which the Featherlings had against Hand or his trustee.

The only question remaining is whether the debt of Hand to the Featherlings was such as was embraced in the terms of the deed of trust. At the time the deed of trust was executed his debt to the Featherlings had not been reduced to judgment, it existed only as a liability on the bond—and before it was reduced to judgment the assignee in bankruptcy had been appointed—unless this liability is embraced within the scope of the trust, the assignee in bankruptcy would probably have the right to receive the residue of assets in the hands of the trustee and this claim would have to share with other creditors in the assignee's distribution.

The trust in the first place seems to be for the payment in full of all debts of which Hand was the principal debtor. It was the intention as we can infer from the whole instrument, to exclude from the benefits of the trust only such debts as Hand had become liable for by indorsement or as surety for others where he was not the *real debtor*. The express condition contained in the deed of trust "that it shall not include any benefit to or security for any of Hand's *liabilities* other than those *debts* or *liabilities* in which Hand is the *real debtor*," would fairly imply that the intention was that it should include all *debts* and *liabilities* in which he *was the real debtor*. It is only in this clause of the deed of trust that the term *liability* is introduced; in all other parts of the deed, *debts* only are spoken of, but the inference is fair and consonant with honesty of purpose, that not only then existing debts, but also then existing liabilities, as to which Hand was principal, were intended to be satisfied from this trust.

Hand's liability on the bond existed at the time of the execution of the deed, and the language of the trust is broad enough to embrace that liability where the amount was ascertained, and the facts set up by the assignee in bankruptcy is not such as can defeat the plaintiff's right to subject the property in the hands of the trustee to the payment of the plaintiff's claim.

Demurrer sustained.

Asa W. Waters, for plaintiff.

W. T. Potter and C. A. Hoyt, for assignee in bankruptcy.

SPECIFIC PERFORMANCE.

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[Cincinnati Superior Court.]

HARRY LACY V. HUBERT HEUCK ET AL.

1. A mandatory injunction will not be granted to enforce the performance by the lessees and managers of a theater, of a contract for the use of such theater, and the services of such manager and subordinates, for the period of one week, in and about the production of a play contracted to be given, for the reason that the supervision of such personal services, by the officers of the court, would be impracticable.
2. But in such case, where the contract is plain, and the proposed breach not disputed, the court will enjoin the defendants from assisting, advertising, or managing any other play, or from putting their theater to any other use than the production of plaintiff's play during the period covered by the contract.

MOTION for temporary injunction.

PECK, J.

The plaintiff alleges that in September, 1888, he entered into a written contract with the defendants for the use of Heuck's opera house for the week now next ensuing, the house to be lighted and heated by defendants, who also agreed to furnish the services of ticket sellers, door keepers, ushers, stage carpenters, an orchestra, and certain other persons necessary for the production of a play to be performed during that time by a company of actors and actresses employed by, and under the control of plaintiff. That defendants were also to perform certain services in and about advertising the play, and the parties were to be compensated respectively, by a division of the receipts from the sale of tickets in certain agreed proportions. That plaintiff is now on his way to Cincinnati with his company, where they will arrive in time to produce the play as agreed—and that he is ready and willing to perform all the stipulations of the contract incumbent upon him, but that defendants have refused to perform their part of the contract, have declined to do what is required of them by its terms as to the advertising, have notified plaintiff that he cannot occupy the opera house during the period agreed upon, and are now advertising another company to appear there during that time.

The plaintiff moves the court to enjoin defendants from permitting the opera house to be occupied by others or put to other use than the production of his play, during the period named in the contract; that defendants be enjoined from advertising or permitting any other play there during the week mentioned, and also for a mandatory injunction restraining defendants from failing or refusing to provide the opera house and perform the services stipulated in the contract.

The defendants appear in person and by counsel, and have filed their affidavit. They do not deny the execution of the contract, or its intended breach, but it is claimed by their counsel that injunction is not a proper remedy for such an injury; and that presents the only question before us. The reasons assigned to support the claim that injunction is an improper remedy in such case, are two: First—That the plaintiff will have an adequate remedy at law; and second—that this is not such a contract as can be enforced in equity, either by a mandatory injunction or by means of a decree for specific performance, because it is largely a contract for personal services, and such contracts, cannot from their very

nature, be specifically enforced. *Port Clinton R. R. Co. v. Toledo Railroad Co.*, 13 O. S., 544.

As to the first point, it seems clear that the only remedy at law accessible to plaintiff would be an action for unliquidated damages for breach of contract. In such case it would be necessary for the jury to determine as best they might from the evidence adduced, what would be the probable receipts from the performances contracted to be given. To show that it would not be impossible to furnish proof on the subject, defendants, in their affidavit, set forth the receipts during two previous weeks of performance by plaintiff's company at their theater, within a year or two past, but it is obvious that even with all the aid to be derived from such testimony, the jury could not fix the amount of such receipts with any degree of certainty. That plaintiff could maintain an action for damages after the breach had occurred, is beyond question, but it is not at all certain that such an action would furnish him with an adequate remedy for the wrong he had suffered.

In the language of the Lord Chancellor in *Lumley v. Wagner*, 1 D. G. & M., 618, a court of equity "will not suffer persons to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damage which a jury may give."

As to the other proposition that this is not such a contract as can be specifically enforced, I am inclined to the opinion that the point is well taken. The contract provides not only for the use and occupation of the opera house, but for the personal services of a large number of persons. It would be impracticable for the court to supervise or enforce the performance of such services. See *Port Clinton R. R. v. Cleveland R. R.*, above cited; and *Chapman v. R. R. Co.*, 6 O. S., 119, 189.

But there is a part of the relief asked to which the same objections do not apply. Among other things plaintiff prays that the defendants may be enjoined from putting the opera house to any use during the time covered by his contract, other than the production of the play by his company, and from advertising or permitting any other play during that time.

As to actors and singers it has been held in a number of cases in England and this country, that they may be enjoined from playing or singing at any other place than the one where they have agreed to play or sing, and in this indirect manner their contracts for personal services have been enforced. *Lumley v. Wagner*, 1 D. G. M. & G., 604, and S. C. 5 De. G. & S., 485; *Montague v. Flockton*, 16 L. R. Eq., 189; *Webster v. Dillon*, 8 Jur. N. S., 432; *Daly v. Smith*, 38 N. Y. Sup. Ct., 158.

In the first case above cited the Lord Chancellor placed his decision largely upon the ground that the contract provided that the defendant should sing at a certain place *and not elsewhere*. The injunction was granted because of the negative words, and she was accordingly restrained from singing elsewhere, but in the latter cases that distinction is said to be ill-founded, and it has been pointed out that a contract to play at a certain place at a certain time necessarily excludes the idea that the actor may perform at another place at the same time and injunctious restraining such breaches of contract were granted in those cases, although the contract contained no negative words. There are cases in this country holding that such an injunction will not be granted as there were such decisions in England prior to *Lumley v. Wagner*. One of these is *Dela- van v. Macarte*, 1 Dec. R., 226 (4 W. L. J., 555), decided in the court of

common pleas of this county, in the year 1847, prior to *Lumley v. Wagner*, and in accord with the English authorities overruled by that case.

Under the circumstances, the question is fairly an open one in Ohio, and in that situation we should be guided by the cases best grounded in principle. The only reason assigned for the refusal to grant a mandatory injunction is that it is impracticable to apply such a remedy because it might involve the supervision and direction by the officers of the court, of the performance of the services contracted for. But how is it impracticable to afford such relief as was granted in *Lumley v. Wagner*? Difficult as it might be to compel a singer to sing at the proper time and place and in the proper manner, it would not be at all difficult to compel him to desist from singing except at a specified place. Such a writ might not in all cases afford a remedy to plaintiff, as the defendant might elect not to sing at all, but it is safe to believe that the ordinary motives governing human action would lead him to prefer to comply with his contract, rather than to be altogether prevented from the exercise of his talents, and such appears to have been the result in cases where this sort of relief was granted. Why then should not a plaintiff in such case have an injunction of this sort? His contract rights are clear, the proposed violation of them is clear, and here is a remedy not impracticable. It would seem to be a sound general rule that where the right of one party is plain, and the wrong done or intended to be done by the other equally plain, the court should not be sparing in the application of its remedies, but rather should grant them with a liberal hand.

The case at bar differs from all the cases cited in that the position of the parties is here reversed. In those cases it was manager against actor, in this it is actor against manager, but in both the personal services of the other party are sought, and in that respect they are the same in principle. If Heuck could enjoin Lacy from performing next week in any other place than his opera house, why should not Lacy have similar relief to secure the services of Heuck and his subordinates in the management of the opera house?

The contract for the use of the opera house adds an element not found in the above cases, but there appears to be no reason why the same remedy may not be applied as to it. This part of the agreement, if it stood alone, could be enforced by mandatory injunction or decree for specific performance. *Taylor on Landlord and Tenant*, sec. 46, and cases cited. It has been a common practice for courts of equity to interfere to restrain a tenant from putting the property to uses other than that agreed upon. 2 *Daniel's Chy. Practice*, 1655, *et seq.*; also to restrain the landlord from the violation of his covenants; *Kerr on Injunctions*, *417. In the case of *Hooper v. Broderich*, 11 *Simons*, 47, the vice-chancellor held that a mandatory injunction in effect requiring defendant to keep an inn upon certain premises which he had leased for that purpose ought not to have been granted, but that defendant might be restrained "from doing or causing or permitting to be done any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises." See also *Tipping v. Eckersley*, 1 *K. & J.*, 264. There appears to be no reason why defendant should not be restrained from managing, advertising, assisting or providing assistance for any other play or performance at their opera house during the week covered by the contract, and from using or causing or permitting their opera house to be used for any other purpose than the production of plaintiff's

that this paper was given to the son to be delivered to the father upon a condition and if the condition was not performed it was to be returned to her.

It was urged by the defendant that this testimony could not be offered under the pleadings.

The answer alleged that for a valuable consideration she had released the said judgment and discharged Mr. Walter from all liability therefrom. To this answer there was a general denial by the plaintiff. It seems to us that this objection is not well taken.

A release is a deed—an instrument under seal; it implies a signing and sealing and delivery. The delivery is as much a part of the execution as the signing and sealing. The want of either of these essentials can be proved on the issue whether it was or not her deed. The testimony relied upon in rebuttal was the testimony of a son of these parties who seems to have been a wanderer from place to place, but who at that particular time was here and who testifies was entrusted by the mother to deliver the instrument on condition, and who instead of returning it to the mother when the condition was not performed, as he should have done, left it with the father. The court below seems to have found in favor of the mother upon this testimony, that this release had never been legally delivered.

It must be confessed that this testimony seems to us very suspicious, but there is a possibility of its being true. It was not so incredible but it might be true and the court below had the advantage of having the witness before it.

We have nothing but the testimony as it appears upon the record. The court below had the advantage of seeing the witness and listening to his explanations.

In accordance with the rules which must govern a reviewing court "a finding and judgment will not be reversed, because that finding and judgment are contrary to the evidence, unless they are clearly so; and the reviewing court will always hesitate to reverse where the doubt about the propriety of doing so arises from a manifest conflict in the oral testimony, as it appears on the record of the reviewing court." *Landis v. Kelly*, 27 O. S., 567.

There is a conflict in the testimony; the witnesses have appeared before the trial court, and as the finding is not clearly against the weight of the testimony, we are constrained to affirm the judgment.

The really serious question raised in the case is that this release was delivered as an escrow; that an escrow must be delivered to a third person to be delivered to the grantee upon the happening of a contingency, and neither the grantee nor his agent can be this depository, but it must be a third person; and numerous authorities are cited. It is said that according to the testimony of Albert Walter, he went from the father to the mother as the agent of the father, the grantee, and if this paper had been delivered by Mrs. Walter to the father it could not be an escrow because she could not by parol testimony be permitted to say it operated otherwise than according to its face; and as it was delivered to the agent of the grantee it had the same effect in law as if it had been delivered to the grantee himself.

There is very much to be said in support of this position, but we think we are controlled by a decision of our Supreme Court which covers this precise case, *R. R. v. Iliff*, 13 O. S., 235, the syllabus of which is as follows, viz.:

"The delivery by the releasor, of an otherwise perfectly executed deed of release, to a known agent of the releasee, is, in law, a delivery to the principal; and it will be operative, according to its terms from the time of such delivery, no matter what verbal stipulations or conditions may have accompanied its delivery in respect to the *operation* of the deed after the delivery. But the mere delivery of manual possession of the deed is not necessarily a delivery of the deed; and in cases where an acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make the agent of the releasee his own agent, for the purpose of holding the deed as an escrow, and returning it to him, the releasor, in case of the non-performance of a stipulated condition. There is no such personal identity between the releasee and his agent as to preclude the latter from becoming the depository of an escrow."

This was an action brought by Iliff against the railroad for damages to real estate in occupying a portion of his land. The defense was that the agent of the railroad company had procured the release of several of the landowners in that vicinity, and this agent had gone to the plaintiff who had given him a release of the land in controversy, but had given it to be operative only on condition that certain other persons should also release to the agent. Having thus obtained possession of the instrument he gave it to his principals and they claimed it was a release. The court held there was nothing in the relation of the agent of the railroad company to prevent him from being a lawful depository of the instrument as an escrow, and the paper having been given to him on a condition, it was no delivery in the law till the condition was performed and therefore the plaintiff was not estopped by it. The opinion is very vigorous, and some pretty harsh terms are used by the judge who delivered it, but we think it covers the case before the court, and are compelled to hold that the relation of the son as the agent of the father did not prevent him from holding the release as an escrow for the mother.

Judgment affirmed.

Lincoln & Stephens and J. H. Perkins, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

TESTAMENTARY CAPACITY.

213

[Hamilton District Court.]

MARY C. BROCKMEIER ET AL. V. CHARLES BUCK ET AL.

On the issue of whether a testator has testamentary capacity, witnesses may be asked as to his capacity to transact business, when it does not involve his capacity to make a will.

MOTION for new trial on appeal from the Court of Common Pleas.

SMITH, J.

The action was brought to contest the validity of a codicil made by Henry Buck, deceased, on the ground that the testator was not of sound mind and memory at the time it was made, and that he was also under restraint. The action was tried before the court of common pleas, and there a verdict was entered *pro forma*. The case was appealed to this

court and tried a few days ago. The trial consumed about a week. The jury rendered a verdict declaring the codicil was not the codicil of testator. A motion was made for a new trial, and the first ground urged is that the court erred in permitting certain questions asked of the contestant's witnesses to be answered. Several witnesses having been presented, and having stated what they knew of the testator's habits, and certain facts tending to show that he was of unsound mind, the question was then put, what in their opinion was his capacity for transacting business, which question was allowed, and exception taken. The same line of examination and character of question was put by counsel upon both sides. It seems to us, that under the practice of this court, and the rulings of the Supreme Court of the state, that when the issue is whether the testator is of sound mind and memory, or in other words of testamentary capacity, his capacity to transact business, when it does not involve his capacity to make a will, is a fact upon which witnesses given may give their opinion after they have the facts upon which their opinion is based. Therefore this objection is not well taken. The next ground of the motion is that the verdict was against the evidence. It should be borne in mind that the statute expressly submits the issue to the verdict of the jury. Upon the question of the sanity of the testator there have been two different trials.

Some time before the testator died he had made another will in favor of the same defendant, who was one of his brothers. That will was contested in the court of common pleas, on the ground that the testator was of unsound mind and memory, and that it was made under restraint. The jury found in favor of the contestants, and set aside that will. After the verdict was rendered in that case, another will turned up, with this codicil, which to a certain extent was somewhat similar, but was not quite so glaring in its characteristics as the will previously set aside by the jury. But the witnesses were the same, the testimony the same, and another jury has determined that the codicil was not valid.

The codicil was made, I think, in December, 1876, and that will in October, 1877. Testator died in December, 1877. Mr. Charles Buck, the real contestee, has had the benefit of two jury trials, lasting each about a week, and each resulting in a similar verdict.

The amount, even if the will was sustained, coming to Charles Buck is only \$1,500 in cash, and a house and lot worth \$1,200, making in all only \$2,700. We doubt if we should subject the county to the expense of a third trial for Mr. Buck.

Taking all the facts and circumstances together, the character of the parties, the character of the legatee, the infancy of the heirs who were cut out of this legacy, the conduct of the testator, about the time and prior to the making of this codicil, I cannot say that the verdict is against the weight of the testimony and can see no reason to set it aside.

S. F. Hunt and M. Smith, for plaintiffs in error.

T. Q. Hildebrandt, E. M. Spangenberg and M. Sater, for defendants in error.

NUISANCE.

222

[Hamilton District Court.]

COELESTINA DIERINGER V. CAROLINE WEHRMAN ET AL.

1. The owners of property who are not the occupants of the same cannot properly complain of a nuisance created upon it when they, as owners, have suffered no special injuries thereby.
2. As owners, the measure of damages would be whatever injuries they sustained in the diminution of rents, in the failure to rent the property, for injury to property or the cost of repairs.

ERROR to the Court of Common Pleas.

The petition in the court below was filed by Caroline Wehrman and others, alleging that they were the widow and heirs at law of one John E. Heinberger who died in 1857, and as heirs at law became owners of the real estate described in the petition; that in 1868, they improved that real estate; that defendant below was the owner of the adjoining premises which she had improved in 1869, by erecting a large tenement house which was occupied by the tenants of defendant; that in the construction of the defendant's house the water-closet for the different stories was built against the wall of the plaintiff's building whereby it was more or less injured, and the contents and the filth of the water-closet created a nuisance disagreeable to the occupants of the premises. Wherefore they prayed for an injunction and damages in the sum of \$1,000.

The answer first contained a general denial, and secondly, pleaded the statute of limitations, that the plaintiffs could not recover any damages prior to October 1, 1877, that being four years before the time of bringing this suit. After the petition was filed the court below granted a conditional restraining order, that unless the defendant within a certain number of days repaired his premises so as to prevent the alleged nuisance, then the restraining order should become absolute. This conditional restraining order was issued and seems to have remained in force, and no steps were taken to have it dissolved. Probably the nuisance was abated by the defendant. The case afterwards came on for trial before the court and jury for the ascertainment of damages to plaintiffs by reason of the alleged nuisance and resulted in a verdict of five hundred dollars damages. On motion for a new trial the court ordered a remittitur of one hundred dollars. The remittitur was made and judgment entered on the verdict less the remittitur. To reverse this judgment as entered the petition in error is filed in this court.

SMITH, J.

The ground of error is, that there was no proper evidence submitted to the jury for which damages could be estimated. There was abundant evidence of the construction of these water-closets; that the defendant had erected a large building three stories in height, that from twenty-five to thirty families occupied that tenement house and most or many of them used the water-closet on each story; that the contents of the water-closets were taken from the different stories to the ground by a flue which was built up against the plaintiff's building and very imperfectly constructed, and the filth, moisture and dampness penetrated the walls of the plaintiff's building, ran into the cellar, and at certain periods of the year there would be three, four, five inches of filth and disagreeable

matter in the cellars; that the sanitary police was called upon from time to time and required defendant to move, change and repair, and he was very slow in doing it. But there was no testimony that the plaintiff suffered anything by a diminution of rents or the plaintiffs failed to rent the premises, and no testimony as to the cost of any repairs, and none as to any damage done to the walls of the building.

We suppose the rule of damages to be this: that where the injury complained of is to the person—the reputation or feelings of the individual,—or where it is injurious to the health, it is not necessary to prove damages in dollars and cents; it is sufficient to prove the facts causing the injury, and it is for the jury in their discretion, being men of experience and judgment, and having knowledge of these matters, to estimate and fix the damages according to the injury which the parties have sustained.

In this particular case, if the action had been brought by the occupants as occupants, by the persons in possession who in fact suffered injury, then the proven facts would be a sufficient foundation for a verdict, and the jury in their discretion could award damages as they saw fit, and their finding would determine the amount.

In the present case the action is brought not by the plaintiffs in their relation as occupants and sufferers, but as *owners of the premises*. They allege that they were *owners* of the premises and bring suit to recover such damages which they sustained as *owners*. They have not brought suit for damages as an occupant might sustain by reason of such a nuisance. As owners of the premises the measure of damages would be whatever injuries they sustained as owners, in the diminution of rents, in the failure to rent the same, for injury to property, or for the cost of repairs. And only as such damages are proven, could they as owners recover against defendant. The authorities which recognize this distinction are numerous: *Pike & Co. v. Doyle & Co.*, 19 La. Ann., 362; *Frank v. R. R. Co.*, 20 La. Ann., 25; *Woods on Nuisance*, sec. 853; *Worcester v. Mfg. Co.*, 41 Me., 159; *Francis v. Shrockhoff*, 53 N. Y., 155; *Jutte v. Hughes*, 67 N. Y., 267; *Emory v. Lowell*, 109 Mass., 197.

It seems to us therefore under the authority of these cases that there was no evidence before the jury warranting the verdict for damages which the plaintiffs allege they have sustained by reason of their ownership of the property, and the verdict was erroneous, as to the amount of damages recovered.

However, the injury itself had been clearly proven to the satisfaction of the jury, and the plaintiffs were entitled to nominal damages. If plaintiffs below desire a judgment for nominal damages, for the purpose of establishing their right to a perpetual injunction, and will enter a remittitur, then a verdict will stand for nominal damages; otherwise the case will be reversed and remanded to the court of common pleas for a new trial.

Baker & Goodhue, for plaintiff in error.

J. H. & J. A. Clemmer, *contra*.

TAXATION IN CINCINNATI.

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[Hamilton District Court.]

†STATE EX REL. MCCARTHY V. JOSEPH BREWSTER, AUDITOR.

1. Under sec. 2689, Rev. Stat., as amended, 80 O. L., 128, the rate for all purposes of taxation in Cincinnati, above the state and county tax and taxes for Southern Railway, cannot exceed in any year, including the levy by the board of education for schools and school-house purposes, sixteen mills on the dollar of taxable value.
2. Where the levy certified to the county auditor by the board of education, under sec. 3960, Rev. Stat., and the levy certified by the common council under sec. 2691, in the aggregate exceed sixteen mills on the dollar of the valuation of taxable property in the city, mandamus will not lie against the auditor to put the levy of the board of education on the tax duplicate; the aggregate being in excess he can not be compelled to put on one part more than the other.

AVERY, J.

The petition alleges in substance that the estimates for levy, certified to the county auditor by the board of education of Cincinnati, are at the following rates upon the taxable property of the district, embracing more territory than the city proper itself, that is to say: for schools and school-house purposes, four mills; for school library, one-tenth of a mill; and upon the taxable property of the city, for astronomical observatory, three hundredths of a mill; and for university sinking fund, one-tenth of a mill; all of which the auditor refuses to assess and enter on the tax-list, for the reason that the common council of the city by ordinance duly certified to him has levied on the real and personal property, within the city, subject to taxation, twelve mills and seventy-six hundredths; and that, with said estimates of the board of education, this exceeds sixteen mills on the dollar of taxable value, to which he claims the aggregate levy is limited by the act of April 16, 1883, 80 O. L., 128. The prayer is for a mandamus. The auditor demurs.

The only question is whether the levy for schools and school-house purposes must be included within the aggregate of sixteen mills, at least, the auditor makes no other question; and except as to the relation of the other levies of the board of education to the school levy itself, there is no other question.

The aggregate limit of sixteen mills is fixed as follows: Section 2689, Rev. Stat., as amended, 80 O. L., 128: "The aggregate of all taxes levied or ordered to be put upon duplicate, above the tax for county and state purposes, including the levy for general purposes and the tax for schools and school-house purposes, and for hospital purposes and other special purposes in cities of the first grade of the first class, shall not exceed in any one year sixteen mills on each dollar of the value of any property as valued for taxation on the county tax list." It would seem that language could not be plainer, that the school levy was included, for the very words are, "including the levy for general purposes, and the tax for schools and school-house purposes." But the argument of counsel is, that the limitation is only upon the municipality itself, and that the board of education is a different body exercising distinct powers. The last half of the proposition may be conceded, but

†The Supreme Court allowed the peremptory writ of mandamus prayed for October 28, 1884. No further report of the case was made.

upon the other, the words of the limitation are to be observed. It is not upon the aggregate of taxes levied by the city, but in the city; and it is "including the tax for schools and school-house purposes." True, by the same general enactment, 80 O. L., 124-129, amendatory of sec. 3958, and supplemental to chapter 1, division 9, title 12 of the Rev. Stat., the board of education was to report its estimates for school levy to the city comptroller, and he and the board of tax commissioners and the common council were to revise them, "so as to bring them within fair limits to the other expenditures required by the city;" and the levy was to be certified to the auditor by the common council. See *State v. Brewster*, 39 O. S., 653, 656, Okey, J. And it is true, again, that this was repealed by the legislature at its last session, 81 O. L., 177, and that now the estimate and levy are certified by the board of education to the auditor, without being subject to any supervision of the comptroller, the common council, or the board of tax commissioners. But we are unable to see why the words, "tax for schools and school-house purposes," shall not have the same meaning now, as when the estimate was reported by the board of education to the city comptroller, and, after the revisions required was certified to the auditor by the common council. There has been no change in the nature of the tax. It was included within the sixteen mills aggregate by the amendment of sec. 2689. As the section stood before the amendment, twelve mills was the limit of the aggregate to be levied or ordered by the municipal corporation, excluding the tax for schools and school-house purposes, then limited to the maximum of five mills, but now to four. In *State v. Brewster*, 39 O. S., 653, 658, speaking of the amendment, it was said, Okey, J.: "Aside from taxes for state, county and Cincinnati Southern Railway purposes, the rate for all purposes including schools, cannot exceed sixteen mills in any year." This still stands without change. The legislation having for its object the adjustment, through the tax commission, of the sixteen mills aggregate has been repealed; but sec. 2689, as amended, fixing that aggregate remains. The intention of a law upon its enactment, being once ascertained, must continue the same until a new enactment.

It is urged again, however, that by freeing the estimates of the board of education from the revision of the common council and tax commissioners, as was done at the last session of the legislature, the board of education is left independent of any limit but that contained in sec. 3959, Rev. Stat., as amended, 81 O. L., 178, that is to say: "Such estimate and levy shall not exceed, in cities of the first grade of the first class, three and one-fourth mills; provided, however, that the boards of education in said cities may levy one mill additional for every five thousand pupils over and above twenty-five thousand enrolled in the public schools of said cities, which levy, however, shall in no case exceed four mills."

The argument, as we understand it, is that the levy made by common council being alone subject to revision by the tax commissioners, the levy of the board of education, to the limit of four mills, is to be left to the discretion of that board, and must be placed by the auditor upon the duplicate, leaving the common council and the tax commissioners to reduce their levy to what may remain of the aggregate of sixteen mills. But the levy of the common council is no less in the discretion of that body than is the school levy in the discretion of the board of education. If the one is independent, the other is equally so. The provision as it once stood, for revision by the board of tax commissioners, so as to bring the levies "within fair limits," 80 O. L., 127, sec. 2690i, had the effect of

creating a common arbiter between the two. This is now repealed as concerns the board of education. 81 O. L., 177. But the result is not to prefer that levy to the levy by the common council. Each has been left, as must always be the case with conflicting interests, where the common arbiter is withdrawn, to mutual accommodation and adjustment, in the confidence which, from the state of the law, it must be assumed the legislature possessed, that public boards and bodies, although independent, would each discharge its particular function so as to conform to the general interest of the whole. That the aggregate levy in the city of Cincinnati, above the tax for state and county purposes and the Southern Railway, should not exceed sixteen mills on the dollar, is the legislative understanding of the general interest of the whole.

The limit of four mills, upon the levy by the board of education, is of no more significance than that of four and a half mills, upon the levy for general purposes by the common council. It is in the nature of prohibition and not of authority. And if an argument is to be derived from a limitation of discretion, the argument must be stronger where discretion is left unlimited, as it has been left with respect to several of the objects of the levy by the common council, subject only to the aggregate of sixteen mills. It is possible for each body to levy to the limit of its own discretion, as it has been possible, now, for the levy made by each to exceed in the aggregate the limit fixed by law, but whether the levy shall be placed on the tax duplicate, is a different question. The duty of the auditor, as prescribed by sec. 8960, Rev. Stat., is to assess and enter upon the tax-list the amount certified by the board of education; but by sec. 2691, it is equally his duty to place on the tax-list the percentage certified by the common council. The aggregate "levied or ordered to be put upon the grand duplicate * * shall not exceed in any one year sixteen mills" (sec. 2689); and here it is sixteen mills and seventy-six hundredths. Mandamus would certainly not lie against the auditor to put this aggregate upon the duplicate. It is a process that can be used to compel only that which the law specially enjoins as a duty; and the right to the performance of the duty must be clear. *State v. Cappler*, 39 O. S., 455. It is not the duty of the auditor to do an illegal thing, and since the same objection would remain, if put upon the duplicate as before—a vain thing. And it is no more his duty to put upon the duplicate one part of the aggregate than the other.

In the consideration of the case no attention has been given to the relations involved between the other estimates of the board of education, as for the library, the astronomical observatory, the university sinking fund, and the school levy itself, nor to the question argued on behalf of the trustees of the university, that the levies for its purposes should be placed upon the duplicate, as entitled to preference, and to be levied at all events, whether in addition to the school levy, or as part of it, or as included in the aggregate of sixteen mills. Mandamus is a single writ. It is defined by the statute as a writ issued in the name of the state, commanding the performance of an act which the law specially enjoins as a duty—one act and not several, except as in connection with the same duty. Upon demurrer to a petition for mandamus, the duty sought to be enforced must be taken, we think, to be the same; and where the writ will not lie for one part, as here it will not for the levy of schools, the court can not, as it seems to us, be required to consider whether it may lie for other parts. The writ of mandamus originally, at least, was a discretionary writ, and it would not be an unfair exercise of discretion, we

think, to leave those questions to wait until a separate application is made.

The demurrer is sustained and petition dismissed.

D. Thew Wright, for relator.

Wm. Worthington, for University Board.

Otway Cosgrave and M. F. Wilson, for defendant.

J. M. Dawson, for City of Cincinnati.

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BASTARDY.

[Hamilton District Court, May 22, 1883.]

JOHN BRISCOE v. ANNA REED.

It is no defense to a proceeding in bastardy that the complainant was a married woman, if the said marriage was void.

ERROR to the Court of Common Pleas.

The plaintiff, defendant in error, commenced proceedings in bastardy against John Briscoe. The case was tried before a judge and jury. A verdict was given for the plaintiff and judgment entered thereon. A motion for a new trial was made and overruled. A bill of exceptions was taken to this court.

A. J. Pruden, for plaintiff in error, cited: Section 5614, Rev. Stat., Ohio; 1 Blackstone Com., 454; 2 Kent Com., 208; Haworth v. Gill, 30 O. S., 627; Edwards v. Knight, 8 O., 375; as to what is a bastard child.

Sections 4175, 5689, Rev. Stat., Ohio; Haworth v. Gill, *supra*; Carmichael v. State, 12 O. S., 553; on the question whether the marriage was legal in Ohio.

As to the case of the State v. Moore, 3 W. L. J., 144, the law has since been settled in Carmichael v. State, *supra*, and Haworth v. Gill, 30 O. S., 627.

Amos Dye, for defendant in error: The only question presented is, was the marriage of Anna Reed to William Valentine, void or voidable? Valentine had a wife living at the time he married Reed. He was convicted of bigamy for marrying the said Reed, and she had nothing to do with him since his return from the penitentiary. In Swan's Treatise, 596, it is said that in a prosecution for marrying two wives, the second wife is a competent witness, provided there is no proof of the legality of the first marriage, because the second marriage is totally void. The courts of Ohio have not changed the common law. 1 Blackstone Com., 436; 2 Kent Com., 79, 96. In State v. Moore, 1 Dec. R., 170, (see 3 W. L. J., 134), Judge Swan held that the authorities were clear, that the second marriage was void. If the courts held differently, viz: that the marriage was only voidable, Anna Reed could affirm her contract, and look to the said Valentine for support.

SMITH, J.

The only defense urged in this court is, that at the time the proceedings were commenced, the plaintiff was a married woman.

Our statute, sec. 5614, Rev. Stat., does not permit proceedings in bastardy, except where the complainant is an unmarried woman.

It is admitted by the plaintiff that she had been married, but it is said that the man to whom she was married, had another wife living at the time of his marriage to her, and he had been tried and convicted of the crime of 'bigamy. If that were so, then this marriage was void—a nullity—and could be treated in that court or any other court as no marriage at all. *Smith v. Smith*, 5 O. S., 32; *Patterson v. Gaines and wife*, 6 How. (U. S.), 550; *Armory v. Armory*, 6 Robertson, 514; *Robbins v. Potter*, 98 Mass., 532; 1 *Bishop on Marriage and Divorce*, sec. 300. It is claimed, however, on behalf of defendant, that in Ohio, the marriage was voidable and not void; that one ground of divorce is, "that either party had a husband or wife living at the time of the marriage, from which the divorce is sought;" and also, that the issue of parents, whose marriage is deemed null in the law are legitimate; and that these provisions in our statute would not exist if the marriage was wholly void. Though the fact of having another wife or another husband living, is a ground of divorce, the reason is well stated by Swan, Ch. J., in *Smith v. Smith*, *supra*, viz: that it may often be difficult for an innocent party to prove the previous marriage, and it is desirable to have the judgment of the court in a case of divorce as evidence of the status of the party, and also that the wife, if an innocent party, may have alimony where the circumstances may justify it.

And the children are made legitimate notwithstanding the marriage is void, out of consideration of tenderness towards them, that they may not suffer by reason of the guilt or misconduct of their parents. 1 *Bishop on Marriage and Divorce*, sec. 300.

The plaintiff's marriage being void by the law of Ohio, could be treated by the trial court as no marriage at all, and therefore the plaintiff came within the definition of the statute of being an unmarried woman.

Judgment affirmed.

PERSONAL INJURIES.

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[Hamilton District Court.]

MARGARET FERRELL v. C., H. & D. R. R. Co.

1. In an action against a railroad company for injuries to a passenger alighting from a railroad car by being struck by a bag thrown from the baggage car, a charge that "if it was somebody employed in the postal service of the United States, or somebody in the service of the express company that did it, then the government or the express company and not the defendant would be liable," is erroneous.
2. Where there was a rule of the company that an express car should be unloaded outside of the depot and not in the depot, a violation of that rule by an employee of the express company would be an act for which the railroad company would not be liable.
3. A charge that "until plaintiff had left the depot, she remained a passenger and defendant owed her the degree of care due to passengers," properly refused.

ERROR to the Superior Court of Cincinnati.

SMITH, J.

The action was brought by Margaret Ferrell v. The C., H. & D. R. R. Co., to recover damages for a personal injury which she sustained as a passenger after having alighted from the cars in leaving the depot, and

which she claims was caused by the negligence of his, defendant's, servants. The answer was a general denial of the material allegations in the petition. The case was tried before the court and jury, and a verdict rendered for the defendant. Judgment was entered upon the verdict. The exceptions arise on the charge of the court to the jury. The evidence is not reported, except for the purpose of showing the materiality and propriety of the charges given and refused.

The plaintiff offered testimony tending to show that she had taken passage at Hamilton, in the month of October, 1881, and arrived at Cincinnati about 7 o'clock in the evening, the usual time of the arrival of that train; that after leaving the car, in going through the depot by the usual place of exit for passengers, and using due care, she was struck by a bag thrown out from the baggage car which she states was either a bag of corn or coffee, and quite severely injured.

Defendant offers testimony tending to show that the baggage car consisted of two parts, one for the baggage used by the railroad company, and in charge of the baggagemaster of the train, and the other half used by the United States Express Co., for the carriage of express matter, which was in charge of the express agent of the United States Express Company, and that neither the servants of the railroad company nor its employees had any control over that portion of the car or its contents, which was used by the express company. It also offered testimony tending to show that the United States mail was carried on another car, and the mail was in charge of the regular mail agent over whom the company had no control.

It also offered testimony tending to show that it was the rule not to unload the express car in the depot, but it was unloaded outside the depot. There was no evidence tending to show that the injury was caused by anything thrown out from the postal car.

The court, in its charge, after stating generally the duty of defendant and the degree of care required of the defendant, and that to subject the defendant to liability, the injury must have been caused by the defendant's servants and employees, said, "if it was somebody employed in the postal service by the United States, or somebody of the United States Express Co., that did it, then the government or the express company and not this defendant would be liable. This defendant is liable only in case its servants or employees injured the plaintiff." To this part of the charge given by the court, the plaintiff excepted.

We think as to what is said about the postal service, there is nothing here to the prejudice of the plaintiff. There was no evidence at all of any injury by any employee of the postal service; all the plaintiff's testimony negatives it.

Then follows: "Or somebody in the service of the United States Express Co. that did the injury, then the government or the express company, and not this company would be liable."

We think the railroad company owe a duty to its passengers to take proper precautions to protect them from the acts of other persons in the railroad depot which is under its control; and if it permits the express company to unload its freight and merchandise in the passenger depot where passengers are expected to pass, and where it is necessary for them to pass in making their exit from the cars in the depot, then it is incumbent on it to provide such rules and regulations as to reasonably and properly protect them.

Therefore, as an abstract proposition it might be said that this charge, as given by the court, is not precisely the law. It ought to be qualified or limited so that whatever the railroad company permits to be done by third persons in a depot, within its control, it should also guard that in such employment its passengers are not unduly exposed to danger. *Welfare v. Brighton R. R. Co.*, 4 L. R. (2 B.), 693; *Smith v. Great Eastern Railway Station*, 2 L. R. (Com. P.), 4; *Byrne v. Boadle*, 2 Hurl. & C., 722; *Beard v. R. R. Co.*, 48 Vt., 101.

Yet when we apply the charge to the evidence as reported in this case it appears that there was no want of proper precaution by the railroad company in regulating the employment of the express company. The evidence seems to be positive that it was the rule of the company that the express car should be unloaded outside the depot and not in the depot where the passengers passed in going to and from the cars. If such were the contract or general rule between the railroad company and the express company, the violation of that rule by an employee of the express company would be an act for which the railroad company would not be liable, no more than for the act of a stranger. Having provided reasonable rules for the protection of its passengers, the railroad company would not be liable for the violation of those rules by a stranger. Railroad companies are not insurers of the safety of passengers; they are bound to exercise a high degree of care, but are not liable for the acts of strangers.

We think, therefore, that if this charge is construed with reference to the testimony as it appears upon the bill of exceptions the plaintiff below is not prejudiced.

The other ground of exceptions is as follows—I read from the bill of exceptions: "After the jury had left their seats and were entering their room, but before the door thereof had been closed, counsel for plaintiff asked the court to charge the jury that until plaintiff had left the depot she remained a passenger, and defendant owed her the degree of care due to passengers, which the court refused to do, and counsel for plaintiff excepted to such refusal."

Undoubtedly the law requires a high degree of diligence not only in the transportation of passengers, but also in furnishing an opportunity for approaching and leaving the cars for that purpose. *Cooley on Torts*, 645, and cases there cited; also *Burney v. R. R. Co.*, 68 N. Y., 526, and *South R. R. Co. v. Hendrick*, 40 Miss., 374, though this is somewhat qualified in the cases found in *Thompson on the Liability of Carriers*, 104.

But the charge as asked is indefinite and the court had the right to refuse it.

The court is not bound to qualify a charge asked, nor to modify it where it is indefinite or uncertain as to its terms.

Here the language tends to mislead the jury unless qualified.

She asks the court to charge that "until plaintiff had left the depot she remained a passenger, and defendant owed her the degree of care due to passengers."

It does not state what that degree of care is, and there is nothing in the general charge showing what that degree of care is.

The court is not bound to qualify or add to a special charge to make it good law, and then give it.

We think the charge as asked would tend to mislead, and was properly refused.

Judgment affirmed.

Jordan, Jordan & Williams, for plaintiff in error.

Ramsey & Matthews, for defendant in error.

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REVERSAL OF JUDGMENT.

[Hamilton District Court.]

THE CELTIC BUILDING ASS'N V. JOHN REGAN.

A reviewing court cannot reverse a judgment on the ground that it is against the law of evidence, unless there has been a motion for a new trial on that ground, the motion overruled and an exception taken to the overruling the motion. Nor can this motion be dispensed with though there is what purports to be an agreed statement of facts, if that agreement consists merely of what the evidence is and set forth in a bill of exceptions.

ERROR to the Court of Common Pleas.

The action below was brought by John Regan, a depositor in the Celtic Building Association, according to the constitution and by-laws of that association, to recover the amount of his deposits and interest.

He claimed that under the 13th article of the constitution, he was entitled to recover whatever money he had deposited and also interest upon the same. The defendant denied that he was entitled to interest on the deposits for the first year, and there being a dispute between the parties as to the amount to be paid, a certain amount was agreed upon to be paid as a full settlement, which was paid to him and he gave his receipt therefor, but after the settlement was agreed upon and he had signed his name to the receipt, he added to his name the words, "under protest."

The court below gave judgment for the plaintiff. To review the finding of fact and also to get the opinion of this court upon the proper construction of the 13th article of the constitution, this petition in error was filed.

SMITH, J.

The rule is imperative that a reviewing court cannot reverse a case upon the ground that the finding is against the law and evidence, unless there has been a motion for a new trial on this ground, the motion overruled and an exception taken to the overruling of the motion. In this case no motion for a new trial was made. But it is claimed that the parties have an agreed statement of facts. If that be so a motion for a new trial was unnecessary.

An agreed statement of facts is equivalent to a finding of facts by the court or special verdict of the jury. The facts are found, and nothing remains for the court except to pronounce the law upon the facts as found. But there is sometimes what is called an agreed statement of facts which is only an agreement of what the evidence is, which may be embodied in a bill of exceptions, and if properly embodied, and there is a motion for a new trial, the case may be heard like any other upon the evidence, though the evidence is made up by the agreements of the parties.

What purports to be an agreed statement of facts in this case is really an agreement of what the evidence is. It is entitled, "an agreed statement of facts," but to this agreement is attached all the evidence, viz: the statement of the secretary of the association, certain exhibits, the printed constitution, the receipt of Regan for the money paid him, and other statements, all proper, to be received as evidence agreed upon by the parties, but still only an agreement of what the evidence is. This distinction between what is an agreed statement of facts, and what is an agreement upon facts as evidence, is well stated in two cases decided by our Supreme Court: *The Bank of Virginia v. The Bank of Chillicothe*, 16 O., 170, and *The Clinton Bank of Columbus, etc., v. Ayres & Neil*, 16 O., 283.

In one of these cases there was an agreed statement of facts such as the law requires, and nothing remained except to pronounce judgment. In the other there was an agreement of what the evidence was, and the court below held that that could not be considered because no motion for a new trial had been made. One was an agreement upon the evidence, the other the result of the evidence, like a special verdict or special finding of the court.

These two cases, though decided quite early in the history of our Supreme Court, are referred to and approved in the case of *McGonnigle v. Arthur*, 27 O. S., 251. In the case at bar, there being simply an agreement of what the evidence is, and no motion for a new trial, we are not at liberty to consider the evidence, and therefore the judgment must be affirmed.

C. E. Callahan, for plaintiff in error.

Davidson, Conway & Gabler, *contra*.

RATIFICATION OF MARRIAGE.

237

[Cuyahoga Common Pleas]

VERNON V. VERNON.

The consent of parents is not essential to the validity of a marriage by parties under age when it has been ratified by the parties cohabiting together after arriving of age.

JONES, J.

This is a proceeding for a divorce or, more accurately speaking, for a judicial finding that the alleged marriage between the plaintiff and the defendant was, in fact, null and void, for the reason that the plaintiff at the time of entering into it had not the capacity to make a marriage contract or to enter into the marriage relation by reason of being at that time under eighteen years of age. In his petition he set forth that he was married to the defendant on August 9, 1880, when he was not eighteen years of age, and he soon after left her, and has not lived with her at any time since. The evidence disclosed that the plaintiff was born September 11, 1862, was married on August 9, 1880, without any consent on the part of his parents, and they lived together as husband and wife for about eight months, which would be about seven months after he was eighteen years old.

The statutes of Ohio provide that "male persons of the age of eighteen and females of the age of sixteen years * * * may be joined in marriage, provided always that male persons under the age of twenty-one years and females under eighteen shall first obtain the consent of their fathers respectively, or in case of the death or incapacity of their fathers, then of their mothers or guardians."

The statutes also provide heavy penalties against ministers who shall solemnize marriages contrary to the provisions of the statutes; and against probate judges who shall issue licenses therefor unlawfully, but there is no provision that marriages contracted in defiance of the statutes shall be void by reason thereof. On this state of things I shall hold the following propositions:

First—That it is competent for a court of equity to hear and determine the question whether or not an alleged marriage is void for want of capacity to make it, although such want may not be a statutory ground of divorce. *Waymire v. Jetmore*, 22 O. S., 271; 4 *Johnson Ch.*, 348; 1 *Bishop*, 136.

Second—Marriages in this state by male persons under eighteen years of age, or by females under the age of sixteen years are void unless ratified after the age of consent. 20 *Ohio*, 1.

Third—There was in this case a complete ratification of the marriage by the parties living and cohabiting together as husband and wife for seven months after the plaintiff had become eighteen years old. That a void marriage may be ratified and so ratified is sustained by numerous authorities. 1 *Bishop on Marriage and Divorce*, 140-150; 1 *McArthur*, 630; *Shaffer v. State*, 20 *Ohio*, 1; 6 *Nevada*, 63.

Fourth—The consent of the parents is not essential to the validity of the marriage when it has been ratified by the parties after arriving at the age of consent. By the common law, if the parties themselves were of the age of consent there was wanted no other concurrence to make the marriage valid.

The object of the statutes of Ohio requiring the consent of the parents before the specified age is to prevent marriages by serious penalties for solemnizing them, but not to absolutely invalidate them after they have been solemnized without such consent. 8 *Marshall, Ky.*, 370; 1 *Bishop*, 293; 6 *Halstead*, 20; 6 *Nevada*, 63; *Carmichael v. State*, 12 O. S., 553; *Reeves, Domestic Relations*, 196, 290; 5 O. L. J., 126.

I hold, therefore, that the marriage in this case is a lawful and binding marriage on both the parties, and that it cannot be annulled or a divorce decreed on the application of either party on the ground of want of capacity to contract, and the petition must be dismissed.

NEW TRIALS.

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[Hamilton District Court.]

MARY J. YOUNG, ADMX., V. CAROLINE E. LANGDON.

1. Judgment against an administrator will not be reversed for error in permitting the adverse party to testify; no objection being made to such testimony at the time, and there being enough to support the judgment without it.
2. Where there is no exception taken to the charge to the jury, but motion for new trial on the ground that the verdict is against the law, is made and overruled, error will not lie for misdirection in the charge, unless it be reasonable to suppose, upon the entire case, that but for the misdirection the verdict would have been different.

ERROR to the Court of Common Pleas.

The judgment by the court of common pleas was for \$1,040, alleged to have been loaned by the defendant in error to the deceased in his lifetime.

The money, it was admitted, was drawn from bank by him upon a check made by her to his order; but the defense was that it was the proceeds of a policy, which had been assigned to him on the life of her husband but had been collected by her, the company not having notice of the assignment. The answer alleged that the assignment was in consideration of advances by him, for support, and for premiums on other policies kept up for her benefit on the life of her husband.

The evidence was that there had been advances, although the amount was not shown, and that there was a written assignment of the policy, signed by her and her husband; and that the amount of the policy, \$1,040, was identical with the amount of the check, and had been collected by her a few days before the date of the check. But her sister, the only witness to the giving of the check, she herself being incompetent against the administratrix, testified, that Williams came to the house, and wanted to know of defendant in error if she had squandered all the insurance money she had received, and whether she could loan him some of it; to which she answered, he could have what he wanted, and to draw up a check, which he did and she signed it.

AVERY, J.

Peculiar as was this transaction, we cannot say that it is not intelligible, in view of the relations between the deceased and the family of his half-brother. He was a man of means and had befriended them; the confidence displayed, in letting him fill up the check for any amount he wanted, was not unreasonable. At all events, it was a question for the jury. The witness was the only one to the transaction. There was nothing to conflict with her testimony, but the suggestion as to probabilities, and the coincidence between the amount of the policy and the check. This necessarily must have been passed upon by the jury, in determining the credit due to her testimony; and the trial court having entered judgment upon the verdict, we should not be warranted in setting it aside.

Upon the question of the assignment of the policy, a witness testified that the wife had expressed to him her acknowledgments for what had been done for the family, by the deceased, and wanted to know if the deceased had any security except the policy. The witness, however,

upon reflection was not certain whether she said this, or whether he himself first mentioned it. In rebuttal she denied having said so, and then went on, without objection, to testify that, although she signed the written assignment of the policy, she did not know, until this suit had been brought, what it contained. It is contended that the testimony was incompetent, and the remark of Judge Gholson, in Brown's case, 1 Handy, 18, is cited, that it might well be the duty of the court to reject the testimony of a party offered against an executor or administrator, even without objection made.

The language was, with respect to the duty of the trial court; but if it were true as well of a reviewing court, the only result would be to reject the testimony. This being done, there would still be enough to support the verdict. It was not error, certainly, to permit the witness to go on, no one objecting.

The charge of the court consisted of the following propositions, in substance: That the check was testified to be a loan, but that if from a preponderance of evidence the jury found that it was in fact a payment to Williams of his own money, they should find for the defendant: That the written assignment, if so intended, would be valid to transfer the policy, but if procured to be signed, in ignorance of its contents, would be void: That the burden of proof was upon the defendant to make out the assignment. It may be questioned, whether the burden of proof shifted from the plaintiff to the defendant, at any stage of the case, since throughout it was upon the plaintiff to make out the fact of the loan. But there was no exception to the charge; only a motion for a new trial overruled.

Taking the charge and the evidence together, the point is not one upon which, if differently instructed, the jury might reasonably have been expected to render a different verdict. *M. & C. R. v. Strader*, 29 O. S., 448, 452.

Upon the motion for a new trial, an additional ground was newly discovered evidence. But error can not be assigned for this, no abuse of discretion appearing. *Smith v. Bailey*, 26 O. S., 1.

Judgment affirmed.

Bellamy Storer, for plaintiff in error.

Lowe (of Dayton) and Jno. Johnston, for defendant in error.

†CINCINNATI (CITY) v. JOHN L. WHEATSTONE ET AL.

1. During the progress of the work of changing the established grade of the street in front of the mill of W., the premises were rendered less convenient for storage, and additional labor and expense was imposed upon the proprietor and owner in getting material used in his business to and from the street: *Held*, that where a change of an established grade in front of a lot of ground, upon which improvements have been constructed in the faith that the grade would not be changed, injuriously affects the premises; the act of the corporate authorities is in the nature of a "taking" of the interest of the owner in the property, and compensation must be made.

†This judgment was affirmed by the Supreme Court; see opinion, 47 O. S., 196. The latter is cited in *Cincinnati v. Longworth*, 48 O. S., 637, 647.

2. The rule of damages in such case is the difference in the value of the property as a whole, and not for injury to or suspension of trade carried on upon the premises.

ERROR to the Court of Common Pleas.

This was an action brought against the city of Cincinnati to recover damages, alleged to have been sustained by the defendants in error, by reason of a change of grade in Eighth street, in front of their property. The grade of Eighth street having been raised several feet, under an ordinance of the common council of date—
—, 187—, the defendants in error claim that before that time they had owned and were possessed of valuable and permanent improvements, consisting of a brick linseed oil mill with the necessary fixtures and machinery thereon, which had been built before in conformity with the then established grade of Eighth street at a great cost, with machinery propelled by water power, which cost was expended and said mill, fixtures and machinery therein were constructed and used in the faith that the grade would not be changed.

That the said city of Cincinnati had graded and paved said street to the established grade prior to 1872, and that the same was in use as a public highway and furnished the means of convenient access to said improvements, which were constructed in reference thereto.

The plaintiffs in their petition stated several causes of action and sought to recover.

1. The sum of \$2,159.50, the cost of the construction of a retaining wall in front of their premises to support the earth which would otherwise have fallen against the walls of the buildings.

2. For the depreciation in value of their said improvements in the inconvenience of their use, in addition to money expenditures during the lifetime of J. S. Whetstone.

3. For great trouble and expense in the conduct of their business, in this, that for nearly twelve months, while the actual work of changing grade was going on, they were compelled, at a cost of \$1,605.50 to store linseed in the canal elevator, which they at other times stored in their own building.

4. An amount between \$700 and \$800, the cost of additional labor rendered necessary in the prosecution of their business, solely caused by the change of grade and the difficulty of doing business while said street was undergoing the change.

5. The sum of \$148.48, the cost of a new sidewalk in place of the one destroyed by the change of the grade.

6. The sum of \$143.23 for brick and carpenter work in constructing exits from the said mill to the street upon the new grade.

The city of Cincinnati filed a general denial and upon that issue the cause was submitted to the jury. The court instructed the jury that they might state specially in their verdict the amount of damages, if any, for the cost of storage and drayage of flaxseed used in their business in the canal elevator, during the time of the change of grade, or by the embankment in front, and for the additional cost to the plaintiff of the labor necessary in getting their supplies into the mill and the manufactured products out to the top of the fill while the work was in progress. The jury returned a special verdict for \$10,584.96, of which sum they awarded \$1,100 for storage and drayage, and \$621.85 for additional labor as aforesaid, and the sum of \$4,000 for depreciation in the value of the improvements.

I. Rhodes v. Cleveland, 10 O., 160; Akron v. McComb, 18 O., 229; Crawford v. Delaware, 7 O. S., 460. The case of Rhodes v. Cleveland, *supra*, was distinguished in Dayton v. Pease, 4 O. S., 80; Western College v. Cleveland, 12 O. S., 375, and Cincinnati v. Penny, 21 O. S., 499. The case of Cincinnati v. Penny, *supra*, is one of the line of cases that support the case at bar, and while it is admitted that without those cases the weight of authority in other states, and in England, preponderates against any recovery whatsoever, such is not the law in this state. Youngstown v. Moore, 30 O. S., 133; Akron v. Chamberlain, 34 O. S., 328.

II. As to the question of the extra expense for labor to which the defendant in error was put by and during the making of the fill, we think this stands upon the same ground. In our view the city was acting in a capacity precisely analogous to that of the railway company in Carman v. S. & I. R. R. Co., 4 O. S., 399, in which a railway company had employed a contractor to build a stretch of road, in the prosecution of which work it became necessary to remove certain beds of rock of blasting. This blasting threw quantities of stone upon the plaintiff's road to his dam-

age, for the recovery of which he sued the railway company. The railway company was held liable.

III. There is nothing speculative or uncertain in the damages. They are legal consequences of the fill.

MOORE, J.

The two points in controversy arising upon the exceptions of the city, under the right of the plaintiffs to recover as a separate and distinct damage, were the two items, to-wit: First, the storage and drayage, and second, the cost of additional labor in the prosecution of business, during the continuance of the work of changing the grade.

The liability of the city to the plaintiff for the resulting damage by the change of grade, under the circumstances stated, is not disputed, but the difficulty arises out of the rule adopted by the court below, as the measure of damage to be awarded the plaintiff. The statute of this state does not provide in express terms for an assessment of damage to the improvements of adjoining property owners in case of change of an established grade, as in some other states, yet an inquiry is contemplated. Section 563, 4-75, M. C., and the Supreme Court has settled beyond question the right of an adjoining or abutting property owner to compensation for a substantial injury to his buildings by the change of an established grade. *McCombs v. Akron*, 15 O., 474; *Id.*, 18 O., 229; *Crawford v. Delaware*, 7 O. S., 460; *City v. Penny*, 21 O. S., 499.

In the case at bar the improvement made by the city was of a permanent nature. Under corporate authority the city exercised a right which carried with it no liability to the property owner, unless the improvement caused an injury to the plaintiff, which justice would require the community to bear instead of the individual. In carrying on the work of improvement the city so changed the street in front of the plaintiff's buildings as to render their occupancy, especially in the lower stores, less desirable and convenient for storage of certain articles, and that it became necessary to employ additional labor to get to and from the street in and about the business conducted on the premises. These things are merely inconveniences growing out of the conduct of a business. In themselves they may make up and enter into the estimate of any reasonable person, in estimating the value of a building, for business or general purposes. If the plaintiff's property has suffered or depreciated in value, or has been injuriously affected, the plaintiff should be placed where he was before the improvement was made. The verdict of the jury gave the plaintiff damage to his business, for a period covering the interference by the work of changing the grade. The effect of the improvement in question was to render the buildings of the plaintiff less convenient for business during a temporary suspension of the full opportunity of reaching the highway, yet the real effect of the improvement was to change the situation of the buildings, from what they were upon the former grade to what it appeared to be in respect to the new grade. In this case the damage accrued to the plaintiff in his capacity of owner of an interest in the land and improvements thus injuriously affected. The business of the plaintiff is separable from the buildings. The business might cease or it might continue and not affect the owner's interest in the buildings. The city in constructing streets upon its own ground and in the exercise of its corporate authority is not chargeable with the safety of things which are temporary in their nature. The city controls the street and the property owner controls his buildings. The property owner's interest in the buildings is his right to have them remain in a permanent shape—to exercise a permanent or definite right in the lands. The act of the city is not a trespass, for it has the authority to determine the reasonableness of, and construct streets, and it has a continuing power to change the grades in the interest of the public, and if the landowner adjacent is affected, he is required to recognize the right of the public to go upon his property for a public and lawful purpose, the property owner's redress is in compensation in money for the injury as guaranteed by the constitution, so that the act of a city in changing an established grade in such manner as to render less valuable the adjacent improvements built in a way suitable to the established use, is an injurious act and is in the nature of a "taking" of a right of the property owner, for which compensation shall be made. It was held substantially in *Crawford v. Delaware*, 7 O. S., 459, that the alteration of a grade after the establishment, was an invasion of the private right of the lot owner, in the use of the street as an incident to his permanent erections. It is not a taking of property for public use in a constitutional sense—it is not corporally taken. It is a right taken from the property in the exercise of a lawful authority and in a way which lessens the value of the property as an

entirety, the public securing a benefit to the extent to which the property owner sustains a loss.

The current decisions outside our own state, except in some few states where statutory provision is made for compensation to an adjoining owner whose lands are not taken for consequential damage, or, as it is termed in England, "structural damage," as distinguished from an appropriation, deny the right to be compensated. So it is held in England that statutory provision creates the right, and the courts of this country have generally followed the English cases, not only as to the character of damages, but as to the measure of the same.

It is to be seen that there is authority for holding that the most reasonable and just view to take of the consequences of a public improvement, if it disturbs the adjoining owner, in the enjoyment of a guaranteed right, and places him in a different situation from what he was before the improvement was made, is, to ascertain the difference in the value of the property as a whole, to the extent of being injuriously affected.

Such is the tendency of the American cases. 31 Wis., —; 34 Wis., 98. Under the statute of Wisconsin damages are expressly provided for, and it was held that the owner of the lands, or building injured by change of the grade of an established highway, could recover for injuries to the land or building itself, and costs or charges necessary to restore the same to the former relative condition and usefulness, and *not* for injury to, or suspension of the trade carried upon the premises. *McCarthy v. City*, 22 Minn., 527; *Raton v. R. R.*, 51 N. H., 504; *Akron v. Chamberlain*, 34 O. S., 328.

In several instances in England, notably in the cases of *Rickett v. The Metropolitan Railway Co.*, L. R., 2 H. L., 175; and *Biggs v. Corp.*, L. R., 15 Equity Series, 376, the question of the right of an adjoining owner to recover for indirect injury to his business or trade, as an element of damage, by the interferences of a public work, authorized by an act of parliament, is denied, and in a more recent case arising as in the former case, under the Lands Clauses Consolidation Act, and for damages to trade and business by work under authority of Thames Embankment Act in the case of *Metropolitan Road, etc. v. McCarthy*, 7 L. R. Eng. & I. Appeals, (H. L.) 243, after a very exhaustive review of former cases, the Lord Ch. J., said (p. 253):

"Where by the construction of works, there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference the property, as a property, is lessened in value."

And one of the Law Lords, concurring in the opinion, said (p. 556): "It may be taken to have been finally decided that in order to found a claim to compensation under the acts, there must be an injury and damage to the house or land itself, in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade, or the good will of his business, although of such a nature that but for the act of parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it, and where by the construction of works authorized by the legislature, there is a physical interference with the right, whether public or private, which an owner of a house is entitled by law to make use of in connection with the house, and which gives it a marketable value, apart from any particular use to which the owner may put it, if the house, by reason of the works is diminished in value, there arises a claim to compensation."

We are of the opinion that the court below erred in rendering judgment for \$1,100 for storage and drayage, and \$621.85 cost of extra labor, as returned in the special verdict of the jury.

Judgment accordingly.

Kumler, Ampt & Warrington, for plaintiff in error.

Headly, Johnson & Colston and John F. Winalow, for defendant in error.

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INNKEEPER'S LIABILITY.

[Hamilton Common Pleas.]

JACOB W. LANG V. THE ARCADE HOTEL CO.

1. An innkeeper who has complied with sec. 4427, Rev. Stat., by having an iron safe and posting notices of the fact, is not liable to a guest for the loss by theft of jewelry and money, which the latter retained in his possession, in the absence of any proof of negligence on the part of the innkeeper or his servants.
2. The fact of the loss is not presumptive evidence of such negligence.

Long, Kramer & Kramer, for plaintiffs, claimed:

An innkeeper is bound to make restitution for the property of his guests whether damaged in his inn or stolen out of it by any person whatever.

It is not necessary to show it was stolen by a servant of the innkeeper. He must show force was used in the theft which he repelled and which was irresistible. *Bonnett v. Nellor*, 5 Term. R., 273; *Dumbier v. Day*, 12 Neb., 596; *Houser v. Tulley*, 62 Pa. St., 92, S. C.; 1 Am. Rep., 390; *Redfield on Carriers and Bailees*, sec. 596; *Pinkerton v. Woodward*, 33 Cal., 557; *Wash v. Porterfield*, 87 Pa. St., 376; *Sibley v. Aldrich*, 33 N. H., 553; *McDaniels v. Robinson*, 26 Vt., 316; *Piper v. Manny*, 21 Wend., 282; *Howth v. Franklin*, 20 Tex., 798; *Johnson v. Richardson*, 17 Ill., 302; *Mason v. Thompson*, 9 Pick., 282. When the fact of the loss having occurred within the inn is established, which devolves upon the guest, the burden of showing it to be within one of the exceptions, viz., that the loss arose from the negligence of the guest himself, the act of a companion guest or irresistible force rests upon the innkeeper. *Norcross v. Norcross*, 53 Me., 163; *Houser v. Tulley*, 62 Pa. St., 92; *Clute v. Wiggins*, 14 John., 175.

Proof that there was no theft or negligence on the part of the innkeeper or his servants where the property has been stolen is not sufficient for his immunity. He is responsible beyond the fidelity of his servants, and is responsible for safe-keeping—actually safe-keeping. *Shaw v. Berry*, 31 Me., 478; *Story on Bailments*, sec. 490; 2 Comstock, 209; see *Mercheson v. Sergeant*, 69 Ga., 206.

It is not necessary for a guest to prove negligence—nor will proof of want of negligence on the part of the innkeeper excuse him.

Theft is conclusive evidence of negligence and it makes no difference that the theft is unknown. *Mason v. Thompson*, 9 Pick., 280; 22 Hun., 38; *Shaw v. Berry*, 31 Me., 478.

A watch and chain is an article of wearing apparel, and is carried for personal use, and need not be deposited in the safe under the statute. *Ramaley v. Leland*, 6 Robt. (N. Y.), 358; *Maltby v. Chapman*, 25 Md., 310; *Bernstein v. Sweeney*, 33 N. Y., 271; 36 Barb., 70.

Printed rules of a hotel requiring "money, jewelry and other valuables" to be deposited, etc., in a safe in the office, do not apply to a watch and chain and charm, etc., which a guest usually wears on his person for his personal use. *Wilson's Ind. Rep.*, vol. 1, p. 119; *Milford v. Wesley*; *Pope v. Hall*, 14 La. An., 324; see also *Fuller v. Coats et al.*, 18 O. S., 343; *Krohn v. Sweeney*, 2 Daly, N. Y., 200; *Remaly v. Leland*, 43 N. Y., 539 (1871); *Taile v. Cardinal*, 35 Wis., 118.

Perry & Jenney, for defendants, claim:

The first act of this character, passed either in this country or in England, was enacted April 13, 1855, by the legislature of New York, and is entitled an act to regulate the liability of hotel keepers. N. Y. Laws, 1855, Ch. 421, p. 774, Banks & Bros. Rev. Stat. N. Y., p. 1282. The act is as follows:

"Whenever a proprietor or proprietors of any hotel shall provide a safe in the office of such hotel, or other convenient place for the safe-keeping of any money, jewels or ornaments belonging to the guest of such hotel, and shall notify the guests thereof by posting notice (stating the fact that such safe is provided in which such money, jewels or ornaments may be deposited), in room or rooms occupied by such guest, in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments sustained by such guest by theft or otherwise."

The first decision under this act was made in 1861 by the Supreme Court of New York in *Gile v. Libby*, 36 Barb., 70. In that case plaintiff, a guest at defendant's inn, was given a room with another guest. On going to bed he locked the door but did not bolt it. In the morning he found his companion gone, also his watch and chain, and a gold pencil and pencil case and \$25 in money. The defendant pleaded the statute. The court held that this statute did not exempt the landlord from liability for such articles as belonged to the person of the guest, and a reasonable sum of money for his traveling expenses.

In 1867 the common pleas court of New York City followed and based its judgment upon *Gile v. Libby* in the case of *Krohn v. Sweeney*, 2 Daly, 200.

In 1869 the New York Court of Appeals reconsidered this question and overruled the decision of *Gile v. Libby*, in the case of *Hyatt v. Taylor*, 42 N. Y., 258. This was an appeal from the order of the general term of the Supreme Court in the sixth district reversing the judgment below for the plaintiff. The action was brought to recover for the loss of monies, coupons, two gold studs and two gold pens, alleged to have been stolen from the plaintiff's room while he was a guest in defendant's inn, at Jersey City, in the state of New Jersey. The defense pleaded was that the defendant had complied with the New Jersey act, April 6, 1865, and that the plaintiff had not given him the goods for safe-keeping. The third section of that act is as follows: "Be it enacted that whenever the proprietor of any hotel, inn or boarding house shall provide a safe in the office of such inn, hotel or boarding house, or other convenient place for the safe-keeping of any money, jewels or ornaments belonging to the guests or boarders thereof, or by posting notice stating the fact that such safe is provided in which such money, jewels or ornaments may be deposited, in the room or rooms occupied by such guest or boarder, in a conspicuous manner, and if such guests or boarders shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel, inn or boarding house, shall not be liable for any loss of such money, jewels or ornaments sustained by such guest or boarder by theft or otherwise."

It will be observed that this statute, so far as it relates to this question, is precisely similar to the New York act. The court held in this case that the statute covers *all* money, jewels and ornaments of the guest, and that there is no exception in regard to any such which he might reasonably be expected to retain on his person.

The next case upon the subject decided by the New York courts was *Bendettson v. French*, first in the Supreme Court of New York City, 44 Barb., 31, and afterwards in the court of appeals, 46 N. Y., 266. Two points only were decided in this case, and these were: 1. That a guest ought to inform the innkeeper of the contents of the package when offering it for safe-keeping. 2. That the guest should have sufficient time after his arrival in which to make the deposit.

In 1871, the court of appeals cast some doubt upon this question in *Ramely v. Leland*, 43 N. Y., 539. This was an appeal from the New York superior court. The plaintiff as a guest brought an action against the defendant as innkeeper for the value of his gold watch, chain, seal and key attached, and \$50 in money, all of which he had placed under his pillow on retiring at night, and which was stolen during the night. The court below refused to allow evidence to be introduced to show that the defendant complied with the statute of 1865. The question of negligence was left to the jury, who found for the plaintiff, both as to the money and value of the articles stolen. This court held that as to the money lost the statute was a good defense, and the court should have allowed evidence to be introduced showing that it had been complied with.

The Superior Court of New York again had this subject under consideration in the case of *Bernstein v. Sweeney*, 1 Jones & Spencer, 271, in which the articles lost or stolen were a watch and chain. In this case *Ramely v. Leland* and *Gile v. Libby* were followed. The court of appeals, however, in 1873, seems to have settled this whole question in the case of *Rosenplanter v. Roessle*, 54 N. Y., 262. In this case the plaintiff and her husband came to defendant's hotel about three o'clock in the afternoon and had her trunk sent to her room. She remained there about an hour, and then after locking her trunk and also the door of her room went with her husband to dinner. Upon returning in about 20 minutes they found the door had been broken open, the trunk opened and the articles contained in it stolen. These consisted of a pair of bracelets, studs, etc., being such articles as plaintiff wore in ordinary dress and valued at not less than \$300. The defendant pleaded the statute and the court held (overruling *Gile v. Libby* and distinguishing from *Bendettson v. French*), that this statute if complied with by the innkeeper relieves him of liability for the loss of all money, jewels and ornaments of the guest not deposited

with him for safe-keeping and notwithstanding that the rule created a hardship and burden upon the guest.

The court says that it is not probable that any one under the construction of this case would have acted differently from the plaintiff, but that if there is a hardship, in the rule it is for the legislature to remedy. The plaintiff had an ample opportunity to deposit the jewelry with the innkeeper, and if she neglected to do so, it was at her own risk. The court said: "However inconvenient or troublesome it may be to make the deposit, it must be made or else the landlord has the protection of the statute."

It will be seen that by the law of New York it is now finally settled that the innkeeper is not liable for such articles as are named within the statute, or may be reasonably held to be within its terms, however convenient and usual it may be for travelers to retain them in their own possession, and however great the hardship may be in compelling them to turn over these articles to the innkeeper for safe-keeping. The hardship, if any there be, is a matter for the consideration of the legislature, and not for the court. It is true that by the law of New York, a watch and chain are not held to be within the statute, but this arises not on account of the convenience of the guest, or from the fact that he usually wears them, but because the term "jewelry or ornaments" does not include such property. A wide distinction will be observed between the acts of New York and Ohio in respect to the articles which are to be deposited, our statute adding among other things articles of gold and silver manufacture.

The Maryland Act, Code 1860, Art. 70, secs. 5 & 6, Rev. Code, 1878, Art. 67, Ch. 17, secs. 5 & 6, is as follows:

"An ordinary innkeeper in any city or town having a population of more than 500 inhabitants, who shall provide an iron safe or other secure depositary for the keeping of the money, jewelry and plate belonging to his guests, and who shall take charge for safe-keeping of such money, jewelry and plate, shall be liable for the full value of the same if lost or stolen while thus in his charge * * * unless the loss occurred through fire proved to have happened without any negligence upon the part of himself or his guests."

Section 6. "If any ordinary innkeeper referred to in the preceding section shall cause written or printed notice to be put up in his chambers and other conspicuous places about his house notifying his guests of the purport of the preceding section and requesting them to deposit their money and plate with him or his agent, to be designated by such notice, then he shall not be responsible for the loss by robbery or otherwise. Provided such ordinary innkeeper can prove that he has complied with the provisions of this and the preceding section unless such loss occurred from collusion or positive negligence on the part of such ordinary innkeeper or his agent."

The only case decided under this act is that of *Malthy v. Chapman*, 25 Md., 310. This case was decided in 1866, but it will be observed that the decision was rendered after that in the cases of *Gile v. Libby*, and *Hyatt v. Taylor*. This, we think, largely explains the decision. This was an appeal from the court of common pleas of Baltimore City. The appellee was a guest at appellant's hotel, and while such guest there was stolen from his room his watch, watch-guard and pocket-book containing \$90 in money. Appellant pleaded compliance with the act and a neglect on the part of appellee to deposit the goods lost. The court held, on the authority of *Gile v. Libby*, the defendant liable. As has been shown, the case upon which the decision is based has been overruled by later decisions in the court of last resort in the state where it was rendered.

The Rev. Stat., Wis., 1878, p. 503, sec. 1725, provides: "No innkeeper who shall constantly have in his inn, an iron safe in good order and suitable for the safe custody of money, jewelry, and articles of gold and silver manufacture and the like, and who shall keep a copy of this and the next succeeding section printed, etc., * * * shall be liable for the loss of such articles aforesaid, suffered by any guest unless such guest shall have offered to deliver such property lost by him, to such innkeeper, for custody in such iron safe, and such innkeeper shall have refused or omitted to take and deposit it in such safe for its custody and give such guest a receipt therefor."

This act was passed in 1864, and from the great similarity between the two it may be supposed that it was modeled after our own which was enacted in 1860. There is only one decision by the Supreme Court of Wisconsin upon this statute. *Stewart v. Parsons*, 24 Wis., 241. This action was brought for the value of a gold watch and chain stolen from the plaintiff's room, while he was a guest at defendant's inn. The plaintiff alleged that these articles were "such as he habitually did and reasonably might carry and have with him." The defense was the statute

limiting the liability of innkeepers. The court held that these articles were within the statute and that defendant was not liable. The court say: "The statute makes no exception to any article of gold or silver manufacture like a watch and chain which are usually worn upon the person, and which the guest might find very convenient to have after retiring to his room. But it would seem needless to remark that a gold watch and chain are articles of gold manufacture and therefore embraced in the very language of the statute. Upon what ground can it be claimed that the defendant is responsible for the loss in these cases, it being conceded that he complied with the law, and that the plaintiff did not offer to deliver his watch and chain to him for safe-keeping? It seems to us that to hold him liable under the circumstances is practically to nullify the statute."

The Ohio act makes the innkeeper liable in cases of actual negligence which is shown and proved, and the burden of proving it rests with the plaintiff. *Elcox v. Hill*, 98 U. S., 218.

ROBERTSON, J.

This case is submitted to the court upon an agreed state of facts.

On December 27, 1880, the plaintiff was received at the defendant's hotel as a guest and was assigned a room. He had with him a gold watch and chain and a gold locket set with diamonds, which he usually wore upon his person, of the value of \$350; also \$70 in money, as is agreed, a proper sum to defray his ordinary traveling expenses. During the night this property was stolen from his wearing apparel, but the loss was not caused by the theft or negligence of the defendant or of any of its officers or servants "except such as may be implied from this agreed statement of facts if such may be implied."

The hotel company had fully complied with the requirements of sec. 4427, Rev. Stat., relieving them from liability in certain cases, and the plaintiff had not offered to deliver the said articles to the defendant for custody.

On this state of facts it is submitted whether the defendant is liable to the plaintiff for the loss. At common law the innkeeper's liability extends to whatever personal property a guest brings within the inn—including wearing apparel, jewelry, baggage and traveling necessities. For all such articles the innkeeper is charged with extraordinary care, and where such property is confided expressly, or by necessary implication, to his care, his liability approximates an insurance of their safety.

In the case of the theft of such property, whether committed by servants, fellow guests or any one else about the inn, the innkeeper is held strictly responsible, but in Ohio, and in some other states, this common law liability has been specially qualified by statute, reason and modern policy, seemingly uniting in view of the extensive liabilities innkeepers incur incident to furnishing accommodation and entertainment, that they should be in a measure relieved from the extraordinary liability imposed by the common law rules.

The Ohio statute as to how innkeepers may be relieved from liability is as follows, viz: Section 4427, Rev. Stat., Ohio.

"No innkeeper who constantly has in his inn an iron safe, or suitable vault in good order and fit for the safe custody of *money, bank notes, jewelry, articles of gold and silver manufacture, precious stones and bullion*, and who keeps a copy of this section printed * * * constantly and conspicuously suspended in the office * * * and posted upon the inside of the entrance door of every public sleeping room in his inn, shall be liable for the loss of any such article suffered by any guest, unless such guest has first offered to deliver such property lost by him to such innkeeper for custody in such iron safe * * * but every innkeeper shall be liable for any loss of the above enumerated ar-

ticles by a guest in his inn, caused by the theft or negligence of the innkeeper or of any of his servants."

In this case two questions arise under the provisions of this law.

First—Whether the articles lost (gold watch, chain, locket and \$70 in money) fall within the scope of the statute; and

Second—Whether there is any presumption of law that the loss of the articles was caused by the theft or negligence of the *innkeeper or any of his servants*.

For the plaintiff it is contended that the lost articles were not such articles, or such sum of money as falls under the Ohio statute. That the law is to be reasonably construed, that the guest is not expected or required to divest himself of every article of jewelry and every dollar of money. That his watch and chain is rather an article of wearing apparel for personal use than an article of jewelry, and that such a reasonable sum of money as may be necessary for immediate traveling expenses would not fall within the statute.

But these grounds are not tenable. The words of the Ohio statute unavoidably embrace those articles. If the watch and chain are not articles of jewelry, still they must be covered by articles of gold manufacture and the legislature has made no exception either as to the nature or use of such articles nor as to the amount of money. It would be going too far for this or any other court to make or interpolate exceptions to a law which the legislature has not seen fit to make.

If the law in this instance requires a higher degree of care and precaution on the part of a guest at a hotel, and a corresponding limitation of the innkeeper's liability, *than was intended by the legislature*, it must be regulated by legislative action, but cannot be regulated by the courts. The court cannot be governed or influenced by any notions of hardship which the enforcement of the law as it stands may work.

In the opinion of the court therefore, the defendant is not liable to the plaintiff for the value of the lost articles or any part of them, unless their loss was caused by the theft or negligence of the defendant or any of its officers or servants.

The agreed facts are that the loss was not caused by such theft or negligence *except such as may be implied by law*.

At common law the presumption is always against the innkeeper when such a loss occurs; but that rule cannot apply in case of the loss of articles, as to which the innkeeper's liability is limited, as in this case.

We have found that the lost articles are such as fall within the statute. A suitable safe was provided, but the guest failed to offer the articles for deposit or custody, in which case the statute says the innkeeper shall not be liable for their loss unless the loss was caused by the theft or negligence of the innkeeper or his servants.

To hold that the fact of the loss was presumptive evidence of the innkeeper's theft or negligence would effectually nullify the first part of the statute, limiting the liability thus: If the guest fails to offer the articles for safe-keeping the innkeeper is *not liable for their loss*, unless the loss is caused by the theft or negligence of the innkeeper or his servants, *but if the articles are lost* the loss is presumptive evidence of the innkeeper's theft or negligence, and *he is liable for the loss*. Thus the law would become absurd.

The conclusion of the court is, that for such articles the law does not imply theft or negligence on the part of the innkeeper or his serv-

ants from the fact of the loss, but in such case the burden is upon the plaintiff.

Judgment for defendant.

A. Kramer, for plaintiff.

H. Jenney, for defendants.

COMPETENCY OF JUROR.

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[Hamilton District Court.]

†JOSEPH PALMER V. STATE OF OHIO.

Plaintiff in error charged with murder, committed in December, 1883, was tried at the May, 1884, term, under sec. 7278, Rev. Stat., as amended March 18, 1884, 81 O. L., 53, and found guilty. Said amendment provides, in part, that if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine such juror, and if he shall say that he can render an impartial verdict, notwithstanding such opinion, and the court is satisfied that such juror will render an impartial verdict on the evidence, it may admit him as competent to service in such case: *Held*, that such amendment was not as said case, an *ex post facto* law.

MAXWELL, J.

The plaintiff in error was indicted by the grand jury at the January term, 1884, of the common pleas court, jointly with William Berner, upon the charge of having murdered William Kirk, on December 24, 1883. This indictment was destroyed in the burning of the court house which followed the riot, and he was again indicted by a grand jury at the May term, 1884, upon the same charge. He was tried upon this second indictment, found guilty of murder in the first degree and sentenced to be hanged.

Pursuant to sec. 7356, Rev. Stat., as amended April 18, 1883, 80 O. L., 170, as lately construed by our Supreme Court, the plaintiff in error has filed his petition in error in this court, and has assigned twenty-eight errors, which he claims were committed by the court of common pleas during his trial.

Twenty-four of these alleged errors are of the same character, and may be considered together as one. They are founded upon exceptions to the action of the court in overruling challenges for cause as to persons called as jurors, who had formed opinions based upon reading reports of the coroner's inquest and other reports of the testimony, including in some cases the testimony given at the Berner trial, but which persons so challenged stated that they believed they could still try the accused impartially and return a verdict according to the evidence.

In overruling these several challenges, the court followed sec. 7278, Rev. Stat., as amended March 18, 1884, 81 O. L., 53, which provides, as one of the grounds of challenge, that the person called as juror, "has formed or expressed an opinion as to the guilt or innocence of the accused; but if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine such juror, on oath, as to the grounds of such opinion, and if the juror shall say that he can render an impartial verdict, notwithstanding such opinions, and if the court is satisfied that such juror will render an impartial verdict, on the evidence, it may admit him as competent to serve in such case as a juror." This amendment took effect on its passage; the former section was repealed, and the section as amended was the only rule in force as to this class of challenges at the time the plaintiff in error was tried.

The section prior to the amendment had this additional clause in it: "If it" (the opinion) "appears to have been formed upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify," etc.

The plaintiff in error claims, that under the section as it stood prior to the amendment of March 18, 1884, the twenty-four persons challenged would have been

*This judgment was reversed by the Supreme Court; see opinion, 42 O. S., 596. It is distinguished in *State v. Rabbits*, 46 O. S., 178, 188.

incompetent to sit as jurors, and that, as the offense with which he was charged, was committed prior to the passage of the amendment, such amendment was as to his case *ex post facto* and inoperative.

It is true that the persons whom he challenged would have been incompetent to sit as jurors in his case prior to the amendment, and we must then determine whether the amendment was as to his case *ex post facto*.

The constitution of the United States, art. 1, sec. 10, provides: that no state shall pass any *ex post facto* laws. The constitution of our state as adopted in 1802, art. 8, sec. 28, provides: that no *ex post facto* law shall ever be made. The constitution of 1851, art. 2, sec. 28, provides: that the general assembly shall have no power to pass retroactive laws. Whether we are to construe the phrase "retroactive" as equivalent to the phrase "*ex post facto*," is not very material, for, at all events, we are subject to the constitution of the United States.

The phrase "*ex post facto*" was construed at a very early period of our judicial history, and that construction has been followed with very slight modifications, ever since, by the state as well as the federal courts. In the case of *Calder v. Bull*, 3 Dallas, 386, the court holds that the phrase *ex post facto*, refers to criminal and not to civil cases; and that an *ex post facto* law is one which makes an action done before the passing of the law, which was innocent when done, criminal; or makes a crime greater than when committed; or inflicts a greater punishment than the law annexed to the crime when committed; or alters the legal rules of evidence, and receives less or different testimony than the law in force when the crime was committed, required.

This is perhaps, the most elaborate classification that can be found. It has been followed substantially, in the Supreme Court of the United States; *Fletcher v. Peck*, 6 Cranch, 171; *Cummings v. State*, 4 Wallace, 278; *Gut v. State*, 9 Wall., 35; *Kring v. State*, 107 U. S., 221; *Hopt v. Utah*, 110 U. S., 575.

Justice Washington in the case of the *U. S. v. Hall*, 2 Wash. C. C., defines an *ex post facto* law as one, which in relation to the offense or its consequences, alters the situation of a party to his disadvantage. Chief Justice Marshall, in the case of *Fletcher v. Peck*, 6 Cranch, 138, defines an *ex post facto* law as one which renders an act punishable in a manner in which it was not punishable when committed.

Kent, in his Commentaries, Vol. 1, 408-409, says the definition given by Chief Justice Marshall, is distinguished for its comprehensive brevity and precision. See also the cases cited in the note to the above. *Hartung v. People*, 22 N. Y., 95; *State v. Sullivan*, 14 Rich., (S. C.) 281; *State v. Raul*, 5 R. I., 185; *Lord v. Chadbourne*, 42 Me., 429; *Coffin v. Rich*, 45 Me., 507; *Rich v. Flanders*, 39 N. H., 304.

Judge Walker, in his introduction to the study of American Law, 195, says that the prohibition extends to every law which makes an act punishable in a mode or measure in which it was not punishable when the act was committed, unless it be to diminish the punishment.

At the risk of repetition, it may be said, that, according to the authorities, an *ex post facto* law is one which, though passed after the commission of the offense, by its terms relates back to the time when the offense was committed, so as to put the accused in greater peril, either by making that a crime which was not a crime; by increasing the grade of the crime; by increasing the punishment; by requiring less evidence to convict; or by altering the course of procedure in such a manner and to such an extent as of itself will tend to impair his right to a fair and impartial trial.

A distinction has been observed, however, between the right and the remedy, and while conceding the general principle with regard to the vested right of the accused, to an impartial trial by a jury, in accordance with the foregoing principles, it has been held with equal uniformity, that the accused had no vested right in any particular remedy. This must be so in the nature of things, for, although it may be said that principles are immutable, forms are continually changing. Out of the failure to observe this distinction, or the imperfect attempt to observe it, have arisen most of the difficulties that surround cases of this character. Each case must be decided according to its own facts, and it is often difficult to say where to draw the line, since the accused has a vested right in some remedy.

In *Perry v. The Commonwealth*, 3 Grat., 632, a case where the law was changed so as to require the jury to be selected from freeholders residing remote from the place where the offense was alleged to have been committed; and also, so as to reduce the number of peremptory challenges allowed to the accused; the court said, that no authority had been produced which established the principle that a change in the form or mode of trial violated any constitutional provision. Lessening the number of challenges might or might not produce a conviction. It might lessen

the chances of a favorable jury, but the jury however formed, must decide the case upon the same law and the same testimony.

In *Walston v. The Commonwealth*, 16 B. Mon., 40, where the law had been changed so as to allow the commonwealth a certain number of peremptory challenges, the court said referring to the case of *Calder v. Bull*, 3 Dal., 386, and quoting the definition there given; that they had not been referred to any authority by which the constitutional provision had been extended beyond the limit prescribed in that case, nor any that had considered it applicable to laws merely regulating criminal procedure, or the mode of trial in criminal cases, that an impartial jury was all the accused was entitled to, and the change in the law had no tendency to deprive him of that right.

In *State v. Ryan*, 13 Minn., 370, a case where the law was changed so as to give the state seven peremptory challenges, the court said, that if such legislation was an infringement of the defendant's constitutional right, it was because he had a right to a partial jury, or to an inefficient or imperfect administration of the law, and that with just as much reason and justice he might claim that it would be unconstitutional to make a jail more secure, or to provide more efficient means for his arrest and retention prior to and pending the trial, or in any way to make the punishment affixed to crime more certain. See also *State v. Johnson*, 12 Minn., 476.

In *People v. Mortimer*, 46 Cal., 114, the accused was indicted November, 1872; a new penal code went into effect January 1, 1873, and he was tried under that. It was held that this was proper.

In *Ex parte Bethurum*, 66 Mo., 546, it was held that an act of the legislature changing the *habeas corpus* act so that the court where the writ was returnable might correct an erroneous sentence and recommit the prisoner for the proper term or to the proper place, was not *ex post facto* in its nature.

See also *Bishop on Criminal Procedure*, 279, and *Cooley's Constitutional Limitations*, 272, for a discussion of this same subject; also *Jones v. State*, 1 Ga., 610, *Warren v. Commonwealth*, 37 Pa. St., 45, *Walter v. People*, 32 N. Y., 147, *State v. Wilson*, 48 N. Y., 398, *Commonwealth v. Dorsey*, 403 Mass., 412, *Tilton v. Swift*, 40 Ia., 78, *State v. Manning*, 14 Tex., 402, *Strong v. State*, 1 Blackf. (Ind.), 196.

Cases may be found in our own state which, though not directly in point, are analogous. *Rairden v. Holden*, 15 O. S., 207, *Lasure v. State*, 19 O. S., 43; *Westerman v. Same*, 25 O. S., 500; *John v. Bridgman*, 27 O. S., 29.

Let us apply the foregoing principles to the case under consideration. The plaintiff in error had a vested right to an impartial trial by jury. If the amendment in question impaired that right it was *ex post facto* and therefore void, but if it did not impair that right the prisoner was properly tried, and has no cause for complaint, even under a construction of the foregoing principles most favorable to him.

It cannot be claimed that this amendment comes under either of the four classes given by Justice Chase in *Calder v. Bull*, *supra*, for it is plainly a change in the form of procedure or the remedy, and not of the organic law. Does it then come under that class of laws, which, though in terms professing to change or amend the procedure, yet necessarily tend to put the accused in greater peril; we say, necessarily, because we think the tendency must be a necessary one as distinguished from a possible one; for if the change may or may not put the accused in greater peril, according as the law is administered by the court, then clearly the administration of the law, and not the law itself, is the proximate cause of his peril.

The change in the procedure was briefly this: Prior to the change the law divided persons who had formed opinions into two classes (see the original act) and made one class eligible as jurors, the other ineligible. One practical difficulty growing out of this was, that if a person had formed an opinion and was not able to say positively and affirmatively that he had *not* read the account of the coroner's inquest, and had *not* read what purported to be the testimony of witnesses to the transaction, he became *ipso facto* ineligible. In these days of general newspaper circulation, very few conscientious men could say what they had read and what they had not read, especially when the trial did not come off till from six months to a year after the alleged commission of the offense.

So it happened that the value of the distinction between the two classes, if there ever was any value, was entirely destroyed, and the difficulty of getting a legal jury, greatly, almost indefinitely, increased, without, in any way, increasing the security of the accused in his right to an impartial jury.

Again, the right of the accused to an impartial jury so far as this act affected it, was the right to a jury who had not prejudged his case. But if a person summoned as a juror, who had previously formed an opinion, believed that he could divest himself of that opinion, not allow it to influence him in forming his verdict, but could try the accused impartially upon the evidence produced at the trial, and whose

character, reputation and manner were such as that the court should believe that such person would be an impartial juror, what difference, within reasonable limits, could it make to the rights of the accused how such opinion was formed, or whether it was formed by reading one class of newspaper paragraphs or another?

We think the spirit and effect of the amendment was simply to enlarge the class of persons from whom the court might, not must, select jurors. Suppose that a law had been passed doing away with all exemptions from jury duty heretofore existing in favor of those who had connected themselves with military companies, could it be claimed that such a change would impair any of the vested rights of the accused? Undoubtedly not. The right of the accused to challenge a juror for favor or prejudice still remains unimpaired. The jury which is to try him must still be an impartial jury. As finally selected it must have the same qualifications as before. The only change is in the number and class of persons who may be called and examined as to their qualifications.

The plaintiff in error relies upon the case of *Kring v. State of Missouri*, 107 U. S., 221, but we think that case is in accord with the principles we have adopted. In that case the court held, in substance, that the rights of the accused have been invaded in two material particulars. He had been twice put in jeopardy for one offense, and the law of evidence had been changed to his disadvantage. We are willing to admit all that may be fairly claimed for that case, but we cannot see that it helps the case of the plaintiff in error here. At the same time we question whether the *Kring* case is not modified by the later case of *Hopt v. Utah*, 110 U. S., 575.

We do not think it necessary to speak at length of the other assignments of error, we have considered them carefully, and find them not well taken.

The judgment of the court of common pleas will be affirmed.

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JUSTICE COURT PRACTICE.

[Hamilton District Court.]

DANIEL DOUGHERTY V. ANN O'CONNELL.

1. It is not error in an action of trespass before a justice for destroying a fence, to exhibit to the jury a plat, showing the location and size of plaintiff's and defendant's lots, and the subdivision, such plat being not to show title but to explain the testimony.
2. A refusal of a justice to give the jury any charge upon the law of the case is not error where the bill of exceptions does not show that there was any law in the case.

ERROR to the Court of Common Pleas.

The facts are stated in the opinion.

E. P. Dustin, for plaintiff in error.

Healey, Brannan & Desmond and Frank v. Andrews, for defendant in error, cited sec. 5304, Rev. Stat., 1880; *Albatross v. Wayne*, 16 O., 513; *Reed v. McGrew*, 5 O., 376; *Taft v. Wildman*, 15 O., 123; *Cresinger v. Welch*, 15 O., 156; *Stephens v. State*, 14 O., 386; *Gano v. Samuel*, Id., 592; *King v. Kenney*, 4 O., 79; *McDougal v. Fleming*, Id., 388; *Barto v. Abbe*, 16 O., 408, 410; *Beebe v. Scheidt*, 13 O. S., 406, 416; *Austin v. Hayden*, 6 O., 388; *Adams v. State*, 25 O. S., 584; Id., 29 O. S., 412; *Berry v. State*, 31 O. S., 219, 229; *Railway v. Probst*, 30 O. S., 104; *Insurance Co. v. Tobin*, 32 O. S., 77.

SMITH, J.

The alleged error is that the court of common pleas refused to reverse a judgment of a justice of the peace. The action below was commenced by Ann O'Connell against Daniel Dougherty for a trespass to real property, it being alleged by the plaintiff that the defendant cut,

tore down and destroyed a picket fence belonging to plaintiff. It came on for trial before the justice and a jury.

The first error assigned is that this being a controversy affecting the title to real estate, the magistrate had no jurisdiction. Section 590, Rev. Stat., provides that, "*Justices shall have jurisdiction in actions for trespass on real estate where the damages demanded for such trespass do not exceed one hundred dollars, and no claim of title to such real estate set up by the defendant shall take away or affect the jurisdiction hereby given.*" See also *O'Neal v. Blessing*, 34 O. S., 33. Therefore this objection is not well taken.

The next error assigned is that on the trial before the magistrate, the plaintiff was allowed to exhibit to the jury a certain diagram representing the situation of the plaintiff's and defendant's property and the fence and also a certified copy of the subdivision duly certified to, and it was objected to on the ground that it tended to bring into controversy the title to real estate. The justice permitted this diagram to be presented, not for the purpose of proving title, "but to show merely the location and size of the lots belonging to plaintiff and defendant, and to enable the jury to understand the plats, and to show the lines between the parties." It seems to us that a diagram or subdivision presented to the jury for the purpose of explaining the testimony, as stated by the justice, was perfectly competent and this alleged error is not well taken.

After the evidence was closed, the defendant desired the justice to charge the jury "to wholly exclude and rule out from the jury all evidence given upon the question of said plat and survey and oral evidence explanatory of the same, and ask the court to charge the jury that they were not to consider the said plat as evidence in the case," which motion the court overruled.

The ground on which these plats were presented to the jury and admitted, having been already stated, it was not error for the magistrate to refuse this charge. The jury had the right to consider them for the purposes for which they were admitted. The next objection is that the court refused to charge the jury at all.

"And the court refused to charge the jury as asked, or to give any charge to the jury upon the law of the case," which the party excepted to. Very likely it may be the duty of the justice in a proper case to charge the jury, although the statute regulating trials before justices say nothing about a charge to the jury. But as the provisions of the code so far as applicable, govern proceedings before justices, it may be necessary in a proper case to explain to the jury questions of law arising in a case. In the record presented to us there is no evidence to show that there was any law in the case; nothing to show what question of law might or might not be applicable to the case, and there is no charge presented by counsel to the court to be given excepting the charge I have already stated, there not appearing anything in the record to show that the party below was prejudiced by the action of the court, it seems to us the error is not well taken.

Judgment affirmed.

ISSUE OF FACT IN EQUITY.

[Pickaway District Court.]

Bingham, Steel & Minshall, JJ.

†WILLIAM FLEMING V. JOHN FLEMING ET AL.

In a foreclosure proceeding an issue of fact may be referred to a jury.

This was an action brought by William Fleming in the court of common pleas of said county to foreclose a mortgage made to him by John Fleming. The mortgage was dated November 16, 1857, and was given to secure a debt of \$609.67, owing by John Fleming to William Fleming, with interest at ten per cent. per annum from November 16, 1857. The mortgage conveyed to William Fleming 140 acres of land in said county. On March 24, 1873, John Fleming conveyed the land to John Kirkendall, who had no knowledge of the existence of the mortgage. The petition was filed February 3, 1877.

Judgment was rendered against John Fleming in the court of common pleas for \$1,692.06, at the May Term, 1877, and Kirkendall took an appeal to the district court. He had filed an answer in the case alleging that the mortgage had been paid.

On the trial in the district court, Kirkendall, by his attorneys, made a motion to submit the question whether the mortgage had been paid, to a jury, which motion was opposed by the plaintiff's counsel. Upon this motion the counsel for Kirkendall stated that they had no positive testimony that the mortgage had ever been paid, but that the evidence consisted of numerous circumstances in connection with the lapse of time. That they proposed to show among other facts, that during the time which had elapsed since the giving of the mortgage, the said William Fleming had been very much embarrassed, that he had been frequently sued for his debts, and numerous judgments had been rendered against him. That during a part of the time said John Fleming had been largely engaged in business, cultivating, some years, a thousand acres of broom corn, and handling \$50,000 per year in money. That no demand of payment of said mortgage had been made on him for more than fifteen years. That he had had, during that time, many business transactions with William Fleming, and had sold him a great deal of property, and that *he believed* that this debt had been settled.

The counsel for Kirkendall cited sec. 264, Civil Code; 2 Daniel's Pleading and Practice in Chancery, 1285, 1286, and cases cited.

Upon consideration the court granted the said motion, and impanelled a jury, and submitted to the jury the question whether the debt described in the plaintiff's petition had been paid, or any part thereof. The jury after hearing the evidence returned a verdict that the indebtedness described in the mortgage sought to be foreclosed in the plaintiff's petition had been fully paid and discharged.

Thereupon this cause came on further to be heard by the court, and the court being of the opinion that the said verdict was correct, and that the said mortgage had been fully paid and discharged, and that there was nothing due to the said plaintiff on his said claim, adjudged and decreed that the said John Kirkendall go without day and recover his costs.

This case is reported in *Fleming v. Kirkendall*, 31 O. S., 568, but no question was made in that court in regard to the propriety of referring the issue to a jury.

NOTE.—This case is reported at this time, because there are very few cases in Ohio determining *what issues* of fact will be sent to a jury. It is well settled that the verdict of the jury in such cases is not conclusive on the court. *Morgan v. Spangler*, 20 O. S., 38-57; *Milins v. Marsh*, 1 Disney, 612; *Connen v. Drake*, 1 O. S., 166.

Henry F. Page and C. J. Delaplane, attorneys for Kirkendall.

P. C. Smith and B. H. Bostwick, attorneys for William Fleming, objected to the reference to a jury.

†This judgment was affirmed by the Supreme Court; see opinion, 31 O. S., 568.

CORPORATE EXISTENCE.**269**

[Hamilton District Court.]

**STATE OF OHIO EX REL. WM. H. PUGH, PROS. ATTY., V. EDGAR
ROBINSON ET AL.**

1. A corporation comes into existence with all powers necessary to carry out the purposes for which it was organized, as soon as the articles of incorporation are filed with the secretary of state.
2. When in existence, the corporation must organize and carry on its business in accordance with the provisions of the statutes prescribed therefor; otherwise it is liable to ouster for misuse or non-use of its franchises or privileges, or for usurping franchises or privileges not conferred upon it.
3. The existence of the corporation being shown, it is a necessary party in an action of ouster for a misuse, non-use or usurpation of corporate powers.

QUO WARRANTO.**CONNER, J.**

This is an information in quo warranto filed by the state on the relation of the prosecuting attorney of this county against Edgar Robinson et al., charging the usurpation by the defendants of the franchise of being a corporation, by the name of the Robinson Balance Slide Valve Company, and by that name contracting and doing other corporate acts within and without this state; and that they have usurped the franchise of the corporation, and that said R. B. S. V. Co. was never legally incorporated and organized for various reasons, enumerated in the petition, relating to the opening books of subscription of the stock; the subscription for the same; the failure to make payment of ten per cent. thereon; the certificate to the secretary of state as to such installment; the election of directors and officers; the issue of the stock; the holding over of such directors and officers; the change in the place of business of the corporation; the assumption of power by the defendants Robinson and Clarke, and the transfer of stock by some of the defendants. And the relator prays that the defendants may be compelled to answer by what warrant they claim to have, use, and enjoy the liberties, privileges and franchises of said alleged corporation, and that they may be ousted from using the same.

The defendant Clarke demurs to the petition and the demurrer sets forth five grounds:

1. That the court has no jurisdiction of the person of the defendant.
2. No jurisdiction of the subject of this action.
3. The plaintiff has not legal capacity to sue.
4. Defect of parties defendant.
5. The petition does not state facts sufficient to constitute a cause of action.

We shall consider them in the inverse order as stated.

Does the petition state facts sufficient to constitute a cause of action?

Counsel for defendant Clarke claims that it does not, because he claims that the petition on its face shows that the R. B. S. V. Co. is a corporation, and that the acts complained of, all occurred after its incorporation. And the converse of his proposition is, of course, maintained by the counsel for the relator.

The determination of this question involves the consideration and construction of the law relating to proceedings in quo warranto, and the creation of corporations, and the authorities bearing thereon.

Section 6760, Rev. Stat., provides that "A civil action may be brought in the name of the state :

1. Against a person who usurps * * * or unlawfully holds or exercises * * * a franchise within this state.

8. Against an association of persons who act as a corporation within this state without being legally incorporated."

Section 6761, provides that "A like action may be brought against a corporation:

4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred."

The relator claims the action is brought under the first and third paragraphs of sec. 6760, while the defendant Clarke claims that the petition itself shows only a cause of action against a corporation, if there is any cause of action at all, and that the case should be and is brought under paragraph 4 of sec. 6761. But the settling of that question will depend on the fact of the petition showing the existence or non-existence of a corporation.

As to the creation of corporations, sec. 8286, Rev. Stat., prescribes that:

"Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated shall subscribe and acknowledge, before an officer authorized to take acknowledgments of deeds, articles of incorporation, which must contain, first, the name of the corporation; second, its location or place of business; third, its purpose; and fourth, the amount of its stock and number of shares.

Section 3238, after providing for the certifying of the official character of the officer before whom the acknowledgment is taken, by the clerk of the court of common pleas, provides that:

"The articles shall be filed in the office of the secretary of state, who shall record the same, and a copy duly certified by him shall be *prima facie* evidence of the existence of such corporation."

Section 3239 provides that: "Upon such filing of the articles of incorporation, the persons who subscribed the same, their associates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession * * * and to do all needful acts to carry into effect the objects for which it was created."

It would seem therefore from the plain language of the sections of the statute, which says that the certified copy of the articles "shall be *prima facie* evidence of the existence of such corporation;" and "upon such filing of the articles of incorporation the persons who subscribed the same * * * shall thereafter be deemed a body corporate * * * with power to do all needful acts to carry into effect the objects for which it was created, that the corporation came into existence as soon as the articles of incorporation are filed with the secretary of state." And this construction is borne out we think by the ruling of the Supreme Court in the case of *Ashtabula R. R. v. Smith*, 15 O. S., 328. This was an action brought by a R. R. Co. to recover on a subscription to its stock, made after its articles of incorporation had been filed with the secretary of state, but before the company had organized by the election of directors or officers, or had located its roadway.

The provisions of the statute (S. & C., page 271, sec. 2) under which this and other railways were incorporated, at the time this subscription of stock was made, with respect to the provisions of the articles of incorporation, their execution, acknowledgment, certificate as to the official character of the officer and filing the same with the secretary of state were substantially and almost literally the same as sections 3236 and 3238, Rev. Stat. And it was provided in section 2 of that act, that after the filing and recording of such articles in the office of the secretary of state "a copy thereof, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such company." And in sec. 3 of that act it was provided:

"That when the foregoing provisions have been complied with the persons named as corporators in said certificate are hereby authorized to carry into effect the objects named in said certificate, in accordance with the terms of this act; and they and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate" with the same powers as are set forth in sec. 3239, Rev. Stat. The defendant Smith demurred to the petition on various grounds, among which were the claims, that the petition did not show that Smith was a subscriber to the capital stock, or even became a stockholder of the company, because his subscription was made before the company had organized by the election of directors and officers. The court decide, as the first clause of the syllabus, that "when the second section of the act to provide for the creation and regulation of incorporated companies (S. & C., p. 271, and quoted above) has been complied with, the corporators and their associates become a body corporate."

And Judge White in deciding the case, says, on pages 533 and 334: "When the persons associating to form a company for the purpose of constructing a railroad, have complied with sec. 2 of the act to provide for the creation and regulation of incorporated companies (S. & C., Vol. 1, p. 271) they and their associates, successors and assigns, by the name and style provided in the certificate, become a body corporate, invested with all the powers conferred upon this class of corporations, and subject to the restrictions provided by sec. 3 of the act.

Under the restrictions imposed, these general powers fall into two classes: Such as may be exercised before, and such as cannot be until after the election of directors. Among the former is the right to receive subscriptions to the capital stock, and, when ten per centum of the amount shall be subscribed, to elect directors; and, among the latter, the location and construction of the proposed road. After the election of directors all the business of the corporation is to be transacted by them, or under their authority; but, the existence of the body corporate does not depend upon the election of, or the right to elect directors.

And the subscription was held to be a valid and binding one.

This decision was followed in *Powers v. R. W. Co.*, 33 O. S., 429, 432; *Jewett v. Railway*, 34 O. S., 601; *Benninger v. Gall*, 1 C. S. C. R., 334.

It has been claimed by counsel for the relator that a contrary rule has been established by the decisions of our Supreme Court in the cases of *Chamberlain v. Painesville R. R.*, 15 O. S., 2125; *Medill v. Collier*, 16 O. S., 599; *Hanna v. Petroleum Co.*, 23 O. S., 622.

In the *Chamberlain* case, which was also an action to recover a stock subscription, where the defense was that the provisions of the statute respecting the election of directors and officers had not been complied

with, the court did not pass upon the question of when the existence of the corporation began, but only as to the questions of its organization in the matter of election of directors and officers, and the laying out of the roadway. And it cannot in any way be claimed as overruling the *Ashtabula v. Smith* case, since they both were decided in the same term of the court, and the latter case was the last in point of time.

The *Medill* case was an action by a depositor against certain persons who had carried on the banking business under the style of the *Citizens Bank of Steubenville*, and the defense was, that the bank was a corporation. It appeared in the finding of the court below, that the bank had been incorporated by filing the proper articles of incorporation, but that it had never made the proper deposit of securities with the state auditor, which under the provisions of the "Free Banking Act" of March 21, 1851, was a prerequisite to the doing of any banking business. And that it had attempted to do all kinds of banking business except the obtaining of bank notes from the state auditor. The court in deciding the case, Judge Day announcing the opinion, do not question the existence of the corporation by reason of the filing of the articles of incorporation, and obtaining the proper certificate from the state officers, in compliance with the provisions of the banking law; but expressly say on page 610, "It was a corporate body, it is true, but lifeless for all the purposes of its creation. It could be animated with banking powers only by complying with the requisition of the 44th section" (the one relating to the deposit of securities with the state auditor). And in examining this decision, the difference in the powers of the corporation as soon as in existence, under the "Free Banking Act," and under our present laws governing corporations, such as the *R. B. S. V. Co.*, must not be lost sight of. Under the *Free Banking Law*, the corporation when brought into existence had no powers at all, except for organization and obtaining subscriptions and payment of stock, because it was prevented from doing any "banking business" until the securities had been deposited with the state auditor; while under sec. 8239, Rev. Stat., a corporation, like the *R. B. S. V. Co.*, as soon as it is in existence, has all the powers "to do all needful acts to carry into effect the objects for which it was created." And that this is a proper construction of sec. 8239, is borne out by the language of sec. 8244, providing for the filing with the secretary of state of the certificate of the subscription of the requisite amount of stock and the payment of the proper installment thereon, which does not thereupon confer any new powers on the corporation, but only fixes a personal liability upon its incorporators, for any deficiency in the actual payment of the ten per cent. installment.

In *Hanna v. The Petroleum Co.*, 23 O. S., 622, which was an action in replevin by a corporation organized under the laws of Pennsylvania, but having a place of business in Ohio, the point at issue was not when the corporation came into existence, but whether it could do business in Ohio before it had done any in Pennsylvania; and while Judge Welch on page 625, does use the language, "The life of a corporation dates from its organization, and not from the time it begins to do business;" yet it is very evident from the context, that he did not in any manner mean to controvert the doctrine laid down in *Ashtabula R. R. v. Smith*, 15 O. S., 328, that the existence began with the filing of the articles of incorporation with the secretary of state; and that he used the language incidentally in passing on the question of the case, to-wit, the recognition of a

foreign corporation doing business in our own state, before it had done any in the state where it was incorporated.

We therefore think that it is clearly established by the language of the statute itself, and by the decisions of our Supreme Court, that a corporation comes into existence with all the powers necessary to carry out the purpose for which it was organized, as soon as the articles of incorporation are filed with the secretary of state; but that, when in existence, it is bound to proceed in its organization and the carrying on of its business, in accordance with the provisions of the statute prescribed therefor; and, if it does not do so is liable to ouster for a misuse for non-use of its franchises or privileges, or for the exercise of a privilege or franchise not conferred upon it.

And we do not deem any of the authorities, cited by the counsel for relator from the courts of other states and text-books, in the slightest interfere with this conclusion, as those authorities simply show, what are deemed by the various courts to be conditions precedent and subsequent to the existence of a corporation and its power to do business, under the various statutes of the respective states.

Now examining the petition in the light of this conclusion, we find the following language therein: "That said named defendants, Robinson, Pugh, Burt, Beymer, McCracken and Moore signed articles of incorporation for the incorporation of the R. B. S. V. Co., on January 22, 1880, and on said day filed the same with the secretary of the state of Ohio," and thereafter committed the various acts complained of by the relator. From this, it is evident that the articles of incorporation were executed and filed with the secretary of state, and in the absence of any allegation that there was any defect therein, we must presume they were in proper form, properly executed, and properly filed; and therefore, that thereupon the R. B. S. V. Co. came into existence as a corporation, and that thereupon the alleged acts charged in the petition, if they occurred, became the acts of misuser or usurpation by the corporation. We therefore find the demurrer well taken, that the petition does not state facts sufficient to constitute a cause of action.

2. As to the demurrer on the ground that there is a defect of parties defendant.

It is claimed by counsel for defendant Clark, that if the R. B. S. V. Co., was incorporated, it is a necessary party to this action:

In the case of *State v. Taylor*, 25 O. S., 280, it is stated in the third paragraph of the syllabus that "a proceeding in *quo warranto*, to dissolve a corporation, or declare a forfeiture of its charter, or to oust it from the exercise of franchise which it usurps, must be against the corporation itself, and not merely against its individual members." And in deciding the case Judge Welch, on pages 282 and 283, says: "The company having organized in all respects in conformity with the laws of Ohio, with its office and place of corporate business in the state, thereby became and was a legal corporation of Ohio, remains such until dissolved by act of the legislature, by its own volition, or by a proceeding in *quo warranto*, against the corporation itself. This is no such proceeding, but a proceeding merely against its individual officers and members who are admittedly its lawful officers and members, if such corporation exists. If the company has, by the abuse or non-use of its franchises, rendered itself liable to a forfeiture of its charter, such forfeiture can properly be declared and enforced only in a proceeding to which the corporation is a party. If it is assuming to exercise franchises outside

the scope of its charter, it can, by a like proceeding, be ousted from their exercise."

The case at bar is an action against the individual officers and members of the corporation, if it exists, although their authority is not admitted, but expressly denied. But having found that the corporation was created and does exist, so far as the allegations of the petition show, we deem this case of *State v. Taylor* decisive of the point that the corporation is a necessary party defendant, and possibly the only proper defendant; and we do not deem this conclusion as at all in conflict with the decision in the case of *State v. Cinti. Gas Light & Coke Co.*, 18 O. S., 262, as the facts of the two cases are so different.

The demurrer on the ground of defect of parties defendant will thereupon be sustained.

Having passed upon these two points raised by the demurrer which are, in our judgment, decisive of the case, we deem it unnecessary to examine into and pass on the remaining grounds.

The information will therefore be dismissed.

272**MUTUAL INSURANCE—BENEFICIARY.**

[Superior Court of Cincinnati, General Term.]

**MARIAN JAMIESON V. KNIGHTS TEMPLAR AND MASONIC MUTUAL
AID ASSOCIATION.**

The widow is the beneficiary of a policy of insurance in a mutual association upon the life of her husband payable to "his heirs," when he leaves brothers and sisters, but no children.

HARMON, J.

Plaintiff's husband died leaving a brother and sister, but no children. His life was insured by defendant in favor of "his heirs." The only question is whether plaintiff is entitled to the insurance money.

Associations like defendant can make their policies payable only to "the family or heirs" of deceased members. Section 3630, Rev. Stat.; *State v. Mutual Relief Assn.*, 29 O. S., 399; *State v. Moore*, *State v. Life Assn.*, 88 Id., 7, and 281.

It is manifest that the word "heirs" in the statute and in the policy is used merely to indicate the persons who are to receive the proceeds of the policy. They do not take the money by descent but by contract.

Who then are the "heirs" of the deceased here? At common law one's heirs are the persons who would inherit his real estate by right of blood. Our statute of adoption and that of descent have enlarged the meaning of the word so that it may include persons not of the blood of the intestate. Sections 3140, 4159, Rev. Stat. The wife, if there be no children, is the heir of her husband. *Brower v. Hunt*, 18 O. S., 311. Neither by common law nor statute has the word any reference to the distribution of any personalty. The word "heirs" therefore in the policy designates as beneficiaries the person or persons to whom the real estate of the insured would have passed under our statute of descent, whether akin to him or not.

That statute however provides different courses of descent for ancestral and non-ancestral property, sections 4158-9. His wife would under the facts here be heir to the latter, not to the former. By which shall we be governed? It seems to us that every reason and analogy point to the latter. By that, if the deceased had left realty, she, not the brother and sister, would have taken it as heir. She therefore is the beneficiary of the policy.

It is argued that if the insured had intended the policy for her he would have named her as he no doubt might have done, she being one of his "family," or at any rate would not have used the plural "heirs."

But it is not necessary for plaintiff to maintain that her husband had such intention. He meant what he said that whoever might prove to be his heirs, and *memo est haeres viventis*, should have the benefit of the policy. They might be one or more. She might and might not be one of them.

Judgment for plaintiff.

FORCE and PECK, JJ., concur.

Long, Avery, Kramer & Kramer, for plaintiff.

T. M. Hinkle, *contra*.

INTEREST ON PARTNERSHIP FUNDS.

282

[Superior Court of Cincinnati, General Term.]

†JOSEPH W. WAYNE v. T. M. HINKLE, ADMR., ET AL.

1. In a settlement between partners, interest cannot be allowed on capital remaining in the firm after dissolution, awaiting final settlement, although the partnership contract provides for the payment of interest on capital during the continuance of the partnership.
2. But interest will be allowed on funds advanced by a partner, after dissolution, for the purpose of paying off the debts of the firm.
3. A provision for the payment of interest on capital in a partnership agreement, which, by its terms, is to expire at the end of five years, or by mutual consent, at an earlier period, ceases to be operative when a dissolution is had by consent, during the five years, although the partners may have unequal amounts of capital remaining after dissolution, invested in the undistributed assets of the firm.

PECK, J.

On July 5, 1865, William H. Woods, Joseph W. Wayne and James M. Doherty entered into a written partnership agreement to take effect on the first day of August of that year, and to continue in force for the period of five years, unless sooner dissolved by mutual consent. The business to be carried on by the firm so formed was the manufacture of candles, lard oil, and other things of that sort. By the terms of the agreement, each partner was required to pay into the firm as his portion of the capital the sum of ten thousand dollars, on which, and on all other amounts either should so invest, he was to receive from the firm interest at the rate of six per cent. per annum. The profits were to be divided: To William H. Woods, for the first year, sixty hundredths, for the second year, fifty-five hundredths, for the remaining three years, fifty hun-

†This judgment was affirmed by the Supreme Court, without report, June 29, 1888.

dredths; to Joseph W. Wayne, twenty hundredths for each and every year; to James M. Doherty, for the first year, twenty hundredths, for the second year, twenty-five hundredths, for the remaining three years, thirty hundredths. The losses were to be borne by the members of the firm in the same proportions. Pursuant to the agreement the firm commenced operations August 1, 1865. At that time Mr. Woods paid into the concern as capital, \$36,032.08, Mr. Doherty, \$14,700, and Mr. Wayne, \$10,166.95. The first business of the new firm consisted of the construction of a factory on a lot they had acquired on Culvert street. Some eighteen months appear to have been consumed in the building and fitting up of the factory with the necessary machinery and apparatus. A short time after the completion of the factory and the commencement of manufacturing operations, on October 4, 1867, the factory was destroyed by fire, and its contents, machinery and stock on hand were greatly damaged. Soon after the fire the partners consulted together as to the advisability of rebuilding and going on with the business, but Mr. Wayne objecting, the idea was abandoned, and thenceforward the sole business of the firm consisted of selling off the damaged stock, machinery and real estate, collecting its claims, and paying its debts. All claims against the firm except those held by the partners themselves appear to have been paid.

On June 30, 1883, the plaintiff commenced this suit to settle the affairs of the partnership, praying for the sale of a lot of ground still undisposed of, and that an account be taken between the partners. He claims that the firm is largely indebted to him, that it is also indebted to the estate of Woods, in a much smaller sum, and that Doherty is largely indebted to the firm. The defendant Hinkle, administrator of the estate of William H. Woods, who died in the year 1882, answers, admitting the partnership agreement, but denies all the other allegations of plaintiff's petition, except that the firm is indebted to said estate. The defendant Doherty answers admitting the partnership agreement, but denies the other allegations of the petition, and sets up that soon after the fire he abandoned all his interest in the assets of the firm to the other partners, who, in consideration thereof, released him from any and all obligations arising out of the existence or operations of the firm. At the conclusion of the trial at special term, the case was reserved to the general term on the pleadings and all the evidence.

The claim on behalf of Doherty raises a question of fact which it is necessary to dispose of before proceeding to the other questions in the case. (Here follows a lengthy analysis of the evidence on this question of fact ending with the finding by the court that Doherty had been released.)

It has been suggested that there was no consideration for the release, but the abandonment to the other partners of all interest in the assets of the firm, by Doherty, was a sufficient consideration. At the time of the release he had to his credit on the books of the firm over \$2,000, and the affairs of the firm were in an unsettled condition, so that no one could tell just how they would turn him out on liquidation.

How shall the losses be distributed between the remaining members of the firm? We have seen that the partnership agreement provided that the profits and losses should, at the time of the fire, be distributed in the proportions of five-tenths to Woods, three-tenths to Doherty, and two-tenths to Wayne. As between Woods and Wayne the proportion

would be as five to two, and it is in that proportion that we think the loss should be borne by the estate of Mr. Woods and by Mr. Wayne.

An important question of law arises upon plaintiff's claim to interest on the amount of his capital invested in the firm. The partnership agreement provides for the payment of interest on the amounts of capital invested by the partners respectively, and the claim is that by virtue of that agreement as well as at law, if there were no agreement, plaintiff is entitled to interest, both before and after dissolution. The claim is an important one because of the large amount invested and the length of time which has elapsed. It is not necessary to consider whether the law would give interest on capital during the continuance of the partnership. The agreement saves us that trouble, by virtue of the stipulation before mentioned. The real contention between the parties is as to whether plaintiff is entitled to interest for the period elapsed since dissolution. On that point the decisions appear to be somewhat conflicting and in the absence of authority in Ohio, we must look elsewhere, and be guided by that which commends itself to our judgment.

Interest, say the decisions and text writers, is one of two things: It is either a compensation expressly or impliedly agreed to be paid for the use of the money of another, or damages awarded by law for the detention of money beyond the time when it should have been paid. Leake on Contracts, 1099. It might be claimed that during the continuance of a partnership, each partner has the beneficial use of any capital contributed by another, and that therefore the law would imply a contract to pay interest upon it. Whatever answer might be made to that claim, and the authorities are not agreed about it, it is clear that the same argument cannot be made as to money which remains in the firm after dissolution and while the firm is winding up its affairs. When the business ceases, the beneficial use of the capital by any and all the partners is at an end. There is no longer any possibility of profit, and there can hardly be a just claim for interest as a compensation for a use which has ceased. In the case of *Barfield v. Loughborough*, 8 Ch. App., 1, Lord Chancellor Selborne says: "The foundation of the contract for the allowance of interest in such cases is the employment of the capital of the partnership in profitable business transactions, or in transactions from which profit is expected to accrue," and he asserted that "on principle, no interest is, after dissolution, payable between partners, merely on the ground that they have still remaining in the concern unequal shares of capital."

Watney v. Wells, 2 Ch. App., 250, is a strong case to the same effect. See also *Whitcomb v. Converse*, 119 Mass., 88; *Parsons on Partnership*, 229, note Y.; *Lindley on Partnership*, *787. Nor can there be any claim for interest upon the ground that either partner should be made to pay damages for the detention of the money of the other. The delay in closing up the affairs of the firm, and securing a return of the capital invested, cannot be imputed to one partner more than another.

Section 3181, Rev. Stat., while not decisive, tends to support this view. It is that "when money becomes due and payable upon any bond, bill, note, or other instrument of writing hereafter made, upon any book account, or settlement hereafter made between parties," etc., "the creditor shall be entitled to interest at the rate of six per cent. per annum and no more." It can hardly be said that any sum is due and payable from one partner to another, after dissolution, on account of capital lost in the partnership business, until a settlement has been had and the amount of the loss ascertained. As long as any considerable portion of

the assets of the firm remain undisposed of, it is difficult to perceive how the amount of the personal liability of one partner to another on capital account could be determined. If it be said that the debtor partner should have caused a settlement to be had, the answer is that it was equally in the power of the creditor partner to enforce a settlement and fix the amount due. The provision of the partnership agreement as to interest, like the other terms of the instrument, covered a specified period, and ceased to operate when the firm dissolved. On this point see *Barfield v. Loughborough* and other authorities before cited. Neither that agreement, nor the law in the absence of agreement, can sustain the plaintiff's claim to interest on capital after dissolution.

In connection with the claim for interest, there is a special claim made to interest on the sum of \$15,000 which Mr. Wayne had advanced to the firm as a loan. If it had remained in that condition the claim would probably be a valid one, but on November 1, 1867, as appears from the books of the firm, the loan was cancelled and the amount of it credited to Mr. Wayne's capital account. It is claimed that this transfer was made without the knowledge of Mr. Wayne, but when that gentleman was on the witness stand he did not so assert, and in the computation of accounts between himself and partners which forms a part of his testimony, he treats this as part of his capital. At the time of the transfer his capital account had fallen considerably below the \$10,000 called for by the partnership agreement, as there then stood to his credit something over \$6,000, while Mr. Woods had to his credit as capital about \$22,000. The transfer very nearly equalized the amounts the two partners had in the firm, and it will be observed that while the agreement provided for a very unequal division of profits and losses, the amount of capital which each partner bound himself to contribute was the same. There is also in testimony a statement of account, rendered to Mr. Wayne December 13, 1867, which is in the handwriting of Mr. Woods, which shows the transfer on its face. In view of these facts we cannot see how the claim that Mr. Wayne did not know of or consent to the transfer can be sustained. The \$15,000 must be treated as a part of his capital from and after November 1, 1867.

Certain advances were made to the firm after dissolution by both Mr. Woods and Mr. Wayne, and money was also received by them from the firm from time to time. These advances appear to have been made for the purpose of paying off debts of the firm, and we think the parties making them are entitled to interest upon them from the time they were made. They clearly stand on a different footing from capital paid in to carry on the business of the firm. It is difficult to perceive why a partner who, after dissolution, with his own funds pays off a claim against the firm, should not have the same right to interest as the original creditor. Interest will be allowed on the amount of advances made after November 1, 1867, less the amounts from time to time received from the firm. In case the amount received by either partner exceeds the amount advanced by him, such excess, without interest, will be charged against him on capital account.

There has been some discussion about the date of dissolution. It has already been stated that shortly after the fire the parties met and discussed the question as to whether or not the business should be continued, and owing to the opposition of the plaintiff, the conclusion was reached that nothing further could be done, except to wind up the concern. No further attempt was made to carry on the business. The

books were balanced up, interest cast and credited to each partner, and other entries made looking like a general settlement, on November 1, 1867, a time of year when no previous settlement had been made—such settlements appearing on the books at regular half-yearly intervals on the first days of January and July of each year while the firm was in business. The date, November 1, 1867, was three or four weeks after the fire, and must have been very near the time when the understanding not to continue the business was arrived at. Such an understanding acted upon as in this case, clearly works a dissolution.

We therefore fix the date of dissolution as November 1, 1867. A decree may be taken in accordance with this opinion, and if counsel can not agree upon the amounts due the respective parties under the rulings of the court, the case may be remanded to special term and an account may be there stated by a master commissioner or otherwise.

We cannot order the sale of the Woodruff lot for want of proper parties. It ceased to be partnership property, and is now the property of Woods and Wayne as tenants in common. The heirs of Mr. Woods are necessary parties to any proceedings for the sale of that lot.

FORCE and HARMON, JJ., concur.

APPEALS FROM PROBATE COURT.

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[Hamilton District Court, April 24, 1883.]

CHARLOTTE REIDERMAN ET AL. V. GUSTAV TAFEL, ADMR.

1. As the law was before the amendment of sec. 6407 of Rev. Stat., by the act of April 15, 1882, if the probate court neither increased nor diminished the allowance set off by the appraisers for the year's support of the widow and minor children, but confirmed it, there is no right of appeal from said order to the court of common pleas.
2. Where an appeal from the probate court to the court of common pleas is dismissed by the court of common pleas for the want of jurisdiction, no costs can be recovered.

ERROR to the Court of Common Pleas.

The petition in error is filed to reverse an order of the common pleas, dismissing an appeal from the probate court. Reidermann was a creditor of Adam Hugel, deceased; Gustav Tafel was administrator. The appraisers appointed to appraise the estate set off to the widow for her year's support and maintenance of minor children, one thousand dollars, under sec. 6040, Rev. Stat. The plaintiff, dissatisfied with that allowance, petitioned the probate court under sec. 6043, Rev. Stat., to have that court review that allowance made to the widow and children. The probate court on a full consideration confirmed the action of the appraisers. It neither diminished nor increased, but left the allowance as fixed by the appraisers. From the order of the probate court, confirming the action of the appraisers, the plaintiff appealed to the court of common pleas, and the appeal was dismissed. As to the correctness of that action, the case has been brought into this court by a petition in error. It is claimed by the plaintiff that under sec. 6407, Rev. Stat., which was in force at that time, the right of appeal existed. The language of that section is as follows: "In addition to cases specially provided for, appeals may be taken to the court of common pleas, from any order, de-

cision or judgment of the probate court in settling the accounts of an executor, administrator, guardian and trustees, and assignees, trustees and commissioners of insolvents; in proceedings for the sale of real estate for the payments of debts; in cases where the probate court shall have increased or diminished the allowance, made by the appraisers of any estate to any widow or minor child, or children for their support for one year, etc."

N. Bird, for plaintiff in error, cited: Sections 6024, 6203, 6407, 6411, Rev. Stat.; Vol. 54, O. L., 202; Vol. 68, O. L., 67; Vol. 79, O. L., 127; State v. Harmon, 81 O. S., 25, 264; State v. Commissioners, 4 W. L. Gaz., 20; 11 Wend., 511; 1 Burr, 447; Adams v. Card, 2 O. S., 431; Mitchell v. Eyster, 7 O. Pt. 1, 257, 261; Job v. Collier, 11 O., 421; Slater v. Cave, 2 O. S., 80; Sherman, Ex'r, v. Sherman, Adm'r, 21 O. S., 257, 634; Bane v. Wick, 14 O. S., 505, 509, 513; Dorah's Ex'r, v. Dorah's Adm'r, 4 O. S., 292, 296; Rogers v. Weaver, 5 O., 536; Abbott v. Cole, 5 O., 87; Kellogg v. Johnson, Am. Law Reg. Dec., 1872; Tracy v. Card, 2 O. S., 431, 441; Stayner's Case, 33 O. S., 491; Heck v. Heck, 34 O. S., 370; Hempy v. Ransom, 33 O. S., 312; 2 Superior Ct. R., 174.

Gustav Tafel, for defendant in error, cited: Sections 6042, 6043, 6047, Rev. Stat., Sherman v. Sherman, 21 O. S., 681, 634; Heck v. Heck, 34 O. S., 370; Bane v. Wick, 14 O. S., 505, 512, 513.

SMITH, J.

It will be seen by the reading of the section as it stood at the time this appeal was taken, that it gave not a right to appeal generally from the proceedings of the court, but only when the allowance made by the appraisers had either been increased or diminished by the probate court. It is claimed by the plaintiff in error, that the language of that section is broad enough to cover this appeal. We take a different view. And our present opinion is confirmed by the fact that this section has been amended by an act of April 15, 1882, so as to give the right of appeal from the proceedings to increase or diminish the widow's allowance, the very case presented by the plaintiff in error. It was claimed in the argument that the statute of 1882, was simply an indication of what the legislature intended by sec. 6407, Rev. Stat., and the amendment should be taken as an interpretation of the original section. We can not take that view. It is an amendment to that section. It repeals sec. 6407, and the amendment is the law as it now exists.

There is another consideration. This section is the chapter of general provisions regulating proceedings in the probate court, and it will be found that from time to time, since the organization of the probate court in 1853, the legislature enlarged the right of appeal. The statute first gave the right of appeal from the probate court in 1854, 52 O. L. That act was amended in 1856, Swan & Critchfield, 1215, enlarging the cases for appeal.

On February 28, 1866, we find an additional case for appeal by an amendment, Swan & Sayler, 625.

On April 12, 1871, 68 O. L., 57, there was another change giving a further right of appeal, and then for the first time the right of appeal in cases where the judge of the probate court shall have increased or diminished the allowance to the widow, etc.

Again in 1878, 75 O. L., 957, the section was amended, where it appears as found in the Rev. Stat., of 1880; and finally the legislature not being satisfied, in 1882, 79 O. L., 127, passed the last amendment.

These were various amendments of the law, not interpretations of the existing law and it seems to us that under sec. 6407, Rev. Stat., as it was when this appeal was taken, no right of appeal existed, and that the action of the court of common pleas in dismissing the appeal was correct. It was claimed, however, by the plaintiff in error, that under sec. 6203 of the Rev. Stat., a right of appeal existed. That section reads: "Appeals shall be allowed from any final order, judgment, or decree, or the probate court to the court of common pleas, by any person against whom any such order, judgment, or decree may be made, or who may be affected thereby, in the same manner as is provided for appeals from the probate court to the common pleas in other cases; appeals shall also be allowed from any order or judgment of the court of common pleas, in like manner, to the district court, in proceedings, under the sections herein relating to the enforcement of orders of distribution by any person against whom any such judgment or order may be rendered, or who may be affected thereby, to the same extent and in the same manner as is provided for appeals from the common pleas in other cases; and bills of exceptions may be taken and allowed upon any decision of the probate court, court of common pleas, or district court, in proceedings in this behalf as in other cases."

If that section stood by itself, and sec. 6407 was not in the Rev. Stat., there would be some ground for this claim. The language of this section is broad enough to cover all appeals. But it will be found that this is part of the act passed April 17, 1857, Swan & Critchfield, 621, to provide for the enforcement of debts, claims and orders of distribution for the benefit of the next of kin, devisees, and distributees.

The act contains nine sections, and sec. 6203 is the last. It was passed in 1857, and the entire act has remained unchanged on the statute book. It was transferred bodily from the acts of 1857, to the acts of 1878, and thence to the Rev. Stat., under sec. 6208, together with eight or nine sections preceding. It seems to us that this section, although general in terms, was a part of the act passed in 1857, which allowed appeals from orders made by the probate court for the speedy enforcement and collection of claims, and it was not intended as a general act regulating appeals generally from the probate court. It is a part of that act and should be classified among other special provisions for appeal, like proceedings for an allowance of a claim by an executor as per sec. 6101, Rev. Stat., or an appeal to the common pleas, where the probate court refuses to admit a will to probate as per sec. 6934, Rev. Stat., or an appeal from the probate in the settlement of trusts as per sec. 6331, Rev. Stat. The language of sec. 6203, although general in terms, should have reference to the subject of that act, and we are supported in this view by the remark of White, J., in *Aultman v. The Assignee of Seiberling Co.*, 31 O. S., 201, 204. That was an appeal from a decision of the probate court to the court of common pleas for refusing to confirm a sale made by an assignee, it being claimed by the parties that that was a final order which might be appealed from to the court of common pleas. White, J., in giving the opinion of the court after referring to the original of the sec. 6407, Rev. Stat., as the section defining when appeals may be allowed from the probate court to the common pleas court, says, page 204: "The language of the statute authorizing appeals from the probate court, is very general and comprehensive; but it must be construed with reference to the nature of the remedy and the subject-matter. Courts in order to effect

the intention of the statute, often restrain, qualify or enlarge the meaning of the words employed."

There is another view quite obvious. This act was passed in 1857, and has remained ever since. If the claim of the plaintiff in error is correct, that a right of appeal existed in all cases under this section, then it did not require the various amendments of sec. 6407, from time to time, hereinbefore noted, enlarging cases of appeal. We think the right of appeal does not exist in this case under sec. 6203 and the court of common pleas was justified in dismissing the appeal. But the court of common pleas in dismissing the appeal also dismissed it at the cost of the defendant. If the court had no jurisdiction to entertain the appeal, it had no jurisdiction to give judgment for costs. To that extent the judgment will be modified.

286 LIMITATIONS—INSOLVENCY—EXCEPTIONS.

[Hamilton District Court, April 24, 1883.]

B. BETTMAN, JR., TRUSTEE, V. JACOB D. HUNT ET AL.

1. The statute of limitations does not run in favor of an assignee of the debtor under the insolvent laws of this state.
2. The failure of a creditor to present his claim within six months to the assignee is not a bar to an action against the assignee for its allowance.
3. The discharge in bankruptcy of the debtor does not affect the rights of creditors under the assignment, it having been made long prior to the "bankrupt act."
4. The competency of a deposition is to be determined by the rules applicable to the witness himself if present, and although he was competent as a witness when it was taken, yet being a party and the adverse party having since died, it is incompetent against the executor or administrator.
5. A bill of exceptions signed and allowed within thirty days after the trial term, but not entered upon the journal of that term is to be disregarded.

In 1858, one Sargent, assignee under the insolvent laws of this state of * * * Fletcher, filed his petition against Fletcher and Samuel J. Brown, in the superior court of Cincinnati, calling upon them to interplead and settle the true amount owing from Fletcher to Brown. The answer of Brown set forth, in the form of an exhibit, the dates and amounts of a number of notes and bills held by him against Fletcher, in all over nineteen thousand dollars. The answer of Fletcher denied that the true amount was more than eleven thousand dollars.

The case was referred to a referee, or to a succession of referees, not less than four having it in hand from time to time, one resigning and another being appointed. Finally in 1878 there was a report filed, which upon reservation to the general term was set aside. Meanwhile Brown had died, and his administrators had been made parties.

In 1881, the death of Sargent was suggested; and the plaintiff in error, Bettman, being appointed by the probate court to succeed him as trustee, was made party. The administrators of Brown then filed an amended answer, setting forth an exhibit, differing in some items from the exhibit in the original answer, and amounting in all to over twenty-three thousand dollars. An answer to this, filed by Bettman, denied the indebtedness and alleged that most of the notes were paid and that those unpaid were made up of usury. There was a further plea of the statute

of limitations and that Fletcher had been discharged in bankruptcy. It was also alleged that the trustee had no assets, and that the claim had not been presented for allowance.

To this there was a reply by the administrators; and, upon hearing, the superior court found the amount to be eighteen thousand dollars, and ordered that it be allowed.

AVERY, J.

The first assignment of error is that the court had no jurisdiction. But the statute regulating assignments in trust for creditors provides, that on refusal to allow a claim an action may be brought.

Upon the amended pleadings the action was substantially for the allowance of the claim.

The original petition alleging that the claim was disputed, made a case of refusal to allow it. True, the assignment itself and the original petition were prior to the existing legislation regulating the mode of administering assignments. But by section twenty-one, assignments theretofore made were brought within its provisions. This very plaintiff in error had been appointed trustee by the probate court, as provided in the act.

The next question is upon a comparison of the amended, and original answers of the administrators. Of the notes set out in the amended answer some differ, in date or time of payment from those in the original exhibit; there are perhaps some not to be found at all in the original exhibit. To these, we understand, the plea of the statute of limitations is made.

It is a familiar principle of equity that statutes of limitation do not run against a trust. Continuous and subsisting trusts are excepted by the statute itself. This is an action not against the debtor himself, but against a trustee of his estate. Upon an assignment under a statute regulating assignments by insolvent debtors for the benefit of their creditors the statute of limitations does not run in favor of the assignee. *Heckert's Appeal*, 24 Pa. St., 482. *In matter of estate of Leiman*, 32 Md., 225; *Willard v. Clark*, 7 Met., 435.

Upon the plea that these claims had not been presented to the assignee, *Owens v. Ramsdell*, 33 O. S., 439, is in point; the rule declared being that failure to present a claim is no bar so long as there remains assets. The answer, it is true, denied there were assets; but the case was merely for allowance of the claim. The question, whether there were assets or not, could not be litigated by the creditor until allowance of the claim. When allowed, the question would be for the probate court.

Upon the plea of the discharge in bankruptcy, the assignment was long prior to the act of congress. The only effect of the discharge was to relieve Fletcher from liability for any balance, after applying what should be realized from the assignment. Certainly, the effect could not have been to reinvest him with the property without an execution of the trust upon which it had been assigned; or upon the other hand to leave it in the hands of the assignee discharged of the trust. See *Smith v. Tighe*, 46 N. Y. Supr. Ct., 270.

The remaining questions are, upon the sufficiency of the evidence offered by the administrators, and upon the exclusion of the evidence offered by the trustee. The evidence offered by the trustee was the deposition of Fletcher, taken in 1872, before the death of Brown. The suf-

ficiency of the evidence offered by the administrators, all evidence upon the other side being excluded, does not require discussion. Upon the pleadings the burden of proof was on the trustee. The answer denying the "indebtedness" was denial only of a conclusion of law. *Larimore v. Wells*, 29 O. S., 18. The other averments admitted the execution of the notes, but pleaded payment in part and usury as to the rest. These were affirmative facts.

Upon the exclusion of the deposition, one ground on which the competency is maintained is that Brown was living when it was taken. *St. Clair v. Orr*, 16 O. S., 220, reaffirming a common principle that the competency of a deposition depends upon the competency of the witness and is to be judged of as if the witness were present in court, decides, that where a party causes "his deposition to be taken and filed, and afterwards and before trial the opposite party dies and his personal representative is substituted in his place, the deposition is inadmissible on the trial to the same extent as the oral testimony of the party if offered." Another ground is that the statute only prescribes that a party shall not testify where the adverse party is an executor or administrator, etc., and that Fletcher was not a party. In answer it may be enough to say that the original petition made him party. It is said again that his interest was not adverse, by reason of his discharge in bankruptcy. But he had an interest in reducing the amount of his debts.

Moreover a bill of exceptions is required to raise these questions. The trial was at the June term, 1881. Motion for a new trial was overruled June 27, 1881. The entry contains a recital that, "with the consent of the parties the records are left open for thirty days from the adjournment of court for a bill of exceptions. July 27, 1881, there is an entry, not as of the June term but as of the term of July, allowing the bill of exceptions which appears to have been signed on that day.

A bill of exceptions must be allowed and signed during the term, or within thirty days after the term, sec. 5302, Rev. Stat. But the statute prescribes that if it is to be signed after the term, the journal must be kept open, and "the allowance and signing thereof entered thereon as of the term." In *Kerr v. State*, 36 O. S., 614, 624, upon a bill of exceptions entered within thirty days after the trial term, but not in the minutes of, or as of that term, it was held that the court was not at liberty to consider the exceptions.

Judgment affirmed.

McGuffey, Morrill & Strunk, for plaintiff in error.

J. A. Jordan, for defendants in error.

[Superior Court of Cincinnati, General Term.]

† JAS. P. KILBRETH, TRUSTEE, v. SAMUEL FOSDICK.

† For opinion in this case, see 6 Ohio Dec. R., 1235. (a. c. 13 Am. Law Rec., 419.)

PETITIONS IN ERROR.

308

[Hamilton District Court, November 18, 1884.]

JAS. W. SIBLEY v. CONDENSED LUBRICATING OIL CO.

1. Petitions in error to orders discharging attachments may be filed "as in other cases," and within the time allowed by the statute in other cases.
2. Under the supplementary sec. 5563, *a, b, c*, the limitation of time for the filing of petitions in error in attachment proceedings is solely for the purpose of retaining the attached property; and in order that the lien on such property may be retained, the petition in error must be filed and bond given within the time prescribed by the trial court.

ERROR to the Superior Court of Cincinnati.

CONNER, J.

This action was founded upon an overdue account for merchandise, and the affidavit and order of attachment were made and issued on the ground "that the defendant has assigned a part of its property with intent to defraud its creditors." A motion was filed to discharge the attachment, and, after a hearing upon both oral testimony and affidavits, the motion was granted.

The court allowed the plaintiff in error, who was plaintiff below, seven days in which to file the petition in error. The petition in error was not filed within that time, but was filed a little over a month after the order was made discharging the attachment.

The error alleged in the petition in error is, that the court granted the order discharging the attachment, when, as the plaintiff in error claims, it should not have been discharged; or in other words that the finding of the court below was against the manifest weight of evidence.

The defendant in error claim not only that the court's finding below was sustained by the weight of the evidence, but also, that this court should dismiss the petition in error, on the ground, first, that the said petition in error was not filed within the time allowed by the court below, to-wit, within seven days from the date of the order discharging the attachment, and second, because this court could not review the testimony on error, no motion for a new trial having been filed in the court below.

As to the alleged error in not filing a motion for a new trial, it has been held by this court in *Beitman v. McKenzie*, decided to-day, that no such motion is necessary in a special proceeding like an attachment.

As to the alleged error, that the petition in error was not filed within the time fixed, by the court below, it will be necessary, in order to determine that question, to give a construction to sec. 5563, *a, b*, and *c*, passed March 18, 1880, and which are supplementary to the former sec. 5563, Rev. Stat., sec. 5263, *a*, provides that petitions in error may be filed in attachment proceedings "as in other cases;" sec. 5563, *b*, provides for the fixing of the time by the court, who has discharged the attachment, within which such petition in error shall be filed and bond given; and when said petition in error is so filed and bond given, that the attached property shall be held by the officer who has it in charge. Section 6709, Rev. Stat., gives to the district court jurisdiction in error, over the judgments or final orders made by the court of common pleas, or by any superior court, for errors appearing on the record. Section

6707 defines a final order, and, in its definition of final orders, includes "an order affecting a substantial right made in a special proceeding." It was decided by our Supreme Court, in *Watson v. Sullivan*, 5 O. S., 42, that an order discharging an attachment was an order affecting a substantial right in a special proceeding, and that such final order might be reversed, pending the action in which the order of attachment was made.

Prior to the passage of the supplementary sections of March 18, 1880, and set forth above, it was the uniform practice, sustained by repeated decisions of our Supreme Court, for petition in error to be filed, for the reversal of orders discharging attachments, and those petitions in error were filed within the same limit of time as petitions in error in other cases. Our Supreme Court by repeated decisions from *Harrison v. King*, 9 O. S., 388, down, have reviewed in proceeding in error, the finding upon the testimony in the court below; and have done so without any motion for a new trial being filed in the court, where the order was made discharging the attachment. It is claimed by counsel for defendants in error, that prior to the passage of said supplementary sections of March 18, 1880, courts of error could not review the finding of the courts below upon the evidence in attachment proceedings; but, as already said, this is manifestly erroneous. They also claim that by the passage of these supplementary sections of March, 1880, the legislature intended to limit the time, within which petitions in error in attachment proceedings might be filed; while counsel for plaintiff in error claim, that the sole purport of said supplementary sections was simply to provide a limited time in which the attached property should be held, after the order was made discharging the attachment; and within which limit of time the petition in error was to be filed and bond was to be given for the purpose of retaining such lien upon the attached property. It is manifest from an inspection of these sections, as shown in 77 O. L., 69, that there was no express repeal therein of the law respecting the time in which a petition in error should be filed in attachment proceedings or in any other cases; and the only question is, as to whether or not there was a repeal by implication. -

It is a well-settled rule of construction, that where a court is passing upon two sections, full effect shall be given to both if possible; and if it is possible in this case to continue these sections and reconcile them with the former practice and the law respecting the time in which petitions in error in attachment proceedings and other cases were filed, it is our duty to do so. We think that from an examination of the language of these sections that it is clear, the legislature's intention, in passing them, was rather to fix a limited time within which the lien upon the attached property should be preserved, while proceedings in error were being instituted, than that they intended to change the former rule or law, as to the time in which the petition should be filed.

Under the former practice it would be difficult, we think, to find any well-defined plan of retaining the lien upon attached property after an order was made discharging the attachment; and it might be questioned, as to what the objects of litigants could be, in taking up to a reviewing court attachment proceedings, where the attachment had been discharged and the attached property necessarily delivered up. One object, possibly, that litigants may have had in view, in having such case reviewed, as is suggested in *Watson v. Sullivan*, 5 O. S., 42, was, that, if the court above should reverse the finding of the court below, or should modify it in any way, it would be a defense to any claim for damages upon

the bond in attachment. However that may be, it seems to us clear, that it was the intention of the legislature in passing these supplementary sections, to specifically supply that deficiency in the former practice and language of the statutes, and simply to fix the limit of time for the filing of the petition in error, for the sole purpose of preserving the lien upon attached property; and that the petition in error might be filed "as in other cases," if the parties did not choose to file their petition within the time fixed by the court below, give their bond and thereby preserve their lien upon the attached property. And this construction reconciles and gives full effect to all the provisions of the statutes on the subject. We, therefore, think, that while the petition in error in this case was not filed within the seven days fixed by the court below, it was filed within the time allowed for the filing of petitions in error in other cases; and that it is properly before this court; and that the only effect, of filing it after the time fixed by the court below, was the discharge of the lien upon the attached property. As to the ground of error claimed by plaintiffs in error, that the finding of the court below was against the weight of the evidence we are of the opinion, as was stated in *Harrison v. King*, 9 O. S., 888, that we have no power to reverse the finding of the court below, unless it was manifestly improper; and, as the court below had the witnesses before it, we deem that it was better able to judge of the testimony and its effect than ourselves, and that we would not be justified in setting the finding aside.

Judgment affirmed.

Matthews & Shoemaker, for plaintiffs in error.

Jordan, Jordan & Williams and Follett, Hyman & Kelley, *contra*.

[Superior Court of Cincinnati, General Term.]

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CHARLES F. BASSETT v. JOHN G. GUNSOLUS.

For opinion in this case, see 6 Dec. R., 1228, (s. c. 13 Am. Law Rec., 487.)

JUSTICES OF THE PEACE—BONDS.

319

[Hamilton District Court.]

GEORGE LINDEMAN ET AL. v. CHRISTIAN ZIEGLER.

1. Constable fees and other costs stand upon the same footing as money due a party as damages on a judgment claim and when paid to the justice are payable to the party entitled thereto on demand. Hence, there is no breach of a justice's bond by the mere detention of money, no demand therefor having been made.
2. But a demand upon the justice's administrator, whose duty it is to distribute trust funds on hand, and a refusal to pay, constitutes a breach of the bond.

ERROR to the Court of Common Pleas.

BUCHWALTER, J.

The action in the trial court was by Ziegler against the administratrix of the estate of F. A. Dossman, and Lindeman and others, bondsmen of said Dossman, late justice of the peace for Cincinnati township, to recover \$472.19 with interest due him as constable fees collected and paid to said justice.

The petition after making certain formal averments alleged that said sum of money was due him for services as constable as per tabulated account filed as exhibit "B," and that said Dossman received said sum by virtue of his office of justice of the peace during the term aforesaid, for which said Dossman as well as his sureties are liable. That, (after alleging Dossman's death and the appointment of the administratrix) he

properly presented a duly verified account to the administratrix of said Dossman's estate which was by her rejected.

To this petition a general demurrer was filed. The demurrer was overruled. No exception taken. Thereupon the defendants below filed answer. A general denial.

The cause was referred to a master to report separately findings of fact and conclusions of law, the substance of the docket entries, the testimony, etc.

The master made his report accordingly. No motion for a new trial before the master, but motion to the court to set aside report, which was overruled and judgment given on the report for \$406.18, to which defendants below except, as do they also to the overruling of their motion for a new trial.

The error relied upon as claimed is that the petition was defective in that it did not aver nonpayment by the justice to the constable, nor any demand of the justice in his lifetime. That, therefore, the demurrer ought to have been sustained, and it is claimed the proof goes no further than the averments of the petition, viz., that it does not show the *non-payment* of said fees, nor the demand of the justice.

The proof of the fact of fees paid to the justice and demanded of his administratrix did not shift the burden on the administratrix and bondsmen to show that the justice had distributed the costs.

We are of the opinion that constable fees and other costs stand upon the same footing as money due a party as damages on a judgment claim, and when paid by the judgment debtor to the justice is payable by him to the party entitled *on demand*. That it is not the duty of the justice to seek the party entitled, but such party's duty to seek the justice at his office or otherwise and demand the money due. Officially he collects and holds in trust for those entitled all money until distributed; hence, there is no breach of his bond by the mere detention of the money, no demand being made upon the justice—certainly not upon the facts in this case.

By section 592, Revised Statutes, it is the duty of the justice of the peace on the first Monday of April of each year to make out two certified lists of all cases on his docket in which money has been paid and has remained in his hands a year or more, and shall designate to whom due the amount, etc.; to post one of the lists in his office and one in the county clerk's office, * * * and by sec. 593, Rev. Stat., it is his duty in one year after such advertisement to pay all such money remaining in his hands to the county treasury, etc. * * *

By the record in this case none of the costs in question on the first Monday in April, 1879, had remained in hands for one year and the justice had died November, 1879—hence, it appears no breach of his bond occurred in his lifetime by reason of these costs.

In law it became the duty of his legal representative to take possession of his personal and official assets, and out of the same to distribute, according to law, trust funds in his hands, being held by his administratrix in trust for those entitled, and for any failure by her in regard thereto, the bondsmen of the justice of the peace would be liable.

A demand upon her therefore is good, and her failure to pay, according to law, makes a breach of the bond.

See *Peabody & Potter v. Hydorn*, 4 O. S., 887, syllabus and opinion by Judge Ranney, 898.

The petition was good and the demurrer properly overruled.

But no exception was taken to the overruling of the demurrer, and defendant answered by general denial.

This was a waiver of all error, provided the proof at the trial made out a case. See *Davis v. Hines*, 6 O. S., 473.

The proof shows among other facts that Constable Ziegler and Justice Dossman occupied the same office, that by the justice's dockets kept by him, the costs at issue were either paid direct to the justice by the party, or made on execution by the constable, and paid over by him to the justice, and no entry or memorandum thereon showing distribution or payment thereof to Constable Ziegler.

The dockets in each case itemizing the constable's costs, and showing that the service was rendered by Ziegler. Such itemizing of costs is required by statute. Section 594, paragraph 10, and section 611, Revised Statutes.

Section 592 and 593, Revised Statutes, require official lists to be made of dockets, showing money and costs remaining in hands of justice of peace, and after a certain time to be paid to the county treasury.

Sections 6697 and 6700 require all moneys to be paid justice of the peace. No authority in statute for constable to retain his fees out and so that in case of death the justice of peace's representative shall therefrom certify the amounts in his hands, the names and amounts due each party.

Section 619 provides how the justice shall certify to the auditor an account of all fines and costs assessed, whether paid or not, etc., in criminal cases.

There is also some oral testimony, showing that Justice Dossman had receipted on his docket fees paid another constable doing service in his office at that time.

From all of which we are of opinion that plaintiff below made out a *prima facie* case.

The judgment of the court of common pleas will be affirmed with costs.

Pohlman, for plaintiffs in error.

Wm. O. Mussey, for defendant in error.

ATTACHMENT.

321

[Hamilton District Court, November 18, 1884.]

†CHARLES BEITMAN & CO. V. HUGH MCKENZIE.

1. Where the court granted a motion to discharge an attachment, a motion for a new trial was not necessary in order that the action of the court upon the motion discharging the attachment may be reviewed on error.
2. The reviewing court will not reverse the action of the lower court upon a motion to discharge an attachment, where questions of fact are involved, unless the action of the lower court was clearly erroneous.

MAXWELL, J.

This action was brought in the superior court of Cincinnati, August 30, 1883, by the plaintiffs here against the defendant here, upon notes not due. The plaintiffs obtained an attachment against the defendant, upon the ground that the defendant had sold, conveyed and disposed of his property, with the fraudulent intent to cheat and defraud his creditors

†For decision of the superior court affirmed by this decision, see *ante*, 000. The district court was affirmed by the Supreme Court without report, June 14, 1887.

and hinder and delay them in the collection of their debts. A motion to discharge the attachment was made November 25, 1883, and upon the affidavits, counter-affidavits and evidence offered, the court made an order discharging the attachment, July 14, 1884, and dismissed the action.

The plaintiffs excepted to the order discharging the attachment, and have filed their petition in error, in this court, assigning as error that the court granted the motion to dismiss the attachment, instead of overruling it.

The defendant in error raises a question at the outset, which, if determined in his favor, puts an end to the case. He says that a motion for a new trial was necessary in the superior court, that none was made, and therefore this court has no power to review the judgment of the superior court.

It is admitted that no motion for a new trial was made in this case, in the superior court, and the question is, therefore, whether or not one was necessary.

Prior to the act of March 12, 1845, 43 O. L., 80, the overruling of a motion for a new trial could not be assigned as error. *House v. Elliott*, 6 O. S., 497; *Gest v. Kenner*, 7 O. S., 75. By that act, the right of appeal from the court of common pleas to the Supreme Court, in actions at law, was abolished and a provision was adopted giving a party the right to except to the opinion of the court, on a motion for a new trial, based on the insufficiency of the evidence to support the verdict. By section 606 of the code, which took effect July 1, 1853, this right was taken away. The act of April 12, 1858, 55 O. L., 81, section 4, gave a party the right to except in all cases of motion for a new trial * * * by reason that the verdict, or in case the jury be waived, that the finding of the court may be supposed to be against law or evidence." This act was amended by the act of April 8, 1876, 73 O. L., 140, retaining, however, the language quoted above. The act, as amended, was repealed by the act of May 14, 1878, 75 O. L., 802. At the same time 75 O. L., 663-4, chapters 4 and 5 of the revised code were adopted substantially as it now appears in sections 5297 to 5304 and 5305 to 5309, Rev. Stat.

This brief historical review will be found useful for two purposes. All cases arising between March 12, 1845, and July 1, 1853, and between April 12, 1858, and the present time, and appearing in our Supreme Courts, may be looked at as to see what bearing, if any, they have on the question now under consideration. Again, the form of the several acts, giving the right to except to the opinion of the court on a motion for a new trial, may be looked at to see in what cases or proceedings, general or special, it was necessary to make a motion for a new trial; for it is a singular fact that, though the statute, section 5301, recognizes the right to except to the opinion of the court on a motion for a new trial, the right is neither expressly given nor defined anywhere in the statutes; the last act, giving it in express terms, being the act of April 8, 1876, 73 O. L., 140, which was repealed in 75 O. L., 802.

Section 5127, Rev. Stat., defines a trial as a "judicial examination of the issues, whether of law or of fact, in an action or proceeding." Section 5128, Rev. Stat., reads: "Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other." Section 5129, Rev. Stat., reads: "An issue of fact arises (1) upon a material allegation in the petition, denied by the answer; (2) upon a setoff, counterclaim or new matter, presented in the answer and denied by the reply; and (3) upon material new matter in

the reply, which should be considered as controverted by the opposite party without further pleading." Section 5305, Rev. Stat., defines a new trial as a "re-examination in the same court of an issue of fact, after a verdict by a jury, a report of a referee or master commissioner, or a decision by the court;" and subdivision 6 of this section provides that a new trial may be granted on the ground "that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law." Section 5308, Rev. Stat., provides that "the application must be made by motion, upon written grounds filed at the time of making the motion."

It thus appears that an issue of fact arises out of the pleading, that is to say, the petition, answer and reply; that a trial is the judicial examination of the issues of fact so arising in an action or proceeding; that a new trial is a re-examination, in the same court, of an issue of fact so arising; and that the application for the same must be made by motion.

We think the construction of our statute as it stands now, is that a motion for a new trial need only be made where the verdict of the jury or the judgment of the court is not sustained by the evidence, or is contrary to law, after the case has been fully heard and ended, and the questions waived by the pleadings have all been passed upon.

We think the language of the acts of March 12, 1845, April 12, 1858, and April 8, 1876, are plainly to have the same construction as we have given the present statute; and that those acts show the meaning of the legislature in the present statute.

Again, an attachment is a special proceeding, ancillary to the action, and, in ordinary cases, the grounds on which it is obtained constitute no proper part of and should not be embraced in the pleadings in the action. Neither the affidavit nor the order of attachment are pleadings admitting of an answer. *Harrison v. King*, 9 O. S., 388, 394. An order discharging an attachment could always, in our practice, be excepted to and reviewed upon error. *Watson v. Sullivan*, 5 O. S., 42; *Harrison v. King*, 9 O. S., 388; *Gans v. Thompson*, 11 O. S., 579. In the last case, the court, on page 581, after saying that the motion to discharge was made on the ground that the facts stated in the affidavit were not sufficient to sustain the attachment, says, that the question thus raised was a question not of fact, but of law. In *Phelps v. Schroder*, 26 O. S., 556, the court say: "Questions of law in proceedings of this kind (special proceedings) can be brought before a reviewing court on error only by bringing the evidence upon which they arise, upon the record by a bill of exceptions, and where questions of law are thus presented, they may be reviewed on error, in the appellate court, with or without a motion for a new trial having been made in the court below."

The following will be found to be interesting and instructive cases upon the subject of reviewing proceedings upon attachment, and motion for new trial. *Watson v. Sullivan*, 5 O. S., 42; *House v. Elliott*, 6 O. S., 497; *Gest v. Kenner*, 7 O. S., 75; *Harrison v. King*, 9 O. S., 388; *Kline v. Wynne*, 10 O. S., 223; *Gans v. Thompson*, 11 O. S., 579; *Goode v. Wiggins*, 12 O. S., 341; *Earp v. P., Ft. W. & C. R. R.*, 12 O. S., 621; *Westfall v. Dugan*, 14 O. S., 276; *Ide v. Churchill*, 14 O. S., 372; *Hoffman v. Gordon*, 15 O. S., 211; *Randall v. Turner*, 17 O. S., 262; *Holt v. Lamb*, 17 O. S., 374, 384; *Turner v. Turner*, 17 O. S., 449; *Spangler v. Brown*, 26 O. S., 389; *Phelps v. Schroder*, 26 O. S., 549; *Baker v. Pendegast*, 32 O. S., 494; *Everett v. Sumner*, 32 O. S.,

562; Lockwood v. Krum, 34 O. S., 1; Baer v. Otto, 84 O. S., 11; Andrews v. Youngstown, 35 O. S., 218; Weybright v. Fleming, 40 O. S., 52.

We think no motion for a new trial was necessary in this matter in the court below. As to the question whether or not the court properly discharged the attachment, it is said in *Harrison v. King*, *supra*, that a court of error, before reviewing the decision of an inferior court, upon a question of fact involved in a motion to discharge an attachment, should be satisfied that it was clearly erroneous. We are not satisfied that the court was clearly in error in discharging the attachment in this case; we cannot even say that if the case had been originally submitted to us upon the same testimony, we should have come to a different conclusion from the one reached by the court below, and the order discharging the attachment will therefore be affirmed.

J. W. Herron and C. B. Matthews, for plaintiffs in error.

Hagans & Broadwell and Powell & Crosley, for defendant in error.

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PAYMENT OF LEGACIES.

[Hamilton District court.]

WILLIAM DISNEY, EXR., ETC., v. MARTHA G. HAWES.

1. The probate court has the power to pass on the validity of the claims of legatees, and order their payment before final distribution of the estate.
2. Legatees are entitled to demand payment of their legacies, within the four years limited for the presentation of the claims of creditors, upon a satisfactory showing to the probate court, and the giving of the undertakings to the executor, if any be required by the court.

ERROR to the Court of Common Pleas.

CONNER, J.

A petition for citation was filed in the probate court by the defendant in error, reciting the death of one John Masters, the probating of his will, the issuing of letters to and the qualifications of Disney as executor and that defendant in error, Martha J. Hawes, and a Mrs. Pollock were legatees under said will, that more than two and a half years had elapsed since the qualification of the executor, that the decedent left no debts, that the estate was solvent, that the executor had funds in his hands to pay legacies, and prayed for a citation against the executor to show cause why he should not pay the legacies. The executor filed his answer, admitting his appointment and qualification, that he had allowed and paid all claims against the estate, that had been presented, except one for \$1,500, which had been presented and rejected, and that the claimant of said \$1,500 had not brought suit, but that the executor had been apprehensive, that within the four years allowed by law such claim might be presented in a different form and if made good against the estate that there would then be no assets to distribute among the beneficiaries and demises of said testator. The probate court, after a hearing, made an order requiring the executor to pay the legacy of defendant in error upon her giving a bond in accordance with law. The executor appealed the case to the common pleas court, and the common pleas court affirmed the finding of the probate court, and approved the bond presented by the legatee. The executor thereupon filed his petition in error in this court, and alleges the error, that neither the probate

court nor the common pleas court had power to make such order. It is well settled that the power of the probate court with respect to the distribution of estates, is confined to the making of a general order of distribution "according to law," after the filing of the final account, without specifying the parties to whom it is to be distributed, or the amounts to be paid to each. *McLaughlin v. McLaughlin*, 4 O. S., 508, 511; *Swearinger v. Morris*, 14 O. S., 424, 432; *Cox v. John*, 32 O. S., 532; *Armstrong v. Grandin*, 39 O. S., 368. But it is clearly established by the decision of *Dawson v. Dawson*, 25 O. S., 443, that the probate court has the power, upon the application of legatees, to pass on the validity of their legacies, and to make an order directing the executor to pay the same and require a bond of indemnity from the legatee. This decision, in our judgment, is decisive of the question of the alleged error in this case. And we are clearly of the opinion, that both the probate court and the court of common pleas had power to pass upon the validity of the legacy of the defendant in error, and to order the executor to pay the same upon giving bond.

Judgment affirmed with penalty.

Wm. Disney, for himself.

O. Rehm, *contra*.

PROMISSORY NOTES.

13

[Superior Court of Cincinnati, General Term, November 10, 1884.]

†C. B. WILBY v. W. C. BASSENHORST.

In determining whether presentment and notice were within a reasonable time in an action against the endorser of an overdue note, all the circumstances known to the parties at the time of the endorsement are to be considered, and no delay will be held unreasonable which appears to have been contemplated by them.

HARMON, J.

Defendant being one of the creditors of an insolvent firm received on the eve of its assignment a note and chattel mortgage for the amount of his claim. The note was payable one day after date, January 2, 1883, with eight per cent. interest.

On July 30th, the insolvent estate, against which he had filed his note and mortgage as a claim, being still unsettled, defendant sold his claim to plaintiff, endorsing the note in blank. Before the sale was made both parties consulted the assignors and the assignee as to the amount of prior claims, etc., in order to ascertain the probability of its being paid in full, and determined that it no doubt would be. It was known to both that litigation about the validity of a prior claim was pending or impending which would delay the settlement of the estate.

On November 21st, plaintiff presented the note to the makers for payment and at once notified defendant as endorser. The evidence clearly shows that he did this as soon as it became manifest that the accumulation of interest and expenses of litigation upon such prior claim, the litigation proving more protracted than was expected, would prevent payment of plaintiff's claim in full.

The only issue was whether such presentment was within a reasonable time. The jury found for defendant and the case is reserved upon motion for a new trial.

The bill of evidence shows that there was no dispute whatever as to the facts above stated, so that the exercise of judgment upon them was for the court. *Walker v. Stetson*, 14 O. S., 89; *Davis v. Herrick*, 6 O., 55.

Instead of directing a verdict the court left the question of reasonableness of time to the jury. If they have found correctly, this is immaterial; if incorrectly, the question is still for decision here.

We cannot agree with counsel for defendant that parol evidence is incompetent in cases like this. It is true that blank endorsements are written agreements not

†This judgment was reversed by the Supreme Court; see opinion, 45 O. S., 333.

6707 defines a final order, and, in its definition of final orders, includes "an order affecting a substantial right made in a special proceeding." It was decided by our Supreme Court, in *Watson v. Sullivan*, 5 O. S., 42, that an order discharging an attachment was an order affecting a substantial right in a special proceeding, and that such final order might be reversed, pending the action in which the order of attachment was made.

Prior to the passage of the supplementary sections of March 18, 1880, and set forth above, it was the uniform practice, sustained by repeated decisions of our Supreme Court, for petition in error to be filed, for the reversal of orders discharging attachments, and those petitions in error were filed within the same limit of time as petitions in error in other cases. Our Supreme Court by repeated decisions from *Harrison v. King*, 9 O. S., 388, down, have reviewed in proceeding in error, the finding upon the testimony in the court below; and have done so without any motion for a new trial being filed in the court, where the order was made discharging the attachment. It is claimed by counsel for defendants in error, that prior to the passage of said supplementary sections of March 18, 1880, courts of error could not review the finding of the courts below upon the evidence in attachment proceedings; but, as already said, this is manifestly erroneous. They also claim that by the passage of these supplementary sections of March, 1880, the legislature intended to limit the time, within which petitions in error in attachment proceedings might be filed; while counsel for plaintiff in error claim, that the sole purport of said supplementary sections was simply to provide a limited time in which the attached property should be held, after the order was made discharging the attachment; and within which limit of time the petition in error was to be filed and bond was to be given for the purpose of retaining such lien upon the attached property. It is manifest from an inspection of these sections, as shown in 77 O. L., 69, that there was no express repeal therein of the law respecting the time in which a petition in error should be filed in attachment proceedings or in any other cases; and the only question is, as to whether or not there was a repeal by implication. -

It is a well-settled rule of construction, that where a court is passing upon two sections, full effect shall be given to both if possible; and if it is possible in this case to continue these sections and reconcile them with the former practice and the law respecting the time in which petitions in error in attachment proceedings and other cases were filed, it is our duty to do so. We think that from an examination of the language of these sections that it is clear, the legislature's intention, in passing them, was rather to fix a limited time within which the lien upon the attached property should be preserved, while proceedings in error were being instituted, than that they intended to change the former rule or law, as to the time in which the petition should be filed.

Under the former practice it would be difficult, we think, to find any well-defined plan of retaining the lien upon attached property after an order was made discharging the attachment; and it might be questioned, as to what the objects of litigants could be, in taking up to a reviewing court attachment proceedings, where the attachment had been discharged and the attached property necessarily delivered up. One object, possibly, that litigants may have had in view, in having such case reviewed, as is suggested in *Watson v. Sullivan*, 5 O. S., 42, was, that, if the court above should reverse the finding of the court below, or should modify it in any way, it would be a defense to any claim for damages upon

the bond in attachment. However that may be, it seems to us clear, that it was the intention of the legislature in passing these supplementary sections, to specifically supply that deficiency in the former practice and language of the statutes, and simply to fix the limit of time for the filing of the petition in error, for the sole purpose of preserving the lien upon attached property; and that the petition in error might be filed "as in other cases," if the parties did not choose to file their petition within the time fixed by the court below, give their bond and thereby preserve their lien upon the attached property. And this construction reconciles and gives full effect to all the provisions of the statutes on the subject. We, therefore, think, that while the petition in error in this case was not filed within the seven days fixed by the court below, it was filed within the time allowed for the filing of petitions in error in other cases; and that it is properly before this court; and that the only effect, of filing it after the time fixed by the court below, was the discharge of the lien upon the attached property. As to the ground of error claimed by plaintiffs in error, that the finding of the court below was against the weight of the evidence we are of the opinion, as was stated in *Harrison v. King*, 9 O. S., 388, that we have no power to reverse the finding of the court below, unless it was manifestly improper; and, as the court below had the witnesses before it, we deem that it was better able to judge of the testimony and its effect than ourselves, and that we would not be justified in setting the finding aside.

Judgment affirmed.

Matthews & Shoemaker, for plaintiffs in error.

Jordan, Jordan & Williams and Follett, Hyman & Kelley, *contra*.

[Superior Court of Cincinnati, General Term.]

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CHARLES F. BASSETT v. JOHN G. GUNSOLUS.

For opinion in this case, see 6 Dec. R., 1228, (s. c. 13 Am. Law Rec., 487.)

JUSTICES OF THE PEACE—BONDS.

319

[Hamilton District Court.]

GEORGE LINDEMAN ET AL. v. CHRISTIAN ZIEGLER.

1. Constable fees and other costs stand upon the same footing as money due a party as damages on a judgment claim and when paid to the justice are payable to the party entitled thereto on demand. Hence, there is no breach of a justice's bond by the mere detention of money, no demand therefor having been made.
2. But a demand upon the justice's administrator, whose duty it is to distribute trust funds on hand, and a refusal to pay, constitutes a breach of the bond.

ERROR to the Court of Common Pleas.

BUCHWALTER, J.

The action in the trial court was by Ziegler against the administratrix of the estate of F. A. Dossman, and Lindeman and others, bondsmen of said Dossman, late justice of the peace for Cincinnati township, to recover \$472.19 with interest due him as constable fees collected and paid to said justice.

The petition after making certain formal averments alleged that said sum of money was due him for services as constable as per tabulated account filed as exhibit "B," and that said Dossman received said sum by virtue of his office of justice of the peace during the term aforesaid, for which said Dossman as well as his sureties are liable. That, (after alleging Dossman's death and the appointment of the administratrix) he

280, page 437, the text reads, "that covenants will be construed as dependent or independent according to the evident intention of the parties and the good sense of the case." Courts are disinclined to construe stipulations in a contract to do certain things within a given time, in consideration of the payment of money by the other party, as condition precedent, unless compelled to do so by the express language of the contract. *R. R. v. Butler*, 50 Cal., 574. Another test applicable in determining if covenants are dependent or independent, is whether the thing which the lessors agreed to do was to be performed before or after certain things which the lessee agreed to do, and if it be a thing that is to be performed afterwards, and the lessee entered into possession and paid his installments of rent, or otherwise complying with the covenant on his part, it would be presumed that the after covenant to be performed by the lessors, the breach of which could be estimated in damages, would not be a condition precedent to the payment of the rents by the lessee. See *R. R. v. Butler*, *supra*. In this case the lessee entered into possession according to the terms of the lease, installments of the rent became due July 1st, and October 1, 1882, preceding the time when the first note matured. It was the privilege of the lessee upon default of the the lessors to have paid off the matured note, and either by assignment or by virtue of his interest as lessee to have enforced a lien therefor on the premises, with an immediate right of action against lessors for the breach of that covenant; the \$6,000 is but a small portion of the agreed value of the property, to-wit: \$50,000, and it would take less than ten quarterly installments of rent to have satisfied the first note.

We are of the opinion that by a fair construction of the terms of this lease, the covenant to pay the mortgage notes at maturity was not a condition precedent to the payment of the rents, but that it was an independent covenant for the breach of which the lessee had his right of action to recover his damages, which could with certainty be determined.

See *Parsons on Contracts*, Vol. II., 529, note r, 679; *Wood on Landlord and Tenant*, sec. 280; *Benjamin on Sales*, sec. 526, 564, 4th ed.; *Burge v. R. R.*, 32 Ia., 101; *Taylor on Landlord and Tenant*, sec. 381, note 5.

Nor was there a breach of the covenant for quiet enjoyment, for it is manifest that the lessee was not disturbed in his possession. *Rawl on Covenants of Title*, 144. See *Smith v. Dixon*, 27 O. S., 471; *Stow v. Gilbert*, 4 Dec. R., 528 (s. c. 2 Clev. Rep., 321); *St. John v. Palmer*, 5 Hill., 599; *Hoy v. Taliaferro*, 8 S. & M., 727.

The mortgage even after decree in foreclosure, was not that unconditional paramount title that the lessee would be justified in abandoning his estate, because it was one which could be satisfied by payment of a fixed sum of money, and he had no right to assume that lessors would not so satisfy it before judicial sale.

The cases cited by lessee's counsel justifying the tenant in abandoning the premises before eviction, do not reach this case. In those cases it was an unconditional paramount title, asserted against the tenant, which presumably could not be defeated, and for which the owner could not be compelled in satisfaction thereof to accept a fixed sum of money. Nor is a decree in foreclosure an eviction or justification of the abandonment of the premises by the tenant, as was held in *Mills v. Hamilton*, 49 Ia., 105; where under the statute a mortgagor was entitled to retain possession of the premises until one year after decree of sale and confirma-

tion thereof, and it was held that the tenant yielded up possession to the purchaser at his peril, because it was in the power of the mortgagor to have redeemed his title within the year. See *Peck v. Ice Co.*, 18 Hun., 188.

Were it to be conceded that these propositions have been erroneously stated by the court, it appears by the proof that when Mr. Dickson attempted to tender back the possession of the premises in question, there were sub-tenants, put there by him in possession of a part of the premises, and he asked lessors to accept lessee's estate with the incumbrance of the sub-lessee's title upon it; it does not appear that lessors agreed to accept the sub-tenants, or that they took possession. That was not a good tender. It was not tendering back the title which the lessors gave the lessee. The possession of the sub-tenants was the possession of the lessee, Dickson. Wood on Landlord and Tenant, sec. 48; Platt on Leases, Vol. II, 499; Wood on Landlord and Tenant, 267.

We have examined the rulings of the trial court as to evidence offered to prove damage, and we think them correct, and it further appears that notwithstanding the ruling, the witness answered, but the answer fails to prove any other than nominal damages.

The lessee is bound for the payment of the rent and taxes.

Judgment affirmed.

Mayer, Shaffer & Smith, for plaintiff in error.

Ramsey, Maxwell & Matthews and Charles J. Hunt, *contra*.

MARRIED WOMEN.

15

[Hamilton Common Pleas.]

ELIZABETH KOCH v. L. D. SEIFERT & Co.

1. A married woman may now bind herself to the same extent and in the same manner, by contract, as though she were unmarried.
2. The amendments of 1884 do not retroact so as to give a justice jurisdiction of an action on a married woman's prior contract.

JOHNSTON, J.

A petition in error to reverse the judgment of Justice Diehl, against plaintiff in error. Seifert & Co. sued her jointly with her husband to recover on an account for store goods sold and delivered in 1878-9. Upon plaintiffs' resting their case, the evidence showing that defendant was a married woman, she moved that the action be dismissed as against her. This motion was refused and no evidence being offered by either of the defendants, judgment was entered against both, to which the wife excepted, and prosecutes this petition on her own behalf alone, to obtain a reversal thereof.

In *Allison & Townsley v. Anne E. Porter*, 29 O. S., 186, it was decided that a justice could not entertain jurisdiction of an action against a married woman to charge her separate estate; that is, that when the cause of action was not upon a contract which she had a right to make in respect to her separate estate, as was the fact in that case, the justice was without jurisdiction. Except that the contract was one relating to the improvement or leasing, etc., of her separate estate, provided by statute, she could not make a contract binding upon her in an action at law. If

the contract had been of that character, that is one by which in her own name she could bind herself, the justice would have had jurisdiction.

The first expression of the court in that case is: "The suit was not brought on a contract, which the defendant was authorized by statute to make in respect to her separate estate."

Thereafter in *Levi v. Earl*, 30 O. S., 147, it was held directly that an action at law could be maintained on such a contract against a married woman.

In *Patrick v. Littell*, 36 O. S., 79, still later it was decided that upon contracts of that character, a personal judgment could be rendered against her, and execution be levied and collected upon her separate property, "the same as it could be upon the property or estate of her husband, for any judgment rendered against him." (pp. 85-86.) Thus the line between the statutory and equitable obligation was carefully drawn and observed. Where the contract was not within the statute, sec. 3108, Rev. Stat., only a court of equity could enforce the obligation. Otherwise she was liable thereon in an action at law, and a justice could take jurisdiction as in any other action. Now, however, it would seem from recent amendments made of sec. 5319, vol. 81, O. L. (1884), p. 65, and secs. 3108, 3109, 3110, page 209, *ib.*, she is placed as to her separate estate—all of her estate, so far as the making of contracts are concerned, upon the same footing as an unmarried woman. The limitations of sec. 3108, restricting her legal contracts to such as related to improving or benefiting or leasing her separate estate have been swept away, and only what shall constitute separate estate left; and sec. 3109, Rev. Stat., has been amended to read as follows: "The separate property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of the husband, or be in any manner conveyed or incumbered by him, and she may in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried."

In the amendment of 5319, Rev. Stat., the word "separate" has been omitted and now reads "that her property and estate shall be liable for the judgment against her," etc.

These amendments were enacted on March 20th and April 14, 1884, respectively, and do not effect her past contracts and obligations, but only her contracts since those dates. The alleged indebtedness in the case at bar was contracted in 1878-9; hence, not being contracts confessedly for the benefit of her separate estate as at that time provided by sec. 3108, the justice erred against her objection, in entertaining jurisdiction and rendering judgment against her.

Judgment reversed.

A. J. Jessup, for plaintiff in error.

O. Rehm, *contra*.

AFFIDAVIT FOR ATTACHMENT.**35**

[Hamilton District Court, November 18, 1884.]

Buchwalter, Conner and Maxwell, JJ.

E. H. BROWNELL & CO. V. COLBATH STEAM HEATING CO.

An allegation in an affidavit to obtain an attachment that the defendant fraudulently or criminally contracted the debt is in the disjunctive, and is insufficient to support an attachment.

MAXWELL, J.

The plaintiffs in error brought an action in the superior court against the defendants in error, for goods sold and delivered, and, at the same time, obtained an attachment and had it levied on the property of the defendant. The affidavit upon which the attachment was obtained, alleged that the defendant had "disposed of, or was about to dispose of, its property with the intent to defraud its creditors," and that the defendant "fraudulently or criminally contracted the debt upon which a writ had been brought."

A motion was made to discharge the attachment upon the ground that the affidavit, upon which it had been issued, was insufficient in law, and upon other grounds. A number of affidavits were submitted upon the facts, under the second allegation in the affidavit for the attachment, and upon a hearing the court granted the motion and discharged the attachment, upon the ground that the affidavit was insufficient in law.

The plaintiffs have filed their petition in error in this court, and assign as error the granting of the motion to discharge the attachment. Counsel for defendant in error claim that the ruling of the court below was correct, for the reason that the language used in the affidavit "fraudulently or criminally" was in the disjunctive, and therefore insufficient to support an attachment; while the counsel for plaintiffs in error claim that the affidavit follows the language of the statute, that the two words mean substantially the same thing, being found in one subdivision of the section specifying the grounds on which an attachment may issue, and that the affidavit is sufficient.

We think that if the two words, "fraudulently" and "criminally," are separate grounds for an attachment, then it was bad pleading to allege them in the disjunctive. *Rogers v. Ellis et al.*, 1 Handy, 48, and the cases cited in the opinion. Same case in 1 Disney, 1. It is true it is said the affidavit may use the language of the statute, but that is only instead of setting out the facts, and is not to be taken literally. *Coston v. Paige*, 9 O. S., 397; *Creasser v. Young*, 31 O. S., 57. The forms of the affidavits in *Nash's Pleading and Practice*, 4th Ed., 865, and *Bates' Pleading and Practice*, 285, show that the affidavits must be positive, as does the case of *Coston v. Paige*, and if the affidavit be in the disjunctive it cannot be positive.

In the case of *Sturdevant v. Tuttle*, 22 O. S., 111, the court say, p. 114, that, "fraudulently and criminally are neither synonymous nor convertible," and go on in the opinion to show the distinction between the two terms. See also the case of *Kirk v. Whitaker*, 22 O. S., 115, and the case of *Creasser v. Young*, 31 O. S., 57, following and approving the two cases above.

It being clear that the terms "fraudulently" and "criminally" are not synonymous but are separate and independent grounds of attachment, we think the affidavit, in the case under consideration, was in the disjunctive and therefore bad, and the judgment of the superior court will be affirmed.

Ferris & Wilder, for plaintiffs in error.

Hagans & Broadwell, *contra*.

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LIQUOR LAWS—VOLUNTARY PAYMENT.

[Hamilton Common Pleas, January, 1885.]

SNODGRASS V. TREASURER OF FRANKLIN COUNTY.

Paying the "Scott Law" taxes under protest and bringing a suit within the year's limitation does not entitle the party to a refunder.

EVANS, J.

The judge arrested the case from the jury and ordered a non-suit, because plaintiff had failed to establish facts constituting involuntary payment of the tax. The judge held that paying the tax under protest and bringing suit within the year's limitation was not sufficient to entitle a party to a refunder, but involuntary payment must also be shown.

That the mere entry of the tax assessment by the treasurer in his books did not constitute duress. Some act by the treasurer to enforce the collection of the tax must be shown to make the payment by the plaintiff an involuntary one. This ruling of the court will throw out a great many refunder cases.

Leave was however granted to amend by showing that the plaintiff in the case, in obtaining the written consent of his landlord to carrying on the traffic, as he was required to do under the law, had to agree to the condition that his lease should be forfeited if he failed to pay the Scott law tax promptly, and that he was therefore compelled to pay the tax without waiting for any further proceeding on the part of the county treasurer or forfeit his lease. (Trying to bring his case under *Parker v. Cincinnati*, 11 O. S. R., 584.) (*Editorial*.)

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INSURANCE AGENCY.

[Superior Court of Cincinnati, General Term.]

†TRIMBLE V. CONN. MUT. LIFE INS. CO.

A contract of insurance agency, which fixed no term, provided that the agents should devote their entire time and attention to canvassing and soliciting, collecting premiums on policies delivered to them, or to their sub-agents, and should perform all other services pertaining to or necessary for the prosecution of the company's business, and that in consideration of the performance of such duties, the company should "allow and pay them a commission of twenty-five per cent. on all the first premiums, collected by them or their agents upon policies received from them, and ten per cent. for each year for four years on the subsequent or general premium thereon:" *Held*, that after the termination of the agency by the act of the company the agent was not entitled to such commissions on renewals.

†This judgment was reversed by the circuit court and the circuit court reversed by the Supreme Court, without report, January 29, 1889. See also *post*, 22 Bull., 37; re-reported.

Plaintiff, as assignee of George W. Fackler, late one of the general agents of defendant, sues for an account of premiums collected by it within four years after the termination of such agency, upon policies secured by Fackler during its continuance, claiming that by the terms of Fackler's contract he was entitled to commissions on renewals of such policies for four years, without regard to the continuance of his agency, which was at will.

After hearing the evidence and argument by plaintiff's counsel, the court decided as follows :

HARMON, J.

It has been manifest since my mind first got possession of this case, that it turns on the construction of this contract. The plaintiff to succeed must certainly establish the proposition that by its terms he obtained, while the agent of the company, a vested right to renewal premiums, and to unpaid portions of first premiums, which fell due after his agency terminated, it being admitted that the company had the right, with or without cause, to terminate the agency when it pleased.

Assuming that the contract is sufficiently indefinite to justify the court in looking to the subsequent conduct of the parties, to determine whether they have, by mutual assent, whether evidenced by conduct or language, put a construction upon it, we will look at that first.

There were three occasions when it might naturally be expected that the construction of his contract would have been a subject of consideration, for of course the fact that the one party or the other did not contend for a certain construction, would have no weight unless the occasion would naturally call upon him to do so.

The first one was when Rochester transferred his interest in the contract to Fackler. It is contended for plaintiff that the fact that a transfer was made showed that Fackler must have had in mind the construction now contended for by the plaintiff, and that the transfer being sent to the company and at least tacitly assented to by it, it must be held to have known that Fackler made this claim. But I do not think that the transfer necessarily had anything to do with the right to commissions after the agency terminated. It may naturally be accounted for otherwise. Neither Rochester nor Fackler nor the company had in view a termination of the agency. What all the parties had in view was Rochester's going out and Fackler's staying in. If Rochester had made no assignment of his right to Fackler, the company, if they had separated, might not have been justified in paying to Fackler alone any of the commissions upon premiums which it may have received directly. It was bound to pay such commissions to the firm ; and the right to continue in the business, and to earn commissions may have been fairly a subject of transfer, especially when we consider that the company, having bargained for the services of both, could not be expected without its consent to put up with the services of one.

The second occasion was when the company desired to separate Indiana from the agency created by this contract, and a correspondence took place between the parties which resulted in giving Indiana to another agent, and in some agreement between Fackler and that other agent as to the division of commissions on renewals upon policies obtained while Fackler held the agency for that state. The parties were not here considering what the rights of either would be if the agency were terminated. The agency for both states was an entirety so long as Fackler continued

to act for the company, unless he consented to divide it. The testimony shows that the relations of the parties were satisfactory, the company did not of course desire to offend an agent it wished to retain, and the object of the correspondence was to see if they could not agree upon some terms upon which Fackler would be willing to act for Ohio alone and let Indiana go. Fackler wishing to do as well as he could for himself in the bargain, naturally wanted what the new agent was willing to concede, at least a share in an easily earned commission on renewals upon policies which his labor and that of his agents had secured for the company. Of course Fackler had a vested right in these provided his agency continued. I am sure that in the amicable attempt to modify their agreement, neither party had any thought of what would be the effect if the company terminated the entire agency.

The third occasion was when the agency ended. I have not heard what counsel might have to say on that subject, but it is perfectly manifest that that of all times is the one when we would expect something to be said upon the subject, first, because the event had come which would bring it to the minds of the parties; second, because Fackler was then found to be in arrears; third, because he was put to the humiliation of calling upon a relation, and that not a blood relation, to let him have money to pay the company. The fact was well known that interests of this sort have an ascertainable value by the tables of actuaries, and it seems to me that if we were to concede that what occurred on the other two occasions bears in favor of the plaintiff, the fact that Fackler did not on this occasion allude in any way to this claim or seek to have its value taken by the company as a part of his large indebtedness, would overcome it, and that the plaintiff is being given the benefit of every doubt if the court shall say that he comes out even on the question of the conduct of the parties. So that we are put back at last to look at the agreement simply in the light of its own terms.

It must be admitted that this agreement, like a good many others drawn by persons with a little learning so dangerous in the law, has upon casual reading a sound of great profundity and clearness, but is really open to attack for obscurity, and that obscurity, as is often the case, arises from too great a display of words of legal smack. Counsel for plaintiff with great ingenuity have taken advantage of these things and certainly have raised some doubt, if we are to look at the contract as they look at it. But it seems to me they have failed to do what by the well known rule of construction courts are enjoined to do, take the contract by the four corners, consider it as a whole.

The points made by counsel are that when the contract reaches the point where the compensation of Fackler is provided for, it is so worded as to appear that his collection of some premiums is the condition upon which he is to receive a commission thereon, but that upon other premiums he was to have commissions whether he collected them or not. In the first place, I am not prepared to say that this is true. It is only a very critical reading that would suggest it. The said company stipulates and agrees "to allow and pay the said George Fackler & Co. a commission of twenty-five per cent. on all the first premiums collected by them or their agents upon policies received from them, and ten per cent. for each year for four years on the subsequent or renewal premiums thereon," etc. Assuming what may be, and I think perhaps is the case, that there was an intent in the location of the phrase, "collected by them," does it follow that such intent was that the agent was to have a

commission on renewals after his agency ceased, it being provided that it might cease whenever the company so wishes? Is it not equally referable to an intention to allow the agent his commission in cases where the insured might transmit his premium directly to the company, as would very probably be the case, for instance where extra premiums were paid, they being as the testimony shows, a special additional premium paid for a risk not contemplated by the policy. It seems to me that one is as fair a construction as the other, that both would hardly be contended for, and that we must remember that we naturally expect men, when they are providing for what the one is to do and the other to pay, to have in mind only the state of affairs while the contract continues, and that a stipulation for something after the contract is ended is not ordinarily to be looked for except in express terms. It is conceded by counsel that the only effect of the location of the phrase, "collected by them," in the next clause, relating to the commissions or premiums or policies existing when the contract was made, only has the effect of giving the agent the commissions although the premium should not pass through his hands, and that fact strengthens the view that such was the only effect of the clause in question, considering the principle I have already spoken of, that parties are supposed to be stipulating, unless the contrary appears, for the time covered by the contract, and not for something to happen afterwards.

I am unable to discover any particular meaning in the use of the words, "allow and pay," as contended for by counsel. In the first place both words are proper in the view just taken, that first premiums being always collected by the agent, the term, "allow," would naturally apply to them as well as to all other premiums collected by him, and as the parties contemplated the payment of some premiums directly to the company, the use of the word "pay," also would be proper. But if that be not true it is only a part of that verbiage which is well illustrated in the use of the pompous terms, "stipulates and agrees." It certainly could not be contended that there is anything but a desire to spread himself to be seen in the use by the writer of both of those terms.

Now this being the case, it seems to me that it would be straining a point to say, if we look along further, that the intent of this contract was to provide that the agent was to have something after the agency terminated. But looking at the entire contract it seems to me perfectly clear that the parties had no such thing in view, and why? The language of the undertaking on each side is as follows: "Fackler & Co. agree to devote their entire time and attention in a faithful and industrious manner to the general business of life insurance for said company in said states, in canvassing and soliciting in said states, collecting premiums on policies delivered to them or their sub or local agents," etc.

The parties do not then proceed to provide separate payments for these separate services. They do not say the agent shall have so much for getting the application, so much for collecting the premiums, but they say expressly: "In consideration of the faithful performance of the aforesaid duties by said George W. Fackler & Co.," they shall receive the stipulated commissions.

It is true, sometimes, where a number of things, whether articles to be delivered, or services to be rendered, are specified, and afterwards a series of compensations therefor are provided, that the maxim, *singula singulis reddenda* is to be applied, but it seems to me absolutely impos-

sible to do so here because the sums to be ascertained by a certain percentage or commission are expressly stated to be the payment, not only for all the specific things to be done by Fackler, as stated above, but for "all other services pertaining to and necessary for the successful prosecution of the business," of the company in Ohio and Indiana. That being the case it seems to me perfectly plain that what the parties were specifying what he should do on the one hand and what they should pay him for it on the other, while the agency should continue, and that it is impossible by fair construction to find in the contract the meaning contended for by the plaintiff, viz: that the intent of the contract was, that for getting applications of insurance in this company the agent was to be entitled to twenty-five per cent. upon the first premium and ten per cent. on renewals for four years, regardless of the continuance of the agency.

This seems to me to settle the controversy. It may be said that it is eminently fair that the company should continue to pay. It may be said it is a hardship on the agent, after having sowed the seed with much toil not to be permitted to pluck the fruit when the plucking is comparatively easy. But the answer is, that where parties make a contract they stand or fall by it, and if Fackler intended to secure to himself such a right it was easy to say so. He might have done it by separating the various commissions provided for and making each a payment for some specific service. If the contract provided that for getting the insurance he should have twenty-five per cent. upon the first, and ten per cent. upon subsequent premiums for four years, he would have a vested right which would survive the termination of his agency, but those amounts being named as what he is to get for everything he was to do as agent, he cannot say he is entitled to them after his agency has ceased, and he can no longer render the services for which they were to be the reward.

I am sorry now that this view has so ripened in my mind as to lead me to decide the case without hearing from counsel for the defense, that argument was not insisted upon at the time the motion for a non-suit was made, but at that time I did not fully grasp the entire scope of this contract, which I had only heard read over once.

Judgment for defendant.

Stallo, Kittredge & Wilby, for plaintiff.

Jordan, Jordan & Williams, for defendant.

G. leased a part of certain factory buildings in Cincinnati to D. & A. for a term of years, with exceptions as to payment of rents and surrendering premises in good condition at the end of the term, as are covered by sec. 4113, Rev. Stat., in the event said building became untenable by reason of fire, etc., without lessees' fault; during the term, viz.: December 11, 1880, a fire destroyed, without lessees' fault, most of the buildings rented, so that they were unfit for occupancy. G., without any agreement with D. & A., re-entered and rebuilt the factory substantially as before, during which time lessees carried on no business therein, but were frequently on the premises in care of

† This judgment was reversed by the Supreme Court; see opinion, 47 O. S., 396.

their chattel property not wholly destroyed. January 11, 1881, G. notified lessees that the property was now ready for their occupancy, and of their liability for rent from that date; and on January 13, 1881, D. & A. refused to reoccupy, and claimed that the fire terminated the lease.

Held, that the lessees are not estopped from claiming their release from obligation to pay rent under the lease; that sec. 4113, Rev. Stat., did not give an exclusive option to lessees, but that such destruction by fire gave an option to both lessor and lessees to terminate the lease, and that a re-entry by the lessor in this case without any agreement is presumed to have been in his rightful exercise of his option to reoccupy and terminate the lease.

ERROR to the Superior Court.

BUCHWALTER, J.

The action below was upon eleven counts for the recovery of money. The court below found against Gay except on the ninth count, which was for the recovery of money as rent, from January 7th to May 7, 1881, at the rate of \$125 per month, under a lease executed by James P. Gay, the owner, to John R. Davie and others, the tenants.

The lease covered a part of certain factory premises, on the south side of New street, this city, together with an agreement by lessors to provide certain power to operate the machinery of the lessees.

The defense was, that said premises, without any fault of lessees, were destroyed by fire on the 11th day of December, 1880; that they thereby became untenable and unfit for occupancy, and that, therefore, they surrendered possession thereof to the owner.

On the issues of fact and law as submitted to it without a jury, the court held the lessees liable for the rent and gave judgment for the landlord.

By the proof it is clear that, without any fault of the lessees, there was such a destruction of the premises by the fire of December 11, 1880, that they were unfit for occupancy. The floors were destroyed and the machinery of the tenants injured and dropped into the basement. Without any agreement between the parties as to future occupancy, without a word said as to the same, the landlord entered upon the premises, took possession, and rebuilt them.

On January 10th he notified by letter the lessees that the premises from and after January 11th would be ready for their occupation. On the 13th, three days thereafter, the lessees, after having employed an architect to examine the premises, answering said, that by reason of the fire they were not bound by the lease and would not reoccupy the premises.

The lease had this covenant or agreement, "that said lessees will pay said rents in manner aforesaid, except said premises shall be destroyed or rendered untenable by fire or other unavoidable accident * * * and at the end of said term they will deliver up said premises in as good order and condition as they now are * * * damage by fire and other unavoidable casualty excepted."

Section 4113, Rev. Stat., provides: "The lessee of any building which, without any fault or neglect on his part, is destroyed or injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee shall thereupon surrender possession of the premises so leased."

It is claimed by counsel for the landlord that this section gives to the lessee the exclusive option of surrender of the lease, but that he shall surrender the possession before he can avail himself of the right provided for him to be acquitted of the rents, and he cites *Johnson et al. v. Oppenheim*, 55 N. Y., 280, as maintaining that view, and claims that the New York Statute (vol. 3, sec. 2203, Rev. Stat.) is substantially the same as the Ohio Statute; but the concluding part of the paragraph reads, "and the lessees or occupants *may* thereupon quit and surrender possession of the leasehold premises and land so leased or occupied," the difference being substantially in the use of the word "may" for "shall."

The case cited was determined against the tenants, upon the ground that they were in fault themselves in refusing license to the adjoining lot owners to go upon their premises and shore up their division wall to prevent injury by the excavation about to be made on such adjoining lot. However, the court in that case announced the principle, as claimed by counsel for the landlord, that the New York Statute gave the option in favor of the lessee.

We cannot read this statute in Ohio with that construction. We do not read it as one of exclusive option to the lessee; not that lessee *may* surrender possession, but as it reads here "shall," and being a right reserved in favor of the

lessor, that is that the fire or other destruction relieves the tenant or lessee from the payment of the rents, that he shall surrender possession and that lessor is thereby given the right to take possession and regain his estate. That this is a right in his favor also, which the lessor may take into account in making his lease, viz.: that he may, in case of such destruction of his buildings, re-enter and put such other improvements as he may wish, upon the premises, irrespective of what they may have been before.

Again, we are of opinion, that, the landlord having re-entered and rebuilt without any agreement or understanding between him and the lessees, it is to be presumed *rather* that he was exercising his right or option under the statute, to claim the lease terminated—and, if not presumed that he claimed a right to so re-enter and terminate the lease as under the statute, then, when he entered without any agreement or understanding with or permission from the lessees, his possession was an eviction of the lessees; for there was no right reserved in the lease expressly giving to him the privilege of re-entering for the purpose of rebuilding. But it is claimed that the lessees are estopped to now deny their tenancy or liability, because it is said they were in partial possession of the premises while the landlord was rebuilding.

We have read the testimony and are unable to find the occupancy other than consistent with taking care of the machinery on the premises, and such property as there remained. The lessees did not use the premises as theretofore. From their need of a factory building it was impossible for them to carry on their manufacturing business. They were excluded from the possession of even the shell or outside walls of the factory. Their occupancy of the premises was not such as to estop them from denying that they were there as lessees, especially as the landlord was in possession, occupying and rebuilding the premises to the exclusion of lessees, except with reasonable opportunity to care for and remove their property. Besides, the time was reasonable in which they notified the landlord that they would not continue in possession of the premises under this lease.

Judgment reversed.

Jordan, Jordan & Williams, for plaintiffs in error.

Taft & Lloyd, *contra*.

[Hamilton District Court, January 15, 1885.]

Buchwalter, Conner and Maxwell, JJ.

†CROWN MANUFACTURING CO. v. SARAH E. GAY.

1. Where a landlord agrees to furnish tenant with power, the destruction of the building from whence the power is supplied and the temporary cutting off of the supply of power does not render the premises of the tenant "unfit for occupancy," which under sec. 4113, Rev. Stat., terminates the lease.
2. Eviction from part of the premises, entitles tenant to a proportionate reduction of rent, where such eviction is by a stranger under a paramount title to the landlord; but eviction by landlord, not acquiesced in by tenant, relieves tenant from payment of all rent while so evicted.
3. A re-renting after lessee has claimed to abandon is not an assent, for the lessor may re-rent as agent of the lessee.

ERROR to the Superior Court of Cincinnati.

CONNER, J.

This was an action for the recovery of rent of premises on Seventh street and two rooms in a building on New street, in Cincinnati, under a lease from J. P. Gay to the Crown Manufacturing Co., executed February 7, 1880, for a term of two years and five months. Gay's interest passed by assignment to the plaintiff below, who is the defendant in error. Under

†This judgment was affirmed by the Supreme Court, refusing leave to file a petition in error, January 11, 1887.

this lease, power was to be furnished by the lessor from other premises of his on New street, to run the Seventh street premises occupied by the lessee; and without such power, said premises would be comparatively useless for the purposes of the lessee. A fire occurred on December 11, 1880, whereby the New street building of the lessor, with its engines and machinery, from which power was supplied to the Seventh street premises of lessee, was entirely destroyed; but said building was rebuilt and supplied with proper engines and machinery by the 11th of January, 1881, and due notice thereof was given to the lessee. The plaintiff below sought to recover the rent under said lease for the period from October 7, 1881, to July 6, 1882, after deducting for the rent of the two rooms in the building on New street, embraced within the lease to the defendant below, but which were admitted to have been rented by the lessor to the Barb Wire Fence Co., with the alleged consent of the defendant below; and after a further deduction for the rent of the Seventh street premises to Ault & Wiborg, from May 7, 1882, to July 6, 1882, which the plaintiff below claimed was rented by Gay, the lessor, as agent of the lessee, the defendant below, after the lessee had abandoned the premises.

The lessee paid the rent under the lease in full, from January 7, 1881, to May 7, 1881, and in whole or in part from May 7, 1881, to September 7th of the same year.

The lessee admitted the execution of the lease, and set up as defenses to the action:

1. That the fire of December 11, 1880, cut off the supply of power to the Seventh street premises, and, under the provisions of sec. 4113 of Revised Statutes, rendered said Seventh street premises untenable and "unfit for occupancy;" that the lessee thereupon surrendered possession of the premises; that the lease thereupon terminated; and that thereafter the lessee did not use or occupy the premises.

2. That the renting of the two rooms to the Barb Wire Fence Co., and its occupation thereof, was without the knowledge or consent of the lessee, and that thereafter power was not tendered by the lessor to run the Seventh street premises.

3. That the lessee was ignorant of such renting and occupancy of rooms by the Barb Wire Fence Co. until September, 1881, which was some months after the Fence Co. had taken such possession; that, in ignorance thereof, the lessee had paid rent on the premises until September 7, 1881; that then ascertaining the facts as to such renting, it declined thereafter to pay rent, and surrendered and abandoned the whole premises.

4. That the renting of a portion of the premises to Ault & Wiborg was without its knowledge or consent.

5. That the lease contained clauses providing that the rent was payable "except said premises shall be destroyed or rendered untenable by fire or unavoidable accident," and for peaceable possession.

Under sec. 4113 of the Rev. Stat., loss of power cannot be said to be a rendering of the premises "unfit for occupancy," which terminates the lease. At most, it could be but a ground for damages, to be set up by way of counterclaim. And, as the fire of December 11, 1880, in no way affected the property embraced in the lease to the lessee, except by temporarily cutting off the supply of power, there was no destruction or rendering the premises "untenable by fire or unavoidable accident," under the provisions of the lease, which would excuse the non-payment of rent. As to the alleged eviction of lessee by the renting of the rooms to the

Barb Wire Fence Co., and Ault & Wiborg the testimony is conflicting and contradictory. The rule of law in such cases is well settled, namely, that where a tenant is evicted from a part of the premises, he is entitled to a proportionate reduction of rent, if the eviction is by a stranger under a title paramount to his landlord's; but if the eviction is by the landlord himself, then he is relieved from paying any rent under the tenancy, while so evicted, unless he acquiesces in such eviction by assent or failure to act. Wood's Landlord & Tenant, sec. 481.

Applying this rule to the case at bar, we are satisfied that the renting to Ault & Wiborg was long after the lessee had abandoned the premises; that such renting was by the lessor as the agent of the lessee, and was not an eviction. As to the renting to the Barb Wire Fence Co., the testimony is very much more conflicting, and some of it irreconcilable; but as the trial court had the witnesses before it, and was, therefore, better able to judge of the credibility of the witnesses, and weight to be given their evidence, we do not feel that we should reverse its finding that such renting was with the knowledge and consent of the lessee when made, or was subsequently ratified; that it was not an eviction, and no defense to an action for rent under the lease.

As to the other defense, we find there was a tender of power upon the rebuilding of the destroyed building, which complied with the terms of the lease, and that no further tender was necessary, and that the lessee did not surrender the premises at the time of the cutting off of the supply of power, by the fire of December 11, 1880, but continued in possession thereof, and paid the rent thereon for months thereafter, with little or no objection.

The judgment of the court below will therefore be affirmed.

Jordan, Jordan & Williams, for plaintiff in error.

Lloyd & Taft, for defendant in error.

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BUILDING ASSOCIATIONS.

[Superior Court of Cincinnati, General Term.]

†SEIBEL ET AL. V. VICTORIA BUILDING ASSN. NO. 2.

1. The shares in building associations, as they are now organized, are not necessarily of equal value, but the value of each is to be determined by adding together the dues properly credited upon it; and the amount of the earnings of the association to which the holder of each share is entitled, is a sum proportioned to the total earnings of the association, as the value of his share is to the total value of all the shares.
2. The provision requiring an annual rebate of interest to be made by building associations upon dues paid in during the year by borrowing members, found in sec. 3835, of the Rev. Stat., as amended April 15, 1880 (77 O. L., 208), is, in effect, the same as if the association were required to credit the dues so paid, upon the loans previously made to such borrowing members.
3. The effect of such rebate, or credit, is such that the amount so credited can not thereafter be treated as a part of the dues standing to the credit of the borrowing member, in computing the value of his stock for the purpose of ascertaining the ratable share of the earnings of the association, to which he may be entitled upon the same.
4. Borrowing members of a building association who become such after the passage of the amendment to sec. 3835, are subject to its provisions, and an amendment to the constitution of the association, made necessary by, and in conformity to said amended section, is binding upon such members, although adopted after they had become borrowers.

† This judgment was reversed by the Supreme Court; see opinion, 43 O. S., 371.

PECK, J.

This action was begun and is prosecuted by the plaintiffs to enjoin the defendant association from enforcing an amendment to its constitution, as to the distribution of earnings, whereby it is claimed that plaintiffs will be injured. The original clause in the constitution relating to dividends read as follows: "The secretary shall calculate the profits of each member every six months and enter them into their books." This, it is alleged, was amended October 11, 1883, after plaintiffs had become members and had borrowed money from the association, by the addition of the following: "An annual settlement shall be had with each borrowing member, when he shall receive a rebate of interest on the amount of dues paid and earnings credited for the expiring year. But upon sums so credited, he shall receive no further dividends. Upon payment by a borrowing member of a sum or sums aggregating the sum of \$500, he shall be permitted to cease paying premium on one share."

It is claimed that the effect of this amendment, if permitted to become operative, will be to establish a distinction between borrowing and non-borrowing members, whereby a considerable portion of the earnings which should be credited borrowing members, will be illegally withheld from them and credited to the non-borrowing members, thereby making the dividends of the latter much larger than those of the former class of members. That the association is threatening to and will, unless restrained, credit the non-borrowing members with dividends in accordance with the amendment, and such borrowers will withdraw from the association, taking with them their shares and the dividends so allotted to them, thereby working irreparable injury to the plaintiffs.

To the petition containing the foregoing allegations, the association answers admitting the adoption of the amendment, and the intention to enforce it, but denying that it will work any injustice to the plaintiffs, or other borrowing members, in the distribution of the earnings of the association, and asserting that the amendment was adopted in accordance with the provisions of the constitution as to amendments, and was rendered necessary by a change in the statutes of the state caused by the passage of what is known as the Moore Law, April 15, 1880 (77 O. L., 208), amending sec. 3835 of the Revised Statutes.

By way of cross-petition defendants allege that certain of the plaintiffs, since the adoption of the amendment, have been erroneously credited by the secretary of the association with dividends upon the total amount of dues paid in, instead of upon the amount paid in since the last preceding dividend, as they should have been, pursuant to the provisions of the amendment, and praying for an order cancelling the erroneous credits, and enjoining the plaintiffs from transferring their pass-books in which such credits are entered, until the corrections shall have been made. To the answer and cross-petition of defendant plaintiffs demurred. A temporary injunction was granted plaintiffs at the time of the filing of the petition, restraining defendants as therein prayed for, which the defendants moved the court to dissolve, whereupon both the demurrer and motion were reserved to the general term, and are now before us.

It is apparent at a glance that all the questions in the case depend upon that one which relates to the validity of the amendment to the constitution of the building association, adopted as aforesaid, and that in turn depends upon the construction to be placed upon sec. 3835 as amended. Said section provides that after setting apart a sum sufficient to pay expenses and contingent losses "the residue of such earnings shall be transferred to the credit of all members borrowing, and non-borrowing, to be paid ratably to them at such times and in such manner as the association, by its constitution and by-laws, rules and regulations in conformity with this act may provide." It is further provided in the same section, that, "the association shall, at the end of each year, make a rebate of interest on the amount of dues paid on loans awarded." Prior to the passage of the act in question it appears to have been the custom to give no credit to the borrower on his loan until his payment of dues, with their proportion of the profits, equalled the par value of his stock, but when that time arrived he was not only credited with the payment of his stock, but the same was applied to the extinguishment of the loan. In this manner the borrower was required to pay interest upon the original amount of his loan up to the time of its final extinguishment, notwithstanding the fact that his weekly payments of dues before that time may have accumulated a large sum in the treasury of the association to his credit, but on the other hand, by virtue of his payment of dues he participated equally with every other member, borrowing and non-borrowing, in the profits of the association. The provision for an annual rebate of interest works a material change in this system. It is no longer possible to charge

the borrower interest upon the original amount of his loan, he must have an annual rebate "of interest on the amount of dues paid on loans awarded."

It is claimed on behalf of the Association that the change worked by the requirement as to rebate of interest necessitates a change in the distribution of earnings. That if the borrower does not continue to pay interest upon the full amount of his loan, but takes a rebate, or, in other words, a credit by reason of the payment of his dues for the year, he cannot afterwards claim dividends upon the dues so credited. On the part of the plaintiffs, it is claimed that they are entitled to both the rebate, and to subsequent dividends upon the amount of dues made the basis of the rebate.

Neither party seeks to evade the application of the statute. The plaintiffs claim the rebate for which it provides, and the defendants admit the right to rebate, but say that plaintiffs cannot also have dividends upon the principal on which the interest has been rebated.

A borrower from a building association occupies towards it a dual relation. As they are organized no one can be a borrower who is not also a member. As a member he has the same rights and obligations as other members, as a borrower he has obligations not resting upon the non-borrower. As a member he is bound to pay his weekly dues upon his share of stock until the same is paid up, as a borrower he is also bound to pay off his loan. As a member he participates in the profits of the association. As a borrower he contributes by his payments of interest to swell the fund from which the profits arise.

No person can pay two debts with a single sum equal to but one of them, and no person can have two credits at the same time for one payment. The non-borrower receives dividends because he has an accumulated sum to his credit in the association, the borrower is entitled to the same as long as his payments of dues remain to his credit as such, but the moment he transfers them to his loan account and takes a credit for them upon that, they must cease to remain as a credit of dues to him, for he has applied them to a different purpose, to the payment of another obligation. When he takes such credit he ceases to stand upon the same footing as the non-borrower. The money of the latter in such case remains simply as so much paid in to his credit, the money of the borrower has been paid in it is true, and his share is to that extent thereby paid up, but the money cannot stand to his credit, because he has transferred it to another account. It appears to us that the claim of plaintiffs herein is of a right to draw upon "dues" account for funds wherewith to pay their loan accounts, and take a credit on the latter without being charged on the former.

It may be claimed that in any event the dues were ultimately to be applied to the payment of the loan, but there are two considerations to be observed in that connection: First—The dues were not to be applied to the payment of the loan as long as they were treated as dues, but when their sum, together with any other credits there might be due the borrower, were sufficient to fully pay the share of stock, then the share became an asset available to the owner, and, by virtue of his contract, applicable to the payment of the loan. Second—But what is more conclusive, the moment the dues were paid up, and the share into which they were merged was applied to the loan, that application extinguished the credit arising from the payment of dues, or in other words when the amount of dues equaled the amount of the loan, the credit was applied to the debit, both were extinguished and the borrower's relation to the company ended. So, if we admit that it is correct to say that the dues were, in any event, to be finally applied to the loan, we find that such application necessarily put an end to their existence as dues credited to the borrower.

If the argument of plaintiffs herein be correct, the borrower's interest did not then cease. The application of his dues to his loan did not extinguish his right to a credit for them as dues, and he should have continued to receive dividends upon the full amount of such payments, regardless of the fact that he had applied them on another account. To such a conclusion are the plaintiffs driven by the logic of their claim. If one shall not be charged for a partial application of dues to the payment of his loan, why shall he be charged when the sum of all his dues is applied to payment of the entire loan? If the application of all a borrower's dues to the payment of his whole loan extinguishes his entire interest in the association, why should not a partial application of dues to the same purpose work an extinguishment *pro tanto*?

The case would not be different if the borrower were to continue to pay interest upon the full amount of his loan, and received back the amount of the rebate in cash. In that event, if the payments were one dollar per week and the dividend and rebate were each six per cent., at the end of a year the borrowers would receive

dividend on \$52.00—\$3.12, rebate on same \$3.12—while the non-borrower would receive only the dividend, and yet both have paid in the same amount of dues. A further computation embracing subsequent years would give a still more favorable showing for the borrower and a less favorable one for the non-borrower.

It has been suggested that the granting of a rebate of interest is not the same as taking a credit upon the principal of the loan. We are unable to perceive any difference except in name. As the principal of the loan is to be paid from the fund arising from the accumulation of dues, wherever the payments into that fund are made the basis of a rebate of interest, that is practically the application of the fund to the reduction of the borrower's debt. The only reason for rebating interest is that dues sufficient to equal a part of the loan have been paid, and such payments in contemplation of the statute reduce the amount of the borrower's debt, and hence he should have a rebate. The language of the statute indicates that the dues are to be treated as paid upon the loan. The words are "a rebate of interest on the amount of dues paid on loans awarded."

It has been suggested by the learned counsel for plaintiff, that the payment of a premium by the borrower for his loan in some way or other entitles him to have both rebate and dividend. The premium is a sum voluntarily agreed to be paid by the borrower in consideration of the priority awarded him in securing a loan. It is of course only paid by borrowing members, and is a source of profit to the company, but it can in no manner be made a basis for the distribution of earnings. Dividends are paid upon stock to stockholders, not upon credits or assets of the company. A borrower has no claim to dividends except from the fact that he is a member. He pays the premium only in his capacity as a borrower. As to the rebate, the statute bases that solely upon the payment of dues. If there were no premium the association would be bound to grant the rebate, and there is no relation fixed between the amount of the rebate and the amount of the premium. The latter is a sum, determined by competitive bidding, varying greatly in different associations, and from time to time in the same association. It could hardly be the basis of any fixed rule as to rebate, and, as we have seen, the statute makes no allusion to it in that connection. We are of opinion that the fact that premiums were paid by the plaintiffs cannot affect the question before us.

We have found it necessary to go into this brief examination of the practical effect of the rule as to rebate and dividend contended for by plaintiffs, because of the peculiar nature of these associations, the object being to determine what would be a "ratable" distribution of the earnings of the association in accordance with the terms of the statute. In an ordinary corporation the payment of the shares by subscribers is a proceeding preliminary to other operations. In a building association, as organized under the laws of Ohio, payment of the shares is made in small installments, usually by the week, extended over a considerable period, and when the share is paid up, that is the end of its existence. It is the interval between the subscription and the final payment of a share, into which all the operations of the association and its members so far as they relate to that share, are crowded.

This peculiarity of building associations bears directly upon the questions in this case. In other corporations a share is the unit of interest upon which dividends are computed. All shares are of equal value. But such is not necessarily the case in a building association. There a share is of value in proportion to the number of payments which have been made upon it, and the payments may run from one dollar to the full value of the share. Hence in distributing earnings among shareholders it is impossible to assume as a basis of distribution that all shares are of the same value. The only true method is to ascertain the value of each share, determined by the amount paid upon it and allot to each a sum of the earnings proportioned to the total earnings as the value of the share is to the total value of all the shares, and this we understand to be the practice of the defendant and other associations organized under the laws of Ohio, and such practice is a fair compliance with the statute providing for a ratable distribution of earnings.

The question here raised goes to the ascertaining of the value of the shares of borrowers. Shall they, for dividend purposes, be credited with dues which have been credited upon their loans for the purpose of rebate? For the reasons before given, we hold they cannot. The two accounts are separate and distinct. *North American Building Association v. Sutton*, 35 Pa. St., 463; *Spring Garden Association v. Tradesmen's Association*, 46 *id.*, 493; *State v. Hombacker*, 13 Vroom, 636, and *a. c. 12 id.*, 519; *Endlich on Building Associations*, section 452. The original payment of dues had the effect to extinguish a part of the member's liability on his share, and created a credit in his favor, and the transfer of the credit to loan account does not revive such member's liability for the amount of his share so paid, but there is no longer a sum on "dues" account, on which he can be entitled to dividends. It is the paid portion of his share which is applied as a credit to the

loan, and by this plan he applies his share in parts to the payment of the loan, instead of so applying it as a whole after the share is paid up.

We understand the statute providing for a ratable distribution of the earnings among all the members, borrowers and non-borrowers alike, to intend a distribution proportioned to the value of shares as above stated. To permit a distribution to members who hold shares to which sums have been improperly credited for any reason, would not comply with the provisions of the statute. That would not be a ratable or proportionate distribution. As we hold a credit upon shares of sums which have been previously credited upon loans to be improper and erroneous, it follows that they must be excluded from any computation made to ascertain the value of borrower's shares. If they are included there can be no ratable distribution of the earnings, if excluded there may be such distribution. The amendment in question excludes them, and so doing, conforms to and was made necessary by the statute.

As to the claim that plaintiffs cannot be bound by the amendment to the constitution, because it was made after they had become members and borrowers, it is to be said that the original provision of the constitution contained no rule for determining what amount of earnings should be credited to each share. It simply provided that a semi-annual dividend should be computed by the secretary, and entered in the books of the members. The amendment was only an addition not in conflict with anything then existing in the constitution. It is further to be said that it appears from the pleadings that plaintiffs became members of the association after the passage of the amendment to section 3835 of the Revised Statutes, and both they and the association are bound by it. As the rule contained in the addition to the constitution of the association was rendered necessary by the amendment of the statute, neither party can escape its operation.

The motion to dissolve the temporary injunction will be granted, and the demurrers to the answer and cross-petition overruled.

FORCE and HARMON, JJ., concur.

J. J. Glidden and E. Ritchie, for plaintiffs.

J. Shroder, F. M. Coppock and Philip Roettinger, for defendant.

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TAXATION.

[Muskingum Common Pleas.]

AARON HERZBERG V. D. G. WILLEY, TREAS.

1. An action under sec. 5850, Rev. Stat., to recover taxes illegally collected by a county treasurer, must be brought against the person who, as such treasurer, made the collection.
2. An assessment under the Scott liquor law, collected after the constitutionality of said law had been settled by the Supreme Court, and before the act was, by the same court, held to be unconstitutional, can not be recovered back, even though paid under compulsion.

PHILLIPS, J.

Herzberg sues Willey, as treasurer of Muskingum county, to recover back certain taxes by him paid under the Scott law, January 16, 1884; alleging that he paid the same under compulsion. to prevent the seizure of his property, etc. The defendant demurs.

Section 5850, of the Rev. Stat., provides that "actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he be dead, against his personal representative."

I construe this statute to mean that such action must be brought against the *person* who, as treasurer, made the collection; and that it must be against him individually. An action against one "as treasurer" is an action against the *county*, and not against an *individual*. This statute rests upon the principle that an officer who compels payment of

money, without authority of law, is liable as a trespasser, *Richmond v. Patterson*, 3 Ohio, 368, 370; *Loomis v. Spencer*, 1 O. S., 153; *Thompson v. Kelley*, 2 O. S., 647; *Bank v. Smith*, 7 O. S., 42.

This action being against the successor of the person who made the collection, and against him "as treasurer," can not be maintained. And this disposes of the demurrer, upon the only question that has been argued by counsel.

But I sustain this demurrer upon the broad ground that this collection, when made, was not illegal, but was authorized and required by law. At the time this collection was made, the Scott law was in force, and its constitutionality had been settled by a decision of the Supreme Court of the state. Afterward, the same court overruled its former decision, and held the law to be unconstitutional.

It is the right, and it is the duty, of a court, "for very cogent reasons, and upon a clear manifestation of error," to overrule its former decision. And I am not unmindful of the rule that gives retroactive operation to such correction of judicial errors. This rule—resting somewhat upon a legal subtlety—gives to judicial acts an operation denied, by the constitution, to legislative acts. But property rights, and contract rights, acquired upon the faith of the correctness of the former adjudication, have always been protected from the unsettling effects of this technical rule. This protection, formerly standing as a mere exception growing out of necessity, now rests, I think, upon the broad and rational ground that a law enacted by the supreme legislative power of the state, and sanctioned by the solemn and deliberate judgment of the supreme judicial power of the state, has, until repealed or annulled, some effect and operation *as a law*. The judicial construction becomes a part of the law, and there can be no higher evidence of its correctness and validity; the community have a right to regard it as a just exposition of the law, and to regulate their actions and contracts by it. 16 O. S., 703; 1 Kent Com., 475.

Under an act of the legislature of Missouri, to facilitate the construction of railroads in the state, county bonds were issued and put upon the market as commercial paper. The Supreme Court of the state, having first held the law to be constitutional, thereafter overruled its former decision, and held the law to be unconstitutional. In an action on bonds purchased after the former decision, and before the latter, the Supreme Court of the United States held, that the rights of the parties thereto are to be determined according to the statutes of the state as they were then construed by her highest court; that the settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself; and that a change of decision is the same in its effect on pre-existing contracts, as a repeal or an amendment by legislative enactment. *Douglas v. County of Pike*, 101 U. S. Rep., 677.

It is the exclusive right of the judiciary to interpret the constitution, as well as all laws passed thereunder; and I suggest that when the constitutionality of a law is settled by judicial construction, such law, so validated, then rests upon constitutional authority likewise validated by such construction.

This principle of validation by judicial construction rests upon the soundest reason; and if it is to be applied to protect those who voluntarily enter into contracts, relying upon the validity of the law, *a fortiori*,

it should protect an officer in the performance of the very act required by the law in question.

When this collection was made, the validity of the law in question was as certain as the wisdom of human tribunals could make it; and the thing here complained of is an official act then required by that law to be done. Is a faithful officer to be made personally liable for an official act required of him by the combined legislative and judicial powers of the state? Certainly not, unless to avoid greater wrong to the plaintiff. But every presumption was in favor of the validity of this law, and of the correctness of its construction as then settled; and it is fair to assume that when the plaintiff chose to engage in the business, and paid the assessment, he at once put his business upon a basis that would return to him the money so paid to the county.

I am not called upon to decide what constitutes payment under compulsion, as the averments of the petition would answer even the requirements of the common law in that regard.

Demurrer sustained.

335**LIBEL AND SLANDER.**

[Cuyahoga Common Pleas.]

HENRY WILLIAM DOPP V. ARNOLD DOLL.

1. It is not within the jurisdiction of a court of equity to restrain by injunction the publication of an anticipated libel or slander, even though business and reputation is involved, and the intended publisher is insolvent.
2. An injunction beforehand in such a case would be an abridgment of the freedom of speech and of the press, guaranteed by art. 1, sec. 11 of the Bill of Rights in the constitution of Ohio.

PETITION for injunction and equitable relief.

JONES, J.

The plaintiff in this case filed his bill in equity to procure an injunction against the defendant, restraining him from continuing the publication of certain false and libelous circulars, injuriously affecting the plaintiff's business, and did obtain a temporary injunction restraining the same.

In the plaintiff's bill he affirms that he is the inventor and patentee of a certain "soap remelting and crunching apparatus," and that he has a large amount of money invested in the business of making and selling the same, which he claims is a useful and valuable invention; that the defendant Doll claims to be the owner and patentee of an alleged improved machine for mixing soap, but which is wholly unlike plaintiff's and on which plaintiff's machine is no infringement, which defendant has at all times well known.

Yet the said defendant has frequently, by threats of suits, by verbal statements and circulars directed to plaintiff's customers, and others, continually, falsely and maliciously asserted that the plaintiff's patent was an infringement on the patent of the defendant, and that he would sue all parties concerned in selling, buying or using the same; that the defendant has no real intention of bringing a suit, and that plaintiff has often requested him to bring such suit, but he refuses to do so, and continues to issue his false and malicious circulars, tending to the irreparable injury

of the plaintiff and the destruction of his property; that he has no adequate redress on account of the incalculable nature of the injury and the insolvency of the defendant.

The defendant Doll files a demurrer to this petition, for two reasons:

1. Because this court has no jurisdiction to enjoin the publication of a mere libel.

2. Because the petition aforesaid does not state facts sufficient to constitute a cause of action.

It is certainly extraordinary, if there exists a power in courts of equity to interfere by injunction to restrain the publication of anticipated libel, that no instance of the kind can be found in any reported case in Ohio; and in view of the countless rival patents and machines, insurance companies and rival business enterprises of every character, it could not have been for want of a prolific field to work in. And, indeed, it is true that very few cases can be found in the United States where an injunction for such a cause has ever been sought for, and I know of no reported case in any court of last resort where such an injunction has been sustained.

The counsel for plaintiff have cited no American authority which gives any direct countenance to plaintiff's claim, except the case stated in 65 Ga., 452, which in its general functions was somewhat similar to the one at bar, and where the court held that a court of equity had jurisdiction, but its exercise in that case was refused. Several English decisions were cited in behalf of the plaintiff; each of these decisions was given by Vice Chancellor Malins, and the two decisions most in point are to be found in 7 Eq. Cas., 487, decided in 1869, and another, a little later, recorded in 13 Eq. Cas., 487.

In the first of these cases the chancellor held that a court of equity had jurisdiction to enjoin the publication of any document tending to the destruction of property, money or professional reputation, and this certainly was laying down the law with unparalleled freedom and breadth of liberality. And in the case reported in the 13 Eq., he held that a patentee has no right to falsely publish his intention of instituting legal proceedings against his rival to deter persons from purchasing the alleged infringement, if, in fact, he has no *bona fide* intention of doing so, and that he ought to be restrained in such a case. And the chancellor in each of these cases delivered a very well-reasoned opinion.

But each of these decisions and the principles involved in them have been expressly overruled in a case decided in 1874 by Lord Chancellor Cairns in an opinion, concurred in by the full bench, and reported in 10 Ch. Ap. Cas., 142.

In this case the injunction was sought to restrain the publication of pamphlets falsely representing the plaintiff, an insurance company, to be wholly insolvent as the result of reckless mismanagement, which had, as the plaintiff claimed, a tendency to injure the credit, reputation, business and profits of the said company.

In this case the Lord Chancellor distinctly repudiates the idea that the court should restrain the publication because property and business were affected; he says with regard to it that of nine out of ten libels published, the same thing might be said. "Not merely is there no authority for this application," said he, "but the books afford repeated instances of the refusal to exercise jurisdiction," and he quotes Lord Eldon's opinion in *Gee v. Pritchard*; the opinion of Lord Campbell in the case of the *Emperor of Austria v. Day and Kossuth*; the decision of the House

of *Lords in Fleming v. Norton*, and various other cases, and flatly repudiates the law as it was laid down by Vice Chancellor Malins in *Dixon v. Holden*. Thus we see that the English decisions cited by plaintiff and relied on by him are repudiated by the highest courts in England. See also 44 L. J. Ch., 192; 31 L. T., 866.

The American cases reported in courts of last resorts are not in any respect more favorable to the claim of the plaintiff.

In a case reported in 8 Paige Ch., 23, decided by Chancellor Walworth, it was held that a court of chancery had no power to enjoin the publication of a threatened libel, even though its publisher was insolvent and the damages likely to be irreparable; and in that case it was hinted that it would be an unlawful interference with the liberty of the press to do so.

In a case decided in the St. Louis court of appeals, reported in 4 C. L. J., 40, the three judges hold the same proposition to be true, and they declare that such an injunction would be an interference with the rights of defendant under the provisions of the constitution of the state of Missouri. The provision of that constitution is substantially like ours, which, in art. 1, sec. 11, reads as follows:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech of the press."

An interesting and instructive case is also to be found on this subject in 34 Ann. R., 741, in the case of *Leiversey v. The Judge of the District Court*.

Leiversey was the publisher of the paper called the *Mascot*, which had published certain false and scandalous cartoons and paragraphs of and concerning one Van Benthuyssen, who had applied to the defendant, the district judge, and he had issued the writ of injunction restraining the publication of the same in any future issue of said paper, as threatened. The injunction was disobeyed and *Leiversey*, the publisher, was promptly cited to show cause why he should not be punished for contempt, and on this hearing the case came up in the Supreme Court and defendant was discharged, the court holding that the judge was absolutely without authority to control libelous public actions in advance or restrain the liberty enjoined by the press to publish what may be even of libelous nature; that the injunction issued by the district judge was void, and that the proceedings for contempt therefore had no validity. The constitutional provision of the state of Louisiana was simply that "no law shall be passed abridging the freedom of the press," and that provision was construed as broadly as if it had contained the more precise provision of our own constitution; and in that case the court quotes from and adopts the definition contained in *Abbott's Law Dictionary* of the term "Liberty of the Press," as follows: "This expression imports freedom from any censorship over what shall be published, exemption from control in advance over the dissemination of ideas by writing or printing. It does not import that one may not be mulcted in damages or punished for what he has published, if after the act it is shown to be contrary to law, but that he should not be restrained beforehand," and emphatically asserts the absolute unconstitutionality of any restraining order such as is prayed for by the plaintiff in that case and the case at bar.

In a case reported in 114 Mass., 69, Judge Gray, now of the Supreme Court of the United States, held "that the jurisdiction of a court of chan-

cery does not extend to cases for libel or slander, or as to false representations as to the character or quality of plaintiff's property, or as to his title thereto, which involved no questions of breach of trust."

And he reviews and condemns the cases of *Dixon v. Holden* and *Rollins v. Hanks*, so much relied on by counsel for plaintiff in this case, as contrary to the settled weight of English and American authorities.

In the 119 Mass., 484, the same holding was made, in a case where plaintiff sought to enjoin a rival patentee from falsely representing that the plaintiff's patent was an infringement on that of the defendant. See also *High on Injunction*, sec. 1078; *Townsend on Slander*, 95; *Pomeroy, Equity Jurisprudence*, sec. 1358; 2 *Story, Equity*, 11th Ed. So that on whatever ground the refusal may be put, or however plausible the arguments may be in favor of exercising such jurisdiction, it is clear that the weight of authorities in both England and the United States are substantially all one way, against the power of a court of equity to enjoin an anticipated libel merely, and I hold that the constitutional provision in favor of freedom of speech and of the press, subject to responsibility for abuse, permits no restraint beforehand by either statutory enactment or judicial injunction.

And the main reasons on which this equity jurisdiction is denied or refused to be exercised are as follows:

1. Because there is an adequate remedy at law in a suit for damages for the alleged slander or libel.

2. Because of the utter impracticability of supervising anticipated publications by the courts through injunctions and proceedings for contempt; enjoin a publication here and it could be printed and sent here from forty other states or territories.

3. The constitutional objection, which is quite as strong in Ohio as in either of the other states quoted.

It is clear if we should sustain the preliminary injunction in the case at bar, and at the end of a year or two it should be found that there was in fact an infringement between the two machines, that the constitutional rights of the defendant will have been infringed, and what redress has he? In a suit on the bond his damages would be as incalculable as it is claimed the plaintiff's are in this case. And if, as is claimed, we construe the insolvency of the defendant as a decisive element to induce the granting of an injunction, the constitutional provision guaranteeing freedom of speech and of the press would be operative when the defendant is rich, and to be wholly disregarded if he happens to be insolvent.

On the whole, I hold in this case that the plaintiff has no cause of action, and I therefore sustain the demurrer, dissolve the injunction heretofore granted and dismiss the plaintiff's bill.

Sherman & Hoyt, for plaintiff.

G. W. Shumway, for defendant.

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FIXTURES AS PERSONALTY.

[Montgomery Common Pleas, April, 1885.]

COLUMBIA INSURANCE CO. V. KNEISLEY.

1. As between an execution creditor and a mortgagee of the realty, chandeliers and other gas fixtures are not fixtures, but personalty, so of a mantel mirror held to the wall by iron clasps.
2. Bookcases which if removed would also remove a part of the baseboards around the floor, and a hatrack built into the room are a part of the realty.

ELLIOTT, J.

George W. Kneisley, a wholesale grocer, failed for a large amount in 1884. His handsome residence on Second street in Dayton was mortgaged, and on forced sale came far short of paying the lienholders. The Columbus Insurance Company, a judgment creditor, levied on the gorgeous chandeliers, which were valued at \$600, and on a mantel mirror and some bookcases, claiming them as personalty. The mortgagees who found themselves short, resisted the sale of the chandeliers, etc., under the levy, maintaining that they were part of the realty.

The value of the articles was agreed upon and they were sold in connection with the house, and the price reserved to await the decision of the court as to whether the mortgagees or the insurance company should receive the money. Upon a review of the authorities, Judge Elliott held, that the chandeliers and other gas fixtures so-called were not properly fixtures, inasmuch as they could be removed without marring the realty. So with a mantel mirror, that was simply held to the wall by iron clasps. As to the bookcases, which, if removed, would also remove a portion of the baseboard around the floor, requiring some repairs, though slight, they were to be considered as part of the realty. A hatrack, originally built into the room, had been removed, which act the judge characterized as vandalism; the thing being manifestly a part of the realty. It follows from this, that if a man buys a house he must expressly contract for the gas fixtures, or they are not included. In case of the death of the owner of a house, the court also remarked that the gas fixtures must be considered part of the personalty, and subject to administration as such. (*Editorial.*)

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LIQUOR LAW ASSESSMENTS.

[Clark Common Pleas, January, 1885.]

† — v. WILLIAM S. WILSON, TREAS.

1. Assessments under the liquor law of April, 17, 1883, commonly called the Scott Law, collected after the decision of the Supreme Court settling its constitutionality, and before the subsequent reversal thereof, declaring it void, were not illegal, and, therefore, though paid under protest or compulsion, cannot be recovered back from the treasurer.
2. It was the duty of the treasurer to obey the law after such decision, and he cannot be mulcted for so doing.

GOODR, J.

The defendant in all these cases was William S. Wilson, treasurer of Clark county. The claim made was: First. That the payment of these taxes was not a voluntary payment in the meaning of the law, and hence could not be recovered. Second. That the tax having been once declared

†See also Herzberg v. Willey, ante, 000, and Hornberger v. Case, post, 000.

constitutional by the highest judicial power in the state, all money collected under that sanction, and before the decision validating the law had been overruled, could not be refunded, as no retroactive power could be given the decision of the Supreme Court declaring the law unconstitutional.

The court held :

First. When, by the express provisions of a statute, a tax or assessment upon property or a business is made payable on a day certain ; and that, upon default of such payment upon the day so named, it is made the duty of the county treasurer, forthwith, to proceed by action to enforce the lien for the same, with the accruing penalties ; the fact, that the person liable to pay such tax or assessment makes payment thereof under protest, upon the day or shortly before the day the same is so made payable, will not operate and have effect as a voluntary payment thereof. The fair and reasonable intendment under the circumstances is that the payment was made in order to avoid the costs, expenses and vexations of distraint or litigation.

Second. Where an act of the general assembly, imposing an assessment upon property or a business, has been declared by the Supreme Court of the state as valid and of constitutional obligation, so long as such decision of the court stands in force and unreversed, such act of the legislature and such decision must be regarded as settled law in relation to the subject-matter thereof ; and any assessment levied and paid to the proper officer under the provisions of such act, while the decision and judgment of such court stands in force and unreversed, cannot be recovered back in action against the officer receiving or collecting the same, though the same court should subsequently reverse its former decision and hold the act invalid. (*Editorial.*)

TRESPASS.

438

[Huron Common Pleas, January, 1885.]

A. J. MCINTYRE V GLOBE IRON WORKS.

An action for trespass cannot be maintained against one who caused the seizure of a vessel by libelling her in admiralty, in the proper U. S. district court, the libel being dismissed, but the petition may be amended so as to charge malicious prosecution.

WICKHAM, J.

In April, 1879, the Globe Iron Works libelled the steam yacht, H. B. Wilson, through regular admiralty proceedings in the United States district court of Cleveland. The vessel was seized, held ten days, and then bonded. Afterwards an issue was made as to the liability of the vessel, and, upon hearing, the case was decided against the libellants, and the vessel released.

Thereupon, the owner of the vessel, A. J. McIntyre, of Norwalk, brought a suit against the members of the Globe Iron Works, in Huron county common pleas court, charging them with a trespass in wrongfully seizing and detaining the vessel. The petition was good on its face, not showing how the seizure was made. After service had been obtained on the defendants, they answered setting up the legal proceedings in

admiralty as a complete defense. On the trial to a jury, after the evidence had disclosed that the vessel was taken through lawful process, issued from a court having jurisdiction to issue the writ, the defendants moved that the case be taken from the jury and decided for the defendants. The court, after discussion, announced that the motion would be sustained, when the plaintiff asked and obtained leave to amend. A juror was then withdrawn and the case continued.

Judge Wickham held that the libellants were not liable, the vessel having been seized by lawful process.

The decision embraced the following propositions:

1. The United States district court sitting as an admiralty court is a court of record.
2. The decision of a court of admiralty is conclusive in a collateral action.
3. Although a libel in admiralty is dismissed for want of jurisdiction, yet the libellant is not liable to an action of trespass by the owner of the vessel that was taken under the warrant.

Cohen's Admiralty Law, page 2, and Thompson 21; Lyle 31; W. & S., 166.

The plaintiff in due time amended his petition from a trespass into an action for malicious prosecution. But more than a year having elapsed between the seizer and the original suit, the defendants demurred on the ground that the cause of action was barred by the statute of limitation. This demurrer was sustained and the litigation ended.

Strong, Kellogg & Harod, for plaintiff.

C. H. Stewart and A. T. Brewer, for defendants.

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ASSESSMENTS.

[Logan Common Pleas.]

JOHN H. HORNBERGER V. FRANK S. CASE, TREAS.

1. An action to recover back an assessment illegally collected by a county treasurer must be brought against such treasurer individually, and not in his official capacity.
2. When alleged illegal assessments were paid on the last day on which they were made payable by law, and were "paid under protest," and those words endorsed on the official receipts given therefor, payment made under such circumstances was not voluntary.
3. Assessments under the act commonly known as the Scott law, made and collected after the decision of the Supreme Court declaring such law valid and constitutional, and before the subsequent decision of the same court declaring it unconstitutional, were not illegal assessments, and cannot be recovered back.

PRICE, J.

John H. Hornberger brings his action against Frank S. Case, county treasurer of Logan county, setting forth two causes of action in his petition, as follows:

First—That during the year 1884, he, the plaintiff, was engaged in the business of trafficking in intoxicating liquors; that under the statute commonly known as the Scott law he was assessed \$100 upon said business; that the defendant, Case, was treasurer of Logan county; and that June 20, 1884, plaintiff paid to defendant as such treasurer, under protest, said assessment of \$100 on said business.

Second—That August 15, 1884, he paid to the defendant, as such treasurer, an assessment of \$36.12, on that day assessed against him as a dealer in intoxicating liquors on certain other premises. The plaintiff alleges that the assessments so paid him were illegal, and, therefore, seeks to recover them back.

The defendant has filed an answer containing two defenses to each cause of action, as follows :

First—That the plaintiff voluntarily appeared at the treasury of said county, and paid to the defendant, as such treasurer, the said assessments for which defendant gave his official receipts, and then at the request of plaintiff endorsed thereon the words, "paid under protest."

Second—That the defendant relying on the validity of the act of the general assembly as established by the decision of the Supreme Court of Ohio, before that time made, and in the discharge of his official duty, had long before the commencement of the suit, disbursed the moneys received by him from the plaintiff, as required by law, stating in detail how the same was disbursed.

To this answer, and each defense thereof severally, the plaintiff has demurred. As the demurrer to the answer also reaches back to the petition, three questions may be said to arise in the case.

First—Can the action be maintained, if at all, against the defendant in his official capacity as treasurer of Logan county ?

Second—Conceding the allegations of the first defense to be true, as must be conceded on demurrer, do they show a voluntary or involuntary payment of the assessments ?

Third—Were the assessments illegal, within the meaning of the law at the time they were made and collected ?

Section 5850 of the Revised Statutes provides that "actions to recover back taxes and assessments must be brought against the officer who made the collection, or if he is dead, against his personal representative."

True, this section of the statute says the action must be brought against the officer who made the collection, but evidently it does not mean that the action shall be brought against him in his official capacity. This is evident from the fact of the further provision, in the same section, that if the person making the collection is dead, the action must be "against his personal representative."

Such would not be the case if the action might be brought against the officer in his official capacity. The action should be brought against the person who made the collection, or if he be dead against his personal representative. It happens in this case, that the treasurer, who made collection of the assessments complained of, still holds the same office; but if he had retired from office, the action could not be maintained against his successor, but would properly be against him, Case, in his individual capacity.

"An action against one 'as treasurer' is an action against the county and not against an individual. This statute rests upon the principle that an officer who compels payment of money, without authority of law, is liable as a trespasser."

Herzberg v. Willey, Treasurer, (Muskingum Common Pleas) ante, 000. See also, *McCoy v. Chillicothe*, 3 O., 370; *Loomis v. Spencer et al.*, 1 O. S., 153; *The Champaign County Bank v. Smith*, 7 O. S., 43.

This question, however, is one that is, perhaps, not very material in the case, as Frank S. Case who is sued is the same person who collected

the assessments; and the words "County Treasurer of Logan County, Ohio," may be treated as surplusage.

The pleadings show that the assessments were paid on the last day on which they were made payable by law; and the answer, as well as the petition, shows that they were "paid under protest," and that those words were endorsed on the official receipts given by the defendant, as treasurer to plaintiff.

Payment made under such circumstances was not voluntary. *Stephan v. Daniels et al.*, 27 O. S., 527; *Catoir v. Watterson*, 38 O. S., 319.

But the really substantial and vital question in the case is, were the assessments illegal, within the meaning of the law, at the time they were collected?

Section 5848 of the Revised Statutes provides that "Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof, etc."

The words "such taxes or assessments," of course mean *illegal* taxes or assessments. So this court has jurisdiction of actions to recover back *illegal* taxes and assessments.

On April 17, 1883, the general assembly passed an act, commonly known as the Scott law. On April 14, 1884, the legislature amended the law in certain respects, but the amendments are immaterial, so far as the question under consideration is concerned, and need not be particularly noticed.

"Within the year following the passage of the original act, the Supreme Court of Ohio decided that 'the statute of April 17, 1883, entitled 'an act further to provide against the evils resulting from the traffic in intoxicating liquors,' is a valid and constitutional enactment.'"

The State ex rel. v. Frame, Auditor; and *Benner v. Bauder*, 39 O. S., 899.

Thus the Scott law was validated by the highest judicial tribunal known to the constitution and laws of Ohio.

Afterward, and after the collection of the assessments complained of in this case, the Supreme Court overruled its former decision, and declared the Scott law unconstitutional. But at the time of the collection of the assessments complained of, the decision of the Supreme Court, validating the law, was in full force and unreversed. The defendant was a public officer, and, as such officer, was bound to execute the valid statutes of the state prescribing or controlling his official duty. In this regard he was without discretion. Our system of government prescribes the mode by which the validity of statutes shall be ascertained and determined, after which official discretion ceases; and the refusal to perform the duties imposed by a statute, the validity of which shall have been thus ascertained and determined, would subject the officer to penalties.

Upon the judiciary, as one of the three co-ordinate departments of government, the constitution confers the exclusive power of interpreting the constitution itself, as well as all laws enacted by the general assembly.

"A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and

mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." 1 Kent's Com., top paging 539. See also *Douglas v. County of Pike*, 101 U. S. R. Supreme Court, 677; *Herzberg v. Willey, Treasurer*, (Muskingum Common Pleas) *ante*, 000; ——— *v. Wilson, Treasurer*; (Clark Common Pleas) *ante*, 000.

It does not follow as a matter of course, that when and because the legislature shall have enacted a statute, a public officer shall execute it. But his refusal to execute it must be justified, if at all, by judicial decision regularly invoked in his support through the tribunals established for that purpose. But when the highest judicial tribunal in the state has declared a statute valid and constitutional, while such decision remains unreversed, it must, in the very nature of things, be regarded as *settled law*.

There is nothing more that can be done. There is no other tribunal to appeal to. The decisions of the Supreme Court, while in force, are in theory infallible. They are the expressions of sovereign judicial will, to which all subordinate officers are bound to render implicit obedience. After the constitutional validity of a statute has been affirmed by the highest judicial tribunal of the state, it is, doubtless, competent for the same tribunal subsequently to overrule its former decision, and invalidate it; but acts done by a public officer before the decision of reversal, in pursuance of the statute itself, and in pursuance of the decision declaring it valid and constitutional, cannot be said to be illegal. He can only obey and execute the law thus affirmed and validated by supreme judicial determination. Any other principle or rule would simply work confusion and anarchy. Can it be that public officers, charged with the duty of obeying and enforcing the laws, as judicially determined, will become criminals because of such obedience? If the defendant had failed to make the collections about which complaint is made, he would have been guilty of a dereliction of official duty. How, then, can it be said that he did an illegal act when he made the collection? I have not the means at hand of knowing how much money was collected in Ohio under circumstances such as appear in this case, but the amount is perhaps not far from a million of dollars. That large sum has long since been disbursed as the statute prescribed, and has passed out of the possession and control of the various county treasurers. If they are liable to refund that money at all, they are liable personally. It would be shocking to every sense of right and justice to hold that these officers must now suffer personally for doing the very thing they were compelled to do officially, as was decided and determined by the sovereign judicial authority of the state. While the decision of the Supreme Court, declaring the statute valid and constitutional was in force and unreversed *it was the law*, which all were bound to obey; and the fact that the same court subsequently declared the law unconstitutional, cannot affect acts done or rights acquired while the former decision remained undisturbed.

Under section 5848 of the Revised Statutes, the plaintiff could only recover illegal assessments. The assessments, the collection of which complaint is made, were not illegal, within the meaning of the law; hence cannot be recovered back.

Demurrer sustained as to the first defense to each cause of action, and overruled as to the second defense to each cause of action.

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TITLE BY PRESCRIPTION.

[Superior Court of Cincinnati.]

ELIZABETH HAIMEYER ET AL. V. FREDERICK TIETIG ET AL.

1. A party relying solely on possession and the statute of limitations as his title to real estate, must show that he has had exclusive possession of the same for twenty-one years, and where it appears that he has used the property in dispute as a way to his premises for more than that length of time, while the holder of the record title has used it during the same time to furnish light and air to his buildings, the former cannot be said to have been in exclusive possession.
2. To acquire a right of way by prescription there must have been adverse user for more than twenty-one years, and to constitute adverse user there must have been a continuous use under such circumstances or accompanied by such declarations as to manifest a claim of right.

ON MOTION to dissolve a temporary injunction.

PECK, J.

The affidavits filed by the parties are somewhat conflicting upon certain points, but there are a number of undisputed facts in the case, and it is upon these that I shall endeavor to decide the principal questions now presented. The parties to this case are the owners of adjoining lots fronting on Main street in this city. Their title goes back to a common source, beginning with the year 1840, when the two lots were conveyed to the persons under whom plaintiffs and defendants claim by deed, wherein they were described as follows:

That of plaintiffs as twenty-five feet wide in front and running back the same width a distance of forty feet, where there is an offset of four feet on the side next defendants' lot, and thence to the rear end of the lot as but twenty-one feet wide. That of defendants as thirty-two feet wide in front and extending back the same width a distance of forty feet and thence to the rear of the lot as thirty-six feet in width.

The four feet attached to the lot thirty-two feet in front, being the same four feet, which would have been included within the lines of plaintiffs' lot if they had extended back parallel to each other and twenty-five feet apart to the rear of the lot.

It is this four-foot strip which is in controversy. At or soon after the time of conveyances above mentioned the lots were improved as follows: Defendants' lot, except the four feet, was covered by a three-story brick dwelling house, which had, and still has, two openings for cellar windows, extending from fourteen to eighteen inches into the four feet, and above that has some six or eight windows opening from the various rooms of the house on to the area, of which the four-foot strip constituted a part. To these windows are attached outside shutters which hang over the area, projecting into it some eighteen inches when extended at right angles to the wall. Plaintiffs' building covers the entire front of their lot back to a distance of twenty-six feet, but on the side next the defendants' there is a four-foot covered passage extending back the twenty-six feet, and thence to the rear of the lot there is an open area consisting of the four feet in controversy and four and one-half feet of plaintiffs' ground, the whole of which has been in constant use by plaintiffs as a passageway to the rear of their property for more than twenty-one years.

During all that time defendants' use of the property appears to have been only for the purpose of furnishing light and air to the cellar and rooms in the manner indicated. The fence at the rear of plaintiffs' lot extends across the whole twenty-five feet. At some time, the date of which is not definitely fixed, plaintiffs constructed on the four feet in controversy a small open drain and are now using it for the purpose of draining their premises.

The strip in controversy is inclosed on three sides by the improvements on plaintiffs' lot and on the fourth by the wall of defendants' house containing the windows above named.

The buildings on the two lots have been in substantially the same condition, since the year 1840. Defendants now seek to cover the four feet in question with the wall of a new building which they propose to erect. Plaintiffs obtained a temporary injunction on a petition alleging that the strip in controversy belongs to them, and defendants now move to dissolve that injunction.

Plaintiffs' first claim is that they have become the owners of the property because of their long continued possession of the same. Their use has been long enough, more than twenty-one years, and continuous, for it has been daily, open and known to defendants, for it has been going on under the eyes of the latter; but it is denied that it has been adverse or exclusive. As to the eighteen inches next defendants' wall there can be no doubt that plaintiffs' use has not been exclusive. That part has been in constant use by defendants for cellar openings and window shutters as above mentioned. But it is claimed that the other two and a half feet have not been used in any manner by defendants. I do not think the facts justify this claim. The defendants have constantly had six or eight windows opening on this area. It has been the source whence a large part of their building has been furnished with light and air.

Considering the situation of the property and the improvements upon it, there is a probability that this strip was acquired for the very purpose of furnishing light and air to this building. It is contended that such a use of property is not recognized in determining questions of title in this country. It is a well settled law in Ohio, as in nearly all the other states of the Union, that one cannot acquire an easement of light and air over the property of another by prescription. *Mullen v. Stricker*, 19 O. S., 185; *Hieatt v. Morris*, 10 O. S., 523, in the first named case it was further held that an easement of light and air would not be implied from a grant of one of two adjacent lots by the owner of both, because of any necessity existing in the nature or use of the structures upon the lots at the time of the conveyance. But that the use of property for securing light and air to buildings is not a lawful and valuable use of it, is something I have never heard asserted. That such an easement cannot be acquired by prescription is no proof that it could not be acquired by a grant and there is no reason apparent why a grant of such use upon a valuable consideration would not be upheld in Ohio, or why such a use would not of itself furnish a consideration of value to support a contract resting upon it. While such a use of the property of another may not be so adverse to him as to permit the acquisition of an easement over his estate, as pointed out in *Parker v. Foote*, 19 Wend., 809; yet it seems to me that it is a different case where one puts his own property to such use.

Where one has been using his property for the purpose of furnishing light and air to his building, and another has been using it for a different

purpose, neither can be said to have had the exclusive use of the property. Such is the situation here. And the plaintiffs' claim of title to the property which is based only upon prescriptive use and possession, the record title being admitted to be in defendants, is not sustained.

It has been suggested that if plaintiffs have not acquired title to the property, they have acquired a right of way over it, because to establish such right of way the use need not be so exclusive as it must be to acquire title to the property. *Curtis v. Angier*, 4 Gary, 547; *Nash v. Paden*, 1 Speers, 22, and that if there be such easement it is sufficient to support plaintiffs' claim to an injunction in this case. Assuming for the sake of argument that the use by the proprietors of the property for the purpose of furnishing their buildings with light and air is not of such a nature as would prevent the plaintiffs from acquiring by prescription a right of way over it, do the plaintiffs herein show a prescriptive right to such an easement? The use has undoubtedly been long enough and continuous enough, if the other necessary elements exist, to establish a right of way.

Here plaintiffs are met by defendants, with the claim that the use has not been adverse, but, permissive, and the circumstances seem to make good that claim. This was a small strip of ground used only by the owners as a means of securing light and air. The use of it by their neighbors as a way in no manner interfered with their own use. It was not the whole of the way used by plaintiffs, for they used it in common with a strip of their own property which of itself would give them an entrance to their house. Except for the purpose of preventing them from asserting a claim to a prescriptive right, the defendants had no interest to prevent plaintiffs from passing over the property. This is not a case where two parties have used a common passage one-half the property of each, to reach their respective dwellings. The plaintiffs had a passage without the use of this strip, and defendants have not used it for that purpose at any time. The element of an apparent consideration to support the presumption of a grant is wanting.

In *Lane v. Kennedy*, 13 O. S., 42, 47, the learned judge, who delivered the opinion of the Supreme Court, says:

"To make such possession adverse there must have been an intention on the part of the person in possession to *claim title, so manifested* by his declarations or his acts, that a failure of the owner to prosecute within the time limited, raises a presumption of an extinguishment or a surrender of his claim." Tried by this test the plaintiff's case fails. The proof does not show any intention to claim title, manifested either by their declarations or their acts. On the contrary the use by them has rather the appearance of a use by permission.

The motion to dissolve the injunction is granted.

Mannix & Moorman, for plaintiffs.

Von Seggern, Phares & Dewald, for defendants.

[Superior Court of Cincinnati, General Term, April 20, 1885.]

†FIRST NATIONAL BANK V. UNION NATIONAL BANK OF CINCINNATI.

†For opinion in this case see 6 Dec. R., 1229. (s. c. 13 Am. Law Rec., 748.)

SUB-CONTRACTORS.

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[Superior Court of Cincinnati, Special Term, 1885.]

JOHN J. BUSSE v. JOS. H. VOSS AND GEO. H. VOSS.

1. When a sub-contractor takes the steps prescribed by secs. 3193 and 3194, of the Rev. Stat., and the head contractor fails, within the time named in sec. 3199, to begin arbitration proceedings or to commence an action to adjust the account, the house-owner is bound to pay such sub-contractor out of any money which he may owe the head contractor.
2. If, after the expiration of such time, the head contractor and sub-contractor have a conversation about the matter, and agree to meet and adjust the account, and nothing further is done, the sub-contractor repudiating the agreement, the obligation of the house-owner is not affected thereby.
3. If the house-owner, being thereupon sued by the sub-contractor, denies he owes the amount claimed and admits all the steps were taken, but sets up such conversation and repudiation, he is not entitled to pay into court the amount admitted to be due, be dismissed from the action and have the head contractor substituted in his place and interplead.

FORCE, J.

The case comes on for trial upon the pleadings and evidence, and for hearing upon two motions, the hearing of which was, by consent of parties, reserved till the trial.

The defendants built a house, one Decker being the contractor, and the plaintiff, a sub-contractor, to supply brick. The petition states that the plaintiff claimed a certain amount was due him from Decker; that he filed a claim with the defendants in a manner prescribed by statute; that within the period limited by statute Decker did not begin arbitration proceedings or commence an action to adjust the account, and that thereupon the statute absolutely implies that Decker assented to the validity of the claim and that the defendants became bound to pay it.

No other sub-contractor makes any claim.

The defendants deny that the whole amount claimed is due; they admit \$699 is due; they admit that Decker neither began arbitration proceedings nor commenced an action; but aver that Decker and the plaintiff had some conversation about the matter, and agreed to have a conference about it at a named day, at which time when it arrived, the plaintiff refused to confer, but gave notice that he would bring suit. It is not averred that this conversation was before the expiration of the time allowed by statute to Decker.

The motion of the defendants is that they be permitted to pay \$699 into court, bring Decker into contest with the plaintiff for that sum, and be themselves dismissed from the action. The plaintiff moves to strike from the answer the allegations about the conversation between him and Decker.

If Decker was induced by the plaintiff to enter into negotiations, so as to prevent Decker's beginning arbitration proceedings or commencing an action within the statutory time, then the plaintiff would not be allowed to say that Decker is bound to admit the claim because he did not begin arbitration proceedings or commence an action within that time. But if nothing is done within the five days, the rights of the parties are settled by statute; they are fixed. And although the parties should begin after that to talk about it, such talk or negotiation would not be an estoppel. It is not alleged that there was any negotiation or conversation

before the expiration of the statutory time. The motion to strike out is granted.

And now the defendants, by their answer, deny they owe the amount claimed by the plaintiff, and admit they are bound to pay him the amount which they owed to the contractor. The motion for interpleader is necessarily overruled.

It appears from the evidence that \$699 is the whole amount due. Judgment will be entered for the plaintiff for \$699; and it appearing that Decker has brought an action against the plaintiff in which the defendants are garnished for the amount claimed in this action, execution will be stayed until that suit shall be determined.

Rufus S. Simmons and H. J. Gausepohl, for plaintiff.

F. Lampe, *contra*.

INSURANCE—AWARD.

The market value of goods at the date of the loss is not merely the cost of replacing them.

Some time in 1884 the firm of Chatfield & Woods, of Cincinnati, lost a considerable sum by fire. It amounted to about \$56,000. They carried a very heavy insurance. They agreed with the insurance company in all matters except about \$5,500. This was referred to Mr. Wm. M. Ramsey (of the firm of Ramsey, Maxwell & Matthews), for settlement. On September 3, 1884, he decided it. In his decision he said:

"The parties differ as to the construction of policies with reference to the rule by which the amount of the loss is to be determined.

It is claimed by the insurers that the insured are to be paid only the actual cost of the production of the goods, by themselves as manufacturers, while the insured claim the market value of the goods at the date of the loss.

It appears by the books of Messrs. Chatfield and Woods that an account is kept showing the actual cost of the production of their goods, not including insurance, taxes, interest on the investment in the business or any allowance for the personal services of the members of the firm. Upon completion of the production the account is made up, and an addition is made of about 22 per centum upon the aggregate, which represents the manufacturer's profits, and establishes the market price. The insurers say:

1. That this 22 per centum is profit, and that profits are never embraced in a policy in the ordinary form, but must be specially insured as such.

The general rule is undoubtedly well settled, as thus stated, but, in my judgment, it does not apply to the case under consideration. The rule thus established and enforced has never been supposed to conflict with the other equally general and equally well recognized rule that, in the absence of special stipulations in the policy as to the measure of indemnity, the market price alone is to be resorted to. Hence, where goods have been destroyed, the insured has always been allowed, and has been restricted to the recovery of the market value as being the money value of the property. He is allowed to recover the market value, without reference to its cost, to him. Hence it follows irresistibly that allowance of the market value is not the allowance of profits, although the goods may have cost less than the market value at the time of the loss. It only remains to inquire whether any of these policies contain special stipulations which take them out of the operation of the general rule. It is claimed that such a provision is contained in the following words: "No profit or advantage of any kind is to be included in such a claim." We have seen that the recovery of market value, without reference to cost, is not inconsistent with the rule which excludes profit. If such recovery is not inconsistent with a rule of construction of policies generally, which excludes profits, it cannot be inconsistent with a stipulation which is to the same effect. The policy provides for the payment of a sum based upon actual cash value. This is the market price. No profit is made by the insured by the destruction of the property, for which he receives only the value.

It is not claimed that this clause is to be construed with any reference to the business of the insured. It would apply as well to a policy in favor of a merchant as to one in favor of a manufacturer. It therefore only calls for an examination of the word profit, and this, upon the authorities, is free from doubt. Hence, I conclude that this clause does not affect the cause before me.

A stipulation not altogether free from difficulty, appears in many of the policies and is relied upon to establish the proposition that the insured are restricted to the cost of manufacture, excluding interest on capital, etc. It is in these words: "The cash value of the property * * * shall in no case exceed what would be the cost to the insured, at the time of the fire, of replacing the same."

It is claimed that inasmuch as the insured were manufacturers and the goods in question were manufactured by them, the cost of replacing means the cost of manufacture.

It is entirely competent for the parties to a contract to make a stipulation such as this claimed by the companies to be. There is nothing in the law, or in public policy, forbidding it. It must also be conceded that the "cost" referred to in this clause is the cost to the insured. Does it mean the cost of reproducing? It does not say so. But it is argued that this is one method of replacing the goods; that it is a method open to the insured, and that the plain construction of the language requires that if any method of replacing is thus open to the insured, which will give him the goods at less than the market value, he must resort to it, even if it were not open to any one else. All this may be conceded, and yet it is necessary to deny the conclusion which the insurers draw from it.

The date at which the law fixes damages generally is the date of the injury. These policies fix the date of the injury, *i. e.*, the date of the fire, as the time at which the value of the goods is to be ascertained. The insured is entitled to replace them at that time. This cannot, ordinarily be done at the date of the fire, or within such a period as they could ordinarily be purchased in the market. The object of insurance upon goods is to enable the dealer to replenish his stock and proceed with his business. This would not be accomplished if, being a manufacturer as well as a merchant, he should be required to manufacture. Nor would it be practicable or even possible to fix the cost of reproduction at the date of the fire. It is easy to ascertain the costs of the goods destroyed, but the variation in the cost of material and of labor, the infinite variety of circumstances affecting the cost of producing any article, render it impossible to look forward and say what the cost of reproduction will be. Men undertake to manufacture and sell at prices fixed beforehand, but they simply incur the hazard in the hope of profit, after the best examination which they can make of the subject. These policies call for an actual fixing of an actual cost at the time. Counsel for the insurers, feeling the force of this consideration, has argued that the cost of producing the goods destroyed fixes the cost of reproduction. But this cannot be. The cost of manufacture in January may be radically different from the cost in July.

The insurance companies have the sanction of the opinion of Mr. Wood, in his work on Insurance (section 458) for the view which they maintain, irrespective of the peculiar language of the policies in question. He states his opinion to be that in all cases of manufactured goods in the hands of the manufacturer, the actual cash value is the cost of production, excluding interest upon the investment in plant. He states it as a mere suggestion, and admits that there is no authority to support it. It would be strange, indeed, if a rule existed, or could be established, which would require a different construction of the same policy, when held by a manufacturer, from that which it would receive when held by a merchant, and the fact that no sanction for the opinion can be found, at this day, in any decided case, is strong, if not conclusive evidence of its unsoundness. The rule that cash value means market value, is directly opposed to this opinion, and this is so firmly fixed in the law and in the minds of business men that clear stipulations should be required in a policy where a different result is to be attained.

The view which I have thus taken renders it unnecessary to advert to other points discussed by counsel.

I am of the opinion that the terms of submission do not devolve upon me the duty of determining any question as to the proofs of loss.

I award to Messrs. Chatfield and Woods the sum of \$5,403.24, payable in accordance with the terms of the various policies."

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ASSIGNEES—EJECTMENT—PRACTICE.

[Logan Common Pleas.]

WILLIAM HERBST ET AL. V. ALBERT BATES.

1. The requirement in sec. 5, U. S. Bankruptcy Act of 1841, that every deed by an assignee in bankruptcy shall recite the order of sale is merely directory, as shown by the words that it shall supersede other proof to validate the deed, and it may be validated by other proof.
2. Confirmation of sale was not required by the U. S. Bankruptcy Act of 1841, and, hence, was not essential.
3. The plaintiff in simple ejectment may show that defendant's deed from an assignee in bankruptcy is void, but cannot show that it is fraudulent without amending. Hence a reply setting up collusion is a departure.
4. A purchaser from an assignee in bankruptcy alleged by the bankrupt's heirs to be void, cannot add the assignee's possession to his own to make title by adverse possession.
5. That the order did not describe the lands is a mere irregularity, and not ground for collateral impeachment as in ejectment by the heirs against the buyer.
6. Signature of a judge to an order or journal entry thereof is not essential to the validity of the order.

The plaintiffs, William Herbst and others, allege in their petition that they have a legal estate in and are entitled to the possession of ten hundred and ninety and 58-100 acres of land described in the petition; and that the defendant, Albert Bates, unlawfully keeps them out of the possession thereof. The defendant's answer contains three defenses, as follows:

1. He denies all the allegations of the petition, except that he is in possession of the land in controversy.

2. He pleads the statute of limitations, averring that he and those under whom he claims title, have had and held the actual, open, notorious, exclusive, continuous and adverse possession of said lands, for more than twenty-one (21) years next preceding the commencement of this action.

3. The third defense sets out in detail the facts relating to the bankruptcy of George Herbst, the ancestor of the plaintiff; alleging that he, George Herbst, was on December 10, 1842, and prior to that time seized of the lands in controversy, and was on said day adjudged a bankrupt by the United States district court for the district of Kentucky, and that, by decree of the same court, one Henry Waller was appointed and qualified as assignee in bankruptcy of said George Herbst; and that by virtue of said decree and the operation of law said assignee became vested in the title in fee simple absolute of the said lands; and that said assignee conveyed the same to defendant.

The plaintiffs reply and deny certain allegations of the answer as follows:

1. They deny all the allegations contained in the second defense—the one pleading the statute of limitations.

2. They deny the allegations of the third defense, excepting the one that on the 10th day of December, 1842, George Herbst was seized of the lands described in the petition.

3. The plaintiffs further replying that whatever said Henry Waller did or pretended to do in the matter of the sale of said lands as the assignee of said George Herbst, was without authority of law, and wholly null and void; that whatever authority was vested in said Waller, as such assignee,

was revoked previous to his sale to defendant; that said Waller at the time of the sale had no authority to make the same, but that said Waller and defendant wickedly colluding with each other for the purpose of wronging and defrauding plaintiffs of said lands, made the pretended sale and purchase, that the pretended consideration was \$6,000.06, whereas in fact, at the time of said sale, said lands were of the value of fifty thousand dollars; that said sale was never reported to or confirmed by said district court; and that said sale is wholly fraudulent and void, and ask for a decree declaring said sale fraudulent and void and cancelling the same.

Evidence tending to show that the deed from Waller, assignee, to the defendant, was void, was excluded. If the deed was without authority of law, and void, and thus ineffectual to pass title, is one thing, but if it was made through collusion and fraud, that is another.

PRICE, J.

The petition states a plain action at law to recover the possession of real estate; in other words, an action of ejectment. Under the case made in the petition the plaintiffs doubtless have a right to show that the deed under which defendant claims was without authority of law. But part of the reply is an attempt to make a new case—that is, to show that the deed was fraudulent, and asking to have it set aside. This, I think, cannot be done, and hence evidence tending to maintain that part of the reply was excluded. As I understand the rule, plaintiffs cannot be permitted to make a new or different case by way of reply, as that can be done only by amending the petition.

The Supreme Court say: "A plaintiff can recover only on the causes of action stated in his petition. It is not the province of a reply to introduce new causes of action; this can be done only by amendment of petition."

The land records of this county show the legal title of the land in controversy to be in George Herbst. Other testimony in the case shows that George Herbst is dead, and that the plaintiffs are his only heirs at law. This makes a *prima facie* case for the plaintiffs, upon which they would be entitled to recover if nothing further appeared in the case. Having made a *prima facie* case, it devolves on the defendant to overthrow the case thus made. As one mode of doing so the defendant pleads the statute of limitations, averring that he and those, under whom he claims title, have had and held the actual, open, notorious, exclusive, continuous and adverse possession of said lands for more than twenty-one (21) years, next preceding the commencement of this action.

The deed from Waller, assignee, was executed on the 9th of March, 1863. This action was commenced November 6, 1883. At the time of the commencement of the suit the defendant himself had not had possession of the lands for twenty-one (21) years; and whether he can avail himself of the statute of limitations depends on whether the statute run while the lands were in the possession of his grantor, Henry Waller, as assignee of George Herbst.

On the 10th of December, 1842, the district court of the United States for the district of Kentucky, declared George Herbst an involuntary bankrupt, and appointed defendant's grantor, Henry Waller, the assignee in bankruptcy in said case. By virtue of said appointment as assignee, and of section 3 of the bankruptcy law of 1841, the said Waller, as such assignee, became and was vested with the title of said lands with

power to sell the same, subject, however, to the orders and direction of the court appointing the assignee.

It is not claimed that Waller ever had or pretended to have any possession of the lands, except as such assignee. While the legal title was in him by virtue of the decree of court declaring George Herbst a bankrupt and appointing Waller the assignee, and by operation of the bankruptcy law; yet it was in him solely for the purposes of the trust. He held the legal title, but held it as trustee. Such being the case, the statute of limitations would not run while he held possession of the lands. In order for the statute to run, I understand it to be necessary for the person having possession to claim the land in his own right adversely to all the world. It is essentially a state of hostility. He must be in the attitude of one proclaiming to all the world that the land is his. This could not be when he held it simply in trust. Hence I think that the statute of limitations will avail the defendant nothing.

The difficult questions in the case arise in my judgment under the third defense. On December 10, 1842, George Herbst was declared an involuntary bankrupt by the United States district court for the district of Kentucky; and Henry Waller was duly appointed the assignee of said bankrupt. On January 7, 1863, the same court made an order that "the assignee is hereby authorized to sell at private sale the remaining lands of the bankrupt estate for cash at a rate not less than three dollars per acre." On March 9, 1863, Henry Waller, as such assignee, conveyed the lands in controversy by deed to the defendant, having made a sale of the same for the sum of about \$4.00 per acre. If the deed thus made was a good and valid one, effectual to pass title of the lands, the defendant has a good title, otherwise he has not. Plaintiffs insist upon five (5) several objections to said deed as follows:

First—That the title of the lands was vested in the trustee only for the purposes of the trust; and would remain in him so long only as the execution of the trust required. And that after the lapse of a long time it will be presumed that the trust has been executed and the lands will vest in the person beneficiary entitled thereto.

Second—That the order of the court to sell the lands was insufficient in this that it was vague, indefinite and uncertain, and contained no sufficient description of the lands to be sold.

Third—That the order to sell the land was not signed by the judge.

Fourth—That the deed from Waller, assignee, did not contain the recitals required by sec. 15 of the Bankruptcy Act of 1841.

Fifth—That the sale made by the assignee to the defendant was never confirmed by the court.

The legal proposition contained in the first objection may be conceded to be true as a *general* proposition. After the lapse of a long time it will be presumed that the trust has been executed and the lands will vest, in the person beneficially entitled thereto, unless there be something to rebut or overthrow such presumption. But how is it in this case? The assignee was appointed December 10, 1842. The deed in question was executed March 9, 1863, more than twenty years having elapsed from the time of the appointment to the execution of the deed. If there was nothing else to look to, I think it might well be presumed that the trust had been executed and that the land had reverted to or become vested by operation of law, in the original owner, the bankrupt. But on January 7, 1863, just two months and two days before the execution of the deed, the court ordered the sale to be made, thus, in my

judgment, completely rebutting and overthrowing any presumption that might otherwise arise, that the trust was executed, and disposes of the first objection to the validity of the deed.

The order of court of January 9, 1868, was "the assignee is hereby ordered to sell at private sale the remaining lands of the bankrupt estate for cash at a rate of not less than three (\$3.00) dollars per acre." This order, it is true, contains no description of the lands authorized to be sold, but the lands in dispute are a part of the remaining lands of the bankrupt. Thus they are embraced in the order. The court had power to make the order to sell the lands, and exercised that power. In the case of *Cadwallader et al. v. Evans Swift*, 1 Disney, 585, decided by the superior court of Cincinnati, in general term, the court say: "It has long been the policy of our courts to uphold judicial sales, and in this general description we include those made by trustees, administrators and sheriffs, whether upon a decree, an order, or an execution. No technical irregularities are permitted to deprive the purchaser of the property he has acquired. There must be not mere informalities, however gross, or error, however apparent, but a palpable defect of power in the court before his claim can be defeated."

In the case at bar there was certainly no defect of power in the court. The failure of the order of sale to describe the lands at most was an informality or irregularity. The court having to make the order, it can not be successfully questioned in another forum, and in a collateral proceeding, for mere irregularity or informality.

It is further objected, however, that the order of sale was not signed by the judge who made it. The evidence in the case shows that the orders made in "*George Herbst's case*," were entered in what is called the "bankruptcies order book." That the custom was for the judge to sign such orders, and that he did sign all said orders except the order of sale. The custom of signing the orders was certainly a commendable one, but such signing is not indispensable. The order of sale in question is a matter of record in the United States district court for the district of Kentucky. Such record imports absolute verity. And full faith and credit must be given to it notwithstanding the fact that the judge failed to attach his signature thereto. If a deed could be invalidated by such omission, a great many land titles would be disturbed in his country.

It is claimed, also, that the deed from the assignee to the defendant does not contain the recitals required by sec. 15, of the act of 1841, and, therefore, is invalid.

It is provided in sec. 15, that "a copy of any decree of bankruptcy and the appointment of assignees as directed by the third section of this act, shall be recited in every deed of lands belonging to the said bankrupt, and conveyed by any assignee by virtue of this act; and that such recitals, together with a verified copy of such order, shall be full and complete evidence, both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed. And all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order." Under this section, then, must be recited, in the deed, a copy of the decree of bankruptcy, and the appointment of an assignee, as directed by the third section of the act. No other recitals in the deed are required, "and

such recital, together with a certified copy of such order, shall be full and complete evidence, both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed.

I am not clear as to what is meant by the words, "*such order*," as to whether they refer to the order of sale or the order appointing the assignee—and, perhaps, the decree of bankruptcy, also. But the exact meaning of the words, such order, is perhaps not material, for *such order* is not required to be recited in the deed; but there must be a certified copy in evidence to validate the said deed. There is in evidence in this case a certified copy of the decree of bankruptcy; of the appointment of the assignee, and of the order of sale. And as the words "*such order*" evidently refer to some of those three things, it is not necessary to determine precisely which one. The certified copy of such order, required by the statute, is in evidence. The remaining defect, so far as the face of the deed is concerned, is the failure to make the recitals required by section 15. The deed does not recite a copy of the decree of bankruptcy, nor does it recite a copy of the order appointing the assignee or even the fact of such appointment. Are these omissions fatal to the validity of the deed? The statute is mandatory in terms, as it says those things shall be recited. But taking the whole section together, I am led to the conclusion that while it is mandatory in terms, it is, in legal effect, merely directory. It provides that "*such recital, together with a certified copy of such order, shall be full and complete evidence, both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed,*" etc.

I think it fairly follows from these words that a deed from an assignee in bankruptcy not containing these recitals may nevertheless be validated by "*other proof*."

The other proof was made in this case, as we have in evidence a certified transcript of the decree of bankruptcy; of the order appointing the assignee, and of the order of sale.

The remaining objection to the validity of the deed is, that the sale was not confirmed by the court ordering it to be made.

I recognize the general doctrine that when a court authorizes a sale to be made by a trustee, such a sale ought to be, and generally is, confirmed by the court before it is complete. The deed, however, in question, is the creature of the Bankruptcy Act of 1841, and has effect as a deed solely by virtue of that statute. That act prescribes the conditions precedent necessary to validate a deed executed thereunder, and confirmation of the sale by the court is not one of them.

Hence, confirmation is not absolutely essential to the validity of such deed.

I have noted all the objections made to the validity of the deed, and conclude that none of them are tenable. However negligent or dilatory the assignee may have been, the defendant has acted in good faith, and has done all he could be expected to do. He has honestly paid for the land the price agreed upon, the sum being greater than the minimum fixed by the court. It would be grossly inequitable to now deprive him of his land, and it ought not to be done, except on some clear, legal reason. The objections urged to the deed, at most, in my judgment, relate to mere informalities or irregularities. A judicial sale ought not to be, and will not be disturbed because of some informality or irregularity.

As before quoted "it has long been the policy of our courts to uphold judicial sales, and in this description we include those made by trustees etc."

Judgment for the defendant.

ASSIGNEES.

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[Hamilton Common Pleas.]

TERRY CLOCK CO. V. MUSSEY, ASSIGNEE.

1. An assignee, who has given bond within the state for the faithful discharge of his duties, need not give bond on appeal from a justice of the peace.
2. And in such case, where the assignee files his transcript in the common pleas within ten days, the appeal held good, although no written notice of the intention to appeal was given to the justice.

MAXWELL, J.

The plaintiff brought an action of replevin before a justice of the peace, and recovered a judgment against the defendant. The defendant gave no bond for appeal, but within ten days filed a transcript, for the purpose of appealing the case to this court. The plaintiff now moves to strike the transcript from the files, for the reason that no bond having been given, the appeal has not been perfected. The question thus raised is whether or not it is necessary for an assignee, under our assignment laws, to give bond in order to appeal a case from a justice of the peace to this court.

Section 6408, Rev. Stat., of the general provisions relating to procedure in the probate court, after providing for the manner in which an appeal may be taken from the probate court to the court of common pleas, also provides, "but when the person appealing from any judgment or order in any court or before any tribunal, is a party in a fiduciary capacity, in which he has given bond within the state, for the faithful discharge of his duties, and appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed the appeal by giving written notice to the court of his intention to appeal, within the time limited for giving the bond."

An examination of the law, as it stood prior to the revision of the statutes, will show that it was first provided that an executor or an administrator who has given bond in this state, might appeal from one court to another without giving an appeal bond; next that the law was amended so as to include guardians. So the law stood until the revised statutes were adopted, and then the words "executor," "administrator" and "guardian" were dropped, and the words quoted above used.

If we follow the plain and obvious meaning of the statute, bearing in mind, also, that the limited terms, "executor," etc., have been dropped, then we must come to the conclusion that the statute exempts assignees, who have given bond, from giving an appeal bond, and that appeals may be taken from justices of the peace, as well as from courts of record, without giving an appeal bond.

This is in accord with common sense. A person who has given bond in a fiduciary capacity obligates himself to distribute such funds as may come into his hands by virtue of his trust, in obedience to the orders

"Section 63. The council shall have power to provide for the appointment or election by the qualified electors of the corporation, wards or districts, as the case may require, of all such other officers as shall be deemed necessary for the good government of the corporation and the full execution of its corporate powers.

"Section 64. All appointments of officers of municipal corporations created by law or ordinance, shall be made by the mayor, by and with the advice and consent of the council, and the concurrence of a majority of all the members elected shall be required to confirm any such appointment, and the names of those voting, and for whom they voted on the vote resulting in an appointment, shall be recorded."

It appears, then, that we have two sections of the Municipal Code virtually controlling the same subject-matter—section 444, under the head of Wharves, Docks and Harbors, which provides that the common council may appoint a wharfmaster, and sections 61, 62, 63 and 64, which provide that the common council shall have power to appoint all other officers not specially named in any of those sections.

While it is true that one section relates specially to wharves, docks and harbor masters, the other section appears to cover all possible contingencies with respect to officers, and did give the council power to provide for the election of a wharfmaster, as well as any other officers, which might be necessary for good government, and for the full execution of its corporate powers. All these sections, I may say, remain in the Revised Statutes.

By another section of the Municipal Code (Rev. Stat., 1543), it is provided that "all laws, ordinances and resolutions heretofore lawfully passed and adopted by the trustees or council, 'not inconsistent with this title,' shall be, remain, and continue in force, until altered or repealed by the trustees or council established by this act."

If this ordinance, which was adopted in 1859, providing for the election of a wharfmaster, has not been repealed by the common council, by an ordinance for that purpose, or has not been expressly repealed by the legislature, then as a matter of course the election which was held this spring, was held in pursuance of the statute and ordinance, for the ordinance, as admitted by the pleadings, is in full force. So the conclusion at which I have arrived, from an examination of the statutes with reference to the question, as the ordinances stand now, is that it is proper that the wharfmaster should be elected by the people.

There is another objection taken by the defendant. He avers in his answer that he was elected by the common council on the 16th of April, 1885, to be wharfmaster. The statute provides that all appointments must be made by the mayor, by and with the consent of the common council. He does not aver in his answer that he was, and I presume it to be the fact that he was not, appointed by the mayor; he was simply, in fact, elected by the council, not appointed.

A mandamus must issue against the city clerk, to issue a certificate of election to James Carson.

Wulsin & Perkins, for the relator.

Judge Wilson and J. M. Dawson, for respondent.

MUNICIPAL CORPORATIONS.

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[Superior Court of Cincinnati, General Term.]

JOHN SIMPKINSON V. BOARD OF PUBLIC WORKS.

1. Authorizing a city of a particular class to borrow money to pay deficiencies in certain funds, or for a particular year, can only apply to the city then so classified, and hence is special.
2. The acts of March 24, 1885, and April 27, 1885, authorizing the board of public works of Cincinnati to borrow money "to pay deficiencies existing, and that may exist, in the infirmity fund of said city, for the years 1884 and 1885," etc., and to borrow money "to pay deficiencies existing in the board of health of said city," and "to pay deficiencies existing in the general fund of said city," are special acts conferring corporate powers, and, therefore, invalid.
3. That portion of the act of April 27, 1885, authorizing the board of public works to borrow money "to be applied to the street cleaning fund," is not a special act, and is valid without regard to the question whether it confers corporate powers.
4. In so far as the deficiency consists in arrearages of salaries which the city is liable for, it is merely a change in the form of the indebtedness and not a conferring of corporate power, and money may be borrowed for this deficiency if affirmatively shown to exist.

HARMON, J.

Plaintiff, as a taxpayer, upon refusal of the solicitor, sues to enjoin the issuance of bonds, under two acts of the general assembly, each entitled "An act to authorize the city of Cincinnati to issue bonds for the purpose therein specified," passed, one March 24, the other April 27, 1885.

The purposes specified in the first act are to borrow any sum not exceeding \$200,000, "to pay deficiencies existing and that may exist in the infirmity fund of said city, for the years 1884 and 1885," the money to be "paid into the infirmity fund of said city," and "expended by the directors of the city infirmity according to law." The purposes specified in the second act are to borrow money as follows: "The sum of \$19,918, to pay deficiencies existing in the board of health of said city, the sum of \$78,000 to pay deficiencies existing in the general fund of said city, and the sum of \$70,000 to be applied to the street cleaning fund of said city."

The case is reserved upon demurrer to the petition and motion for a restraining order.

We are asked to interfere with the proposed action of the board of public works and comptroller under these acts, they being the officers named therein as actors on behalf of the city, because such acts are void as violations of section 6, article 13, and of section 1, article 13, of the constitution of Ohio, the former being: "The general assembly shall provide for the organization of cities, etc., by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power;" the latter being "the general assembly shall pass no special act conferring corporate powers."

It may be conceded that cases might arise in which it would be the duty of the court to interfere with proposed action of a municipality in borrowing money, although by express authority of the legislature, when either from the amount or from the purpose of the loan it should appear that such action would be an "abuse of such power."

This, however, would have to be manifest to authorize such interference. Mere difference of opinion between the court and the legislature would not suffice.

While the amounts to be borrowed here are large and one at least of the purposes for which the money borrowed is to be spent, namely the payment of current expenses, violates the soundest maxims of economy and prudence, we cannot say that a case of manifest abuse of the power of borrowing money for municipal purposes is presented. The failure of the city to receive the revenue expected under the Scott law, the threatened appearance of an epidemic, present an exigency which would justify action at this time that might be an abuse of power at another time.

If, however, these are special acts and confer corporate power, neither the general assembly nor the court has the slightest discretion. The supreme law is absolute that the general assembly shall pass no such law. No exigency can arise great enough to breathe life into such a law if passed. And, while the court must resolve every doubt in favor of the validity of a law, yet if, after doing so, the law be found to be within this prohibition, no fear of consequences, immediate or remote, may stay its restraining hand, unless it is willing, not only to wilfully violate the solemn oath of office, but also to decree that government by written constitution shall perish from the earth.

Are these special acts? The term special, as used here, hardly needs definition. It is the opposite of general. An act is special when it is intended to and does and can apply to only one (in case it treat of municipal corporation) place, so that in that connection the term is equivalent to local. And while classification of such corporations is lawful, and an act may be valid which relates to an entire class, even though such class at the time consist of but one member, yet the theory upon which such legislation is supported is, that other municipalities which may, from time to time, become members of such class, will come under the operation of the act. Potential general operation upon all members of the class is all that is necessary. But where an act is so framed as to show that it was intended to apply to a particular municipality only, and that it does and can apply to no other, it is a local act, no matter in what terms it may be expressed. The constitution deals with substance, not with form. It is certainly no longer necessary in Ohio to do more than refer to a few cases in which our Supreme Court has clearly defined these principles: *State v. Judges*, 21 O. S., 1, 11; *State v. Mitchell*, 31 O. S., 592; *State v. Hipp*, 38 O. S., 199; *State v. Pugh*, 43 O. S., 98; the last of a long series in which all are referred to and discussed.

These acts are almost exactly alike in the features which must determine whether they are special. The captions announce them to be such without even the qualification of parentheses. But this, while persuasive, is not conclusive. *State v. Pugh*, *supra*.

Courts are neither to be led nor misled by names.

The first act authorizes the board of public works of any city of the first grade of the first class to borrow on behalf thereof the sum named, "to pay deficiencies existing and that may exist, in the infirmity fund thereof for the years 1884 and 1885." The fiscal year in cities of that class and December 31, sec. 1545, Rev. Stat. One of the years named, had already ended when the act was passed, and no other city, as was then well known, can, before the end of the other, come into the grade named either by the self-acting mode of advancement, sec. 1547, Rev. Stat., or by the voluntary mode, section 1582 *et seq*. There was a

possibility that the legislature might, before adjourning, change the basis of classification so as to include other cities in that grade, but an argument for the validity of the acts based upon that possibility, even had it become a fact, would if followed, overturn either the whole fabric of classification or this section of the constitution.

The second act authorizes the same board of any such city to so borrow two of the sums named, "to pay deficiencies existing" in the health and general funds. By a well known rule of construction we are bound to presume that all these words were used intelligently and to give effect to all if rationally possible. The word "existing," so twice used, is utterly meaningless unless it means existing at the time the act was passed, which meaning further appears from the unusual amounts named, which, beyond doubt, corresponded with actual deficiencies shown at the time by the books of this, the only city then belonging to the class named—the only city which ever could have such deficiencies then existing.

We have no hesitation in deciding that both acts with respect to the parts just mentioned were intended to apply and did apply to this city alone, and that they could not when passed, can not now, and can never apply to any other. They are, therefore, so far, special acts.

The second act, however, in so far as it authorizes the borrowing of money "to be applied to the street cleaning fund," is capable of a different construction. No time is named when or within which the money is to be borrowed or expended. It is not to supply a deficiency nor to go into the fund of any particular year. So long as the act remains in force, any city coming into the grade named may, as well as Cincinnati, borrow a sum not exceeding \$70,000 to apply to its street cleaning fund, though of course we do not mean to construe it as an authority to be exercised more than once by any city. This potential general operation relieves this part of the act from the charge of being special, and we think the terms should prevail over the title of the act when they are inconsistent. So that, it being in no way connected with the other parts, but each grant of authority being as independent of the others as though contained in a separate act, it is valid without regard to the question whether it confers corporate powers, which must now be considered with respect to the enactments we find to be special.

Any general discussion as to what is meant by the phrase "conferring corporate powers" in the constitution would be useless here, because we find it already decided by authorities we are not at liberty to disregard, that giving authority to an existing municipal corporation to borrow money by issuing its bonds is conferring a corporate power.

Nebraska copied this clause of our constitution literally. School districts are corporations in that state and one of them was authorized by a special act to issue bonds to borrow money to build a schoolhouse. It was held that the act was void because forbidden by the clause in question. *Clegg v. School Dist.*, 8 Neb., 178.

In a similar case from the same state a like decision was unanimously given by the United States Supreme Court. *School District v. Ins. Co.*, 103 U. S., 707. It appeared in that case that school districts had by general statute power to borrow money and issue bonds to build schoolhouses after a vote of the people, etc., and the attempt was made to sustain the special act by considering it in connection with the general statute, but without success, the bonds having been in fact issued under the former without compliance with the conditions of the latter. The

argument made was no doubt similar to that made here—*i. e.*, that the special act did not confer power, but only repealed the condition imposed by the general law for its exercise. Whether, if this were true, it would not amount to a new grant of power, we need not inquire, for we are only asked to enjoin the exercise of the power these special acts assume to confer, not that of any powers the city has under secs. 2825-6-7, Rev. Stat., which gave the right to money by issuing bonds to cover a deficiency arising from defalcation or other cause, after submitting the matter to a vote of the people.

Our own Supreme Court has held that a special act annexing certain suburbs to this city, though it conferred no new powers upon the city, but merely authorized the exercise over additional territory of the powers already possessed, was void because it conferred corporate powers (*State v. Cincinnati*, 20 O. S., 18); that a special act conferring on the city the management and control of the hospital already erected with the city's funds, was void for the same reason. *State v. Cincinnati*, 23 O. S., 445. See also *State v. Constantine*; *State v. Pugh*, *supra*.

Certainly no higher power could be conferred on a city than the power to pledge the property of her citizens for the repayment of large sums of money, nor one whose exercise the framers of the constitution can be supposed to have intended more carefully to limit. In this connection the reason twice given by the Supreme Court for the insertion of this clause in the constitution, have singular force, *viz.*: That the object was to secure for legislation of this nature the careful scrutiny and judgment of the entire body of legislators by requiring it to be in a general form, and so possibly at least to affect all their constituencies alike. *Atkinson v. M. & C. R. R.*, 15 O. S., 21, 35; *State v. Cincinnati*, *supra*.

The proverbial readiness of men to vote away other people's money is, as the framers of the constitution well knew, the main root of the evils of such special legislation.

The analogy between this case and *State v. Cincinnati*, *supra*, is very close. It is difficult to conceive any distinction in principle between authorizing the city to exercise the general powers it already possessed over other territory, and authorizing it to exercise the power to borrow money it already possesses in certain cases, or possibly a general implied power to borrow money. See *Bk. v. Chillicothe*, 7 O., 81, in other cases or upon other conditions.

If, therefore, the power to borrow these sums and issue these bonds had been conferred by these acts directly upon the city, we should feel constrained to adjudge them utterly void and of no effect. Does it make any difference, as contended by the solicitor, that the power is conferred in terms on the board of public works and the comptroller?

It is true that a power which, if conferred on a corporation, would become a corporate power, may not be such when conferred upon a person or body not incorporated.

State v. Pugh, *supra*. The same power of managing the hospital, which, it was held in *State v. Cincinnati*, 23 O. S., 445, could not, because of this constitutional prohibition, be conferred by special act upon the city through its council, was held in *State v. Davis*, Id., 434, to be properly so conferred upon the board of hospital trustees, which was not a body corporate.

And in *State v. Pugh*, *supra*, it was held that the act there in question was for the same not invalid, in so far as it conferred upon the trustees of the sinking fund power to redistrict the city of Columbus.

It was, however, expressly stated by the court that such trustees were not, "in any substantial sense municipal officers of the city," though intention of passing on the effect of conferring the power on such officers was, later in the opinion, disclaimed. They had neither been elected nor appointed by the city.

The same was true of the trustees of the Cincinnati hospital. In the case relating to the latter it was remarked by the court that the legislative power of the city was vested in the council. The power there under consideration was legislative, and conferring it upon the council conferred it upon the city.

The power conferred by these acts is upon the board of public works, not upon the individuals composing the same. It is legislative so far as concerns determining whether and to what extent the authority shall be used, executive so far as concerns effecting the loan and issuing the bonds.

Without stopping to enumerate them we may say it is well known that under our present laws both the legislative and executive powers of the city are to a very large extent vested in that board.

Its members, as well as the comptroller, whose duties under these acts, however, are only clerical, regularly city officers, elected and paid by it.

It seems to us, therefore, that the case is not different from what it would be if the council, instead of the board of public works, had been designated as the actor "in behalf of" the city in the matter of borrowing this money which would go into the regular city funds, and issuing these bonds which must be "the bonds of said city."

The hospital case, therefore, we think directly in point.

But if it were not and we are forbidden by the later statement in the opinion in *State v. Pugh* to consider the prior remark to which we have referred as a "negative pregnant," we should have no hesitation in saying that this clause, forbidding the conferring of corporate powers by special act, may as well be torn bodily from the constitution as permitted to be thus openly evaded.

The rule has been deeply carved by the Supreme Court upon the tablets of our judicial law that in applying all parts, but especially this part of that instrument, the operation and effect of laws must be regarded rather than their form. And while we can imagine cases in which the legislature, proposing by the exercise of its own power to do something to or for a city, may adopt as its agency for that purpose one or more of the regular officers or boards of the city itself, in which case the corporation itself is merely passive, as, for instance, in the case of re-districting, we can see no difference in fact, and but little in form, between conferring one of the usual municipal powers upon the city by name, in which case it would have to be exercised by its proper board or officer, and conferring it in terms upon one of its boards or officers to be exercised in its name and on its behalf, with exactly the same results. An entry overruling the demurrer and granting the motion will be made so as to embody the conclusions we have reached.

It may be that the solicitor can by answer and proof avail himself of the principle announced in *Reed v. Plattsmouth*, 107 U. S., 568. That case also arose in Nebraska. A city had been authorized by special act, void under this clause of the constitution, to issue bonds for money to build a schoolhouse. It had issued them and used the money, when by another special act the bonds were declared valid. This act

was upheld because the city having become liable to the holders of the void bonds for the money it had received upon them, this second act merely changed the form of an existing indebtedness and conferred no corporate power, properly speaking.

By reason of the Worthington and Burns laws this city is saved from implied liability upon many, if not most of the items, which usually go to make up deficiencies.

Others, such as the salaries of public officers, the city may be lawfully liable to pay, and to the extent of such items, if any, which must be made affirmatively, to appear in view of the laws just mentioned, the issue of bonds may be permitted as only a change in the form or evidence of such already existing indebtedness.

FORCE and PECK, JJ., concurred.

Wulsin & Perkins, for the plaintiff.

City Solicitor Coppock, *contra*.

633

PARENT AND CHILD.

[Superior Court of Cincinnati, June, 1885.]

CLUTHE V. SVENDSEN.

A father is not liable for an assault by a demented and dangerous son, seven years old, unless he knew his condition, and knowingly permitted him to be at large unwatched.

Plaintiff sued to recover damages for the death of a six year old daughter, from the effects of kicks alleged to have been administered by the seven year old son of defendant. The court charged the jury that if a verdict was returned for plaintiff it must be based upon the following findings:

That the alleged assault by defendant's boy was made.

That the boy was demented and dangerous.

That his father knew such to be his condition.

That he knowingly permitted him to be at large without a proper watch being kept of him.

The jury returned a verdict for defendant.—*Editorial*.

637

EXEMPTION IN LIEU OF HOMESTEAD.

[Superior Court of Cincinnati, General Term.]

† THERESA LUGAUER V. AUGUST WEISGERBER ET AL.

A wife being separate from her husband and not on the property, cannot claim exemption in lieu, out of the proceeds, against judgments against him, he not claiming exemption.

PECK, J.

The question herein arises upon the distribution of a fund realized from the sale of certain premises, the property of plaintiff's husband, Joseph Lugauer. Plaintiff claims that she is entitled to an allowance of

† This case in the Supreme Court was dismissed by compromise, November 22, 1889.

\$500 out of said proceeds in lieu of homestead, which claim is resisted by the lienholders and was disallowed by the court below. The case is one where there are liens which preclude the allowance of the homestead, and others which do not preclude such allowance, and there is sufficient money after paying the first class of liens to give the plaintiff the \$500, if she is entitled to it. The plaintiff and her husband are not living together, but apart, under a judicial decree by which she has been awarded alimony and custody of a minor child.

The allowance is claimed under secs. 5440 and 5441, of the Rev. Stat. Section 5440, if taken alone, would probably authorize us to grant what plaintiff demands. It provides that after the payment out of the proceeds of such a sale as this, of the liens precluding the allowance, "the balance, not exceeding five hundred dollars, shall be awarded to the head of the family, or the wife, as the case may be, in lieu of such homestead." The meaning of the last words quoted cannot be overlooked. The allowance is to be *in lieu* of homestead. Section 5435, provides for the allowance of the homestead exemption to the husband and wife when living together, and we think sec. 5440, must be construed with sec. 5435, so that the mention of the wife in the former must be taken to mean what is expressed in the latter, viz: the wife when living with her husband, which is not this case.

Section 5441, if ever applicable to this case, was amended April 12, 1884, so as to make it conform to sec. 5435, and it now reads, "husband and wife living together * * * and not the owner of a homestead, may in lieu thereof, hold exempt from levy and sale real or personal property to be selected by such person, his agent or attorney at any time before sale not exceeding five hundred dollars in value," etc. So we find that this section as it now stands, like sec. 5435, provides that husband and wife may claim the allowance, when *living together*. To hold that a wife living apart from her husband under a judicial decree allowing her alimony, is entitled to the allowance, would in our judgment be doing violence to both the letter and spirit of the statute.

Judgment affirmed.

FORCE and HARMON, JJ., concur.

Robert Kuehnert, for plaintiff.

G. Tafel and J. J. Gasser, for defendants.

VERIFICATION OF PLEADINGS.

5

[Superior Court of Cincinnati.]

VENNEMAN V. SIEVERING ET AL.

Omission of the notary to sign and seal, if the party has actually sworn to the petition, is not reason to strike it from the files, but an entry may be made authorizing the notary to complete the certificate, for that is merely evidence of the fact.

PRICE, J.

Motion to strike the petition from the files for the want of verification.

The attention of the court was called to the fact that the certificate to the affidavit to the petition, otherwise in proper form, was not signed by the notary, nor was his official seal attached by that officer. Whereupon the plaintiff forthwith filed an affidavit by the notary to the effect

"Section 63. The council shall have power to provide for the appointment or election by the qualified electors of the corporation, wards or districts, as the case may require, of all such other officers as shall be deemed necessary for the good government of the corporation and the full execution of its corporate powers.

"Section 64. All appointments of officers of municipal corporations created by law or ordinance, shall be made by the mayor, by and with the advice and consent of the council, and the concurrence of a majority of all the members elected shall be required to confirm any such appointment, and the names of those voting, and for whom they voted on the vote resulting in an appointment, shall be recorded."

It appears, then, that we have two sections of the Municipal Code virtually controlling the same subject-matter—section 444, under the head of Wharves, Docks and Harbors, which provides that the common council may appoint a wharfmaster, and sections 61, 62, 63 and 64, which provide that the common council shall have power to appoint all other officers not specially named in any of those sections.

While it is true that one section relates specially to wharves, docks and harbor masters, the other section appears to cover all possible contingencies with respect to officers, and did give the council power to provide for the election of a wharfmaster, as well as any other officers, which might be necessary for good government, and for the full execution of its corporate powers. All these sections, I may say, remain in the Revised Statutes.

By another section of the Municipal Code (Rev. Stat., 1543), it is provided that "all laws, ordinances and resolutions heretofore lawfully passed and adopted by the trustees or council, 'not inconsistent with this title,' shall be, remain, and continue in force, until altered or repealed by the trustees or council established by this act."

If this ordinance, which was adopted in 1859, providing for the election of a wharfmaster, has not been repealed by the common council, by an ordinance for that purpose, or has not been expressly repealed by the legislature, then as a matter of course the election which was held this spring, was held in pursuance of the statute and ordinance, for the ordinance, as admitted by the pleadings, is in full force. So the conclusion at which I have arrived, from an examination of the statutes with reference to the question, as the ordinances stand now, is that it is proper that the wharfmaster should be elected by the people.

There is another objection taken by the defendant. He avers in his answer that he was elected by the common council on the 16th of April, 1885, to be wharfmaster. The statute provides that all appointments must be made by the mayor, by and with the consent of the common council. He does not aver in his answer that he was, and I presume it to be the fact that he was not, appointed by the mayor; he was simply, in fact, elected by the council, not appointed.

A mandamus must issue against the city clerk, to issue a certificate of election to James Carson.

Wulsin & Perkins, for the relator.

Judge Wilson and J. M. Dawson, for respondent.

MUNICIPAL CORPORATIONS.

614

[Superior Court of Cincinnati, General Term.]

JOHN SIMPKINSON V. BOARD OF PUBLIC WORKS.

1. Authorizing a city of a particular class to borrow money to pay deficiencies in certain funds, or for a particular year, can only apply to the city then so classified, and hence is special.
2. The acts of March 24, 1885, and April 27, 1885, authorizing the board of public works of Cincinnati to borrow money "to pay deficiencies existing, and that may exist, in the infirmity fund of said city, for the years 1884 and 1885," etc., and to borrow money "to pay deficiencies existing in the board of health of said city," and "to pay deficiencies existing in the general fund of said city," are special acts conferring corporate powers, and, therefore, invalid.
3. That portion of the act of April 27, 1885, authorizing the board of public works to borrow money "to be applied to the street cleaning fund," is not a special act, and is valid without regard to the question whether it confers corporate powers.
4. In so far as the deficiency consists in arrearages of salaries which the city is liable for, it is merely a change in the form of the indebtedness and not a conferring of corporate power, and money may be borrowed for this deficiency if affirmatively shown to exist.

HARMON, J.

Plaintiff, as a taxpayer, upon refusal of the solicitor, sues to enjoin the issuance of bonds, under two acts of the general assembly, each entitled "An act to authorize the city of Cincinnati to issue bonds for the purpose therein specified," passed, one March 24, the other April 27, 1885.

The purposes specified in the first act are to borrow any sum not exceeding \$200,000, "to pay deficiencies existing and that may exist in the infirmity fund of said city, for the years 1884 and 1885," the money to be "paid into the infirmity fund of said city," and "expended by the directors of the city infirmity according to law." The purposes specified in the second act are to borrow money as follows: "The sum of \$19,918, to pay deficiencies existing in the board of health of said city, the sum of \$78,000 to pay deficiencies existing in the general fund of said city, and the sum of \$70,000 to be applied to the street cleaning fund of said city."

The case is reserved upon demurrer to the petition and motion for a restraining order.

We are asked to interfere with the proposed action of the board of public works and comptroller under these acts, they being the officers named therein as actors on behalf of the city, because such acts are void as violations of section 6, article 13, and of section 1, article 13, of the constitution of Ohio, the former being: "The general assembly shall provide for the organization of cities, etc., by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power;" the latter being "the general assembly shall pass no special act conferring corporate powers."

It may be conceded that cases might arise in which it would be the duty of the court to interfere with proposed action of a municipality in borrowing money, although by express authority of the legislature, when either from the amount or from the purpose of the loan it should appear that such action would be an "abuse of such power."

"Section 63. The council shall have power to provide for the appointment or election by the qualified electors of the corporation, wards or districts, as the case may require, of all such other officers as shall be deemed necessary for the good government of the corporation and the full execution of its corporate powers.

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It may be conceded that cases might arise in which it would be the duty of the court to interfere with proposed action of a municipality in borrowing money, although by express authority of the legislature, when either from the amount or from the purpose of the loan it should appear that such action would be an "abuse of such power."

dollars, including one item of a little over ten thousand dollars for sheeting, left by direction of the city engineer in the trenches in which the sewer was constructed. It appears that the abutting owners on the sewer paid some sixty-six thousand dollars. The remaining abutting owners refusing to pay, a suit was brought against them, and it was held, that inasmuch as this assessment included the item of ten thousand dollars, which the city had no right to put into the assessment, the assessment was entirely invalid. The assessment being invalid, this action was brought against the city for the breach of its contract to give an assessment. The city presents various defenses: first, whether any such action can be maintained. The city agreed to give an assessment and nothing else. Can it be held to pay money? This action is not brought for work done and materials furnished under the contract; it is for a breach of the agreement to furnish an assessment. An assessment does not mean a form, or collocation of words; but an ordinance valid in law. The city did not give the contractors such an assessment, and therefore, there is a breach of the agreement. The agreement being broken, if damages are sustained, the plaintiffs have the right to recover damages. It is further contended that the agreement to give an assessment was invalid, and the question is then presented, the assessment being invalid because it contained this item of ten thousand dollars for sheeting, can it be that there was a valid contract between the city and the contractors?

If the contract between the city and the plaintiffs included a contract to pay ten thousand dollars for the sheeting, that is to pay over five hundred dollars for an item which was not subjected to competitive bidding, the contract would not be valid. The city did not advertise for proposals for sheeting; the bidders did not offer any bid for the price of sheeting, and the contract which contains a statement of items and prices, contains a statement that these prices for these items will constitute the payment of the contractors, for all materials and labor furnished in constructing the sewers; and the statement containing no item of sheeting and no price for sheeting, there was, therefore, no bid for sheeting; there was no advertisement asking for bids for sheeting; there was no contract for sheeting; it was an item thrust into the assessment, without any basis in the contract with the city or in the preliminary proceedings which preceded the contract with the city.

There was a clause in the specifications that the contractors were not to get more than one dollar per foot, or some other measure, for sheeting that should be left in the work by the direction of the city engineer. There is that clause and that only.

It is not necessary here to pass upon the question whether or not the contractors were obliged to leave that sheeting in; or, if they did, whether or not they are entitled to any compensation for it. If they were obliged to leave it in, compensation for it is included in the price stated to be the price for doing the entire work, and if they were not obliged to leave it in, there was no contract price for it.

There was, therefore, a valid contract between the city and the contractors; and the contract having been performed by the plaintiffs, there is a breach of the contract for which the city is liable to respond in damages.

The question is, what is the rule of damages? The assessment given was for about seventy-nine thousand dollars, including this irregular item of ten thousand dollars; sixty-six thousand dollars have been paid, leaving now about thirteen thousand dollars unpaid upon the assessment as

given. Now, the giving of a valid assessment is payment, and the giving of an invalid assessment is not payment. If, however, an invalid assessment should be given and the abutting owners should pay without demur, while that would not be strictly payment, it would be satisfaction which would be equivalent to payment. Hence, while the city did not pay, yet there has been a partial satisfaction of the claim. Now, what is the rule of recovery? It is claimed by the contractors that the contract was to give an assessment, not in a lump, not one assessment, but as many assessments as there were abutting lots; and that being the case, damages should be a sum equal to the full amount of assessment which ought to have been levied upon the lots which have not paid. It was charged otherwise to the jury; that the contractors were entitled to recover so much of the sum which they ought to have received, as they had not received satisfaction for.

Now, it is true that where an assessment has been made for an improvement which passes along the front of many lots, the assessment is to be made, not in a lump, but proportionately upon each lot; that is a right of the lot owner; each lot owner has the right to see that no lot of his shall be burdened with more than its due share of the general burden. The right of the contractor is to get his money. If the assessment is made in a lump or otherwise, if made upon one lot or many lots, if made with such irregularity as to be invalid, still if it is paid, he receives satisfaction.

Now, we will suppose that there should be an owner of half a dozen lots, if by inadvertence or otherwise, the whole of his assessment should be laid upon one of the lots, still if it should be paid, the contractor would not have the right to sue the city for the amount that should have been assessed on the other five. We take it, therefore, that while it is the right of each lot owner to see that no burden is put upon his lot other than his share, the right of the contractor is to be paid; and if he is not actually paid, he has the right to satisfaction; and so far as his claim is satisfied, that relieves the claim upon the city; and, therefore, the difference between the amount which the contractor was entitled to receive, and the amount which he has actually received, is the amount of damages which he is entitled to recover. In order that the case might finally be disposed of without another trial, the jury were instructed to find in their verdict what that amount would be, and to find separately what the amount would be according to the claim of the plaintiff.

The jury also found under instructions other separate items which were claimed; the first item is the taxable costs of suit in the cases in which the contractor attempted to enforce the assessment; the second, a reasonable allowance for counsel fees. These court costs, which the plaintiff had to pay by reason of the failure of the suits which the plaintiff had to bring, are allowed. The question whether the plaintiffs are entitled to counsel fees, is only left open. In many cases of tort, counsel fees are allowed as a part of the damages. Accordingly, in suits on attachment bonds, or injunction bonds, if the attachment is discharged or injunction is dissolved, the damages include the counsel fees as a part of the damages for the tort, the wrongful obtaining of the attachment or injunction.

So there are other cases, where one agrees to indemnify a party for expenses to which he shall be put in proceedings in condemnation of

land, or other proceedings, the term expense is held to be large enough to include counsel fees as well as costs.

In the case of a mere breach of agreement, ordinarily, damages do not include an allowance for counsel fees; but the injured party receives compensation by getting the money value of the thing, or service, which he was entitled to have.

There are some agreements, damages for breach of which include an allowance at least of costs. Where on an assignment of a chose in action with a warranty of genuineness, and it turns out on suit brought not to be genuine, then in an action brought by the party to whom the assignment is made against the warrantor for damages, it has been held in New York, Massachusetts and Wisconsin, that he can recover the costs taxed, but not counsel fees. In Ohio, we have no decision upon that point, but in the 11th O. S., and 81st O. S., it is held that where land is conveyed with a covenant for quiet enjoyment, and there is a breach of that, damages include the costs of the ejectment suit, and an allowance for counsel fees. So that whatever may be the ruling in New York, Massachusetts and Wisconsin, we may hold by analogy, it is the rule in Ohio to allow counsel fees as part of the damages in such a case as the present.

The defendant took numerous objections, many of which have been passed upon heretofore, and we will not consider them now. There is one, perhaps, it is necessary to consider; that is, can this contract be held to be valid in the face of the Worthington law. The city cannot contract a pecuniary liability when there is no certificate that the city has the amount of money in the treasury unexpended. But the city did not undertake to contract a money liability; it was certified to the counsel that no money liability was imposed, that everything was to be paid by assessment. There was, therefore, no contemplation, at the time, of a money liability. And the city need not have made itself liable; the city could have given a valid assessment at first. After the suits were decided against the contractor, it was still not too late for the city to have given a valid assessment upon the lots which had not paid. Even now, the city can by charging each abutting owner the fee for house connections with the sewer, make itself whole for damages found against it in the present action.

The motions for a new trial will be overruled; the judgment will be entered upon the verdict; that is, for the damages assessed by the jury, with interest, with costs, and with counsel fees; the motion for judgment upon the special finding for damages will be overruled.

HARMON, J., concurs.

PECK, J., did not sit in the case.

Drausin Wulsin and William Worthington, for plaintiffs.

J. M. Dawson, City Solicitor, *contra*.

AGREEMENTS AS TO INCUMBRANCES.

50

[Superior Court of Cincinnati.]

PHIPPS ET AL. V. ELEAZAR GOULDING.

A deed intended as a mortgage, which excepted from the warranty clause three mortgages "agreed to be part of the consideration hereof," was, by agreement, redelivered to the grantor without record, and another substituted not containing such exception and reference. In an action by the holder of such mortgages against the grantee in such deeds:

Held, that, even if such language imported an assumption of payment, it was not absolute, and was discharged by the change of deeds.

HARMON, J.

This is an action brought by the plaintiffs, as the holders of certain notes secured by chattel mortgage executed by George C. Ware, to recover their amount from the defendant, upon an allegation that he, as a part of the consideration for the conveyance to him, by Ware, of certain real estate and chattel property, including that mortgaged, had assumed payment of the plaintiff's notes and mortgage. This allegation of assumption is denied by the answer. The evidence shows that in January, 1882, the defendant loaned to Ware \$7,500, and, to secure the repayment thereof, received from Ware a warranty deed reciting the receipt of \$50,000 consideration, and conveying various pieces of leasehold and other property, together with all the machinery, apparatus, fixtures, etc., on the same, which would include the chattels mortgaged to the plaintiff, and a covenant of warranty against all claims of all persons whomsoever, except three mortgages, including that of the plaintiff, which the deed recites are "agreed to be a part of the consideration hereof." The testimony shows that this deed was never recorded, but that the understanding between the parties was that it was to be renewed every six months, they seeming to have the idea that, a deed being good in Ohio, without record, for six months, the security could be preserved in this way without publicity. Every six months another deed was executed, and, so far as we can gather from the circumstances of the case, when each one was executed the old one was returned.

At any rate, we find that the first one was in the possession of Ware when the last was executed. Finally, in the spring of 1884, the defendant, desiring his money, notified Ware that he either wanted his money or a final deed, as he called it. So on July 11, 1884, Ware executed to Goulding a deed in which the chattel property was omitted from the property conveyed, and from which this reference to the incumbrances agreed to be a part of the consideration, was also omitted. That deed was mailed to Goulding at his home in Massachusetts the day it was executed. Five weeks afterwards, before this deed had been recorded, Ware made an assignment for the benefit of creditors under the insolvent law, and, as he testifies, having heard nothing of the deed which he, in July, had sent to Goulding, and being desirous to secure him, as a special friend, Ware, without the defendant's knowledge or procurement in any way, executed a deed, just before the assignment, and placed it on record, similar to the first deed of January, 1882, except that the counsel who drew it changed the clause from the first deed, which was given him to draw this by, that said incumbrances were "agreed to be a part of the consideration hereof," and made it read that, "All of such incumbrances constitute a part of the purchase price and are hereby assumed

by the grantee." The defendant, being advised of the assignment, hastened on to Cincinnati, and the testimony shows beyond contradiction that he declined to accept the deed so put upon record by Ware, and recorded his deed of July 11, which he had received by mail, and, unless his conduct in demanding rent from the assignee of Ware necessarily means that he was claiming under this deed of August 18, there is nothing to show that he ever did ratify or accept it. I am not of the opinion that such demand necessarily implies any such acceptance. It certainly is inconsistent with his other expressions and conduct, and it is a violent presumption to suppose that, after he had become advised of the contents and effect of this deed, and had already repudiated it, he intended to accept and act under it. His action may be ascribed as well to a belief in his rights under the other deed.

If his rights depend on the deed which he did record, of July 11, and under which he now claims to stand, there can be no question that he is not liable to plaintiff. What is the nature of the deeds intervening between the first one and the last does not appear in evidence. None of them are produced. They seem to have been mislaid. The burden would rest upon the plaintiff, if he sought to enforce liability of the defendant upon any one of those deeds, to prove that it contained such a clause. There is no proof, except circumstantial proof, and what little there is of that would rather lead to the inference that they did not contain any such assumption than that they did.

So that the plaintiff, to maintain his case, must stand upon the first deed, and the first question that arises is, does that deed contain a covenant by the defendant to pay these mortgages? If the deed were in fact an absolute deed there would seem to be a discrepancy between the consideration and the amounts which the defendant was to pay, viz., the difference between the \$23,000 of mortgage assumed and the \$7,500, which is all there is any testimony to show that Goulding ever paid, or was expected to pay, to Ware, and the \$50,000 expressed as the consideration of the deed. And if that were not so, it would still be a serious question in view of what is said by the Supreme Court in *Brewer v. Maurer*, 38 O. S., 548, referring to *Fish v. Tolman*, 124 Mass., 254, in which a deed taken subject to a mortgage recited to be part of the above consideration was held not to amount to a covenant on the part of the grantee to pay the mortgage, whether the clause in question can be held an assumption. The court by italicising the word "assumed," which was found in the covenant in question in that case, seem to imply that some words of obligation are necessary to create such assumption. I do not think, however, it would be difficult if this were an absolute deed in which the defendant had agreed to pay \$50,000, had only paid part, and, reciting this \$23,000 in mortgages, said that they were "agreed to be part of the consideration hereof"—to hold that the intent of that language was to impose upon the grantee the duty of paying the mortgages. But, when the evidence discloses, as it certainly does here, that this was not an absolute deed, and was not intended to be, that it was only a security, I am inclined to think that the language does not amount to a covenant to assume and pay those mortgages. The only way that result could be worked out, if it were an absolute deed, would be by the reference to them as part of the consideration, and, that being still unpaid, though fixed and agreed upon, there would be no sense in referring to them as part of the consideration unless it were to be paid by paying them. And, whereas, it is certain that there was no consideration to be paid other

than the amount loaned, it seems to me that so unusual and violent a presumption as that a person loaning \$7,500 intended to assume and pay an amount three times as great, looking only to such rights as the law would give him if he paid, there being no express covenant on the part of the grantor to repay, but the grantee being left in that view of the case, as was decided in *Guernsey v. Rogers*, 47 N. Y., 233, simply the right to add the amount so paid to his debt, and require the grantor to repay him before he could redeem, should not be made from so vague a clause as that.

If, however, it should be assumed that the meaning to be given to this clause in the first deed, under all the testimony is such as contended for by the plaintiff, what would be the effect of the surrender of the deed and the receipt of the subsequent ones? Certain it is that the surrender of a deed does not revest the legal title. And it is equally certain that in actions of this sort the court is not to be encumbered by the technical rules relating to real property. The question is, what was the intent of the parties? What could have been enforced as between them? Now, I have no hesitation in saying that if, after the delivery of this deed, even if it had expressed such an agreement as plaintiff contends for, upon the expiration of the six months, which the testimony requires me to find was the time for which the money was loaned, this deed was surrendered, and another taken, which the plaintiffs have to prove contained such a condition, and having failed to do so, I am bound to presume did not contain it, the effect, as between the parties, was to substitute another security for this, it being intended only as a security? And if it be said that the title vested by this deed did not revest thereby, it is sufficient to say that certainly in an action between Ware and Goulding, Ware could have enforced the agreement, and compelled Goulding to abandon his rights under this deed and take under the other. So that if a question should arise as to preference under a bankrupt law, or one of priority between Goulding and some other person holding a conveyance, he certainly would be required to stand upon his new security, just the same as if this first deed were a mortgage in terms. That is all, in equity, that it was. And, having surrendered it, he could be compelled, by decree, to reconvey the property and enter cancellation in order to carry the real intention of the parties.

The question as to whether it was competent as against the plaintiff for Ware, to waive performance of a covenant of that sort is a nice one. Undoubtedly a party may either in an express mortgage, or one in the form of a deed in equity a mortgage, the same as in an absolute deed made in pursuance of an outright contract of purchase, assume the payment of incumbrances upon the property. This has been held in various cases. *Guernsey v. Rogers*, *supra*; *Ricord v. Sanderson*, 41 N. Y., 179, and *Jewett v. Draper*, 6 Allen, 434. But in all of these the covenant was express, and, as the court said, in one of the cases, not an open question as to what the parties meant. The conveyance would be a consideration for the assumption in such cases. But, in view of what is said by our Supreme Court, in *Brewer-Maurer*, *supra*, with reference to the case of *Pardee*, 82 N. Y., apparently citing with approval the reasons given for the rule that a third person whose debt has been agreed to be paid by another, upon a consideration moving from the debtor, may maintain an action upon it, I see no reason why I should not accede to the prevailing law in New York, as laid down in *Guernsey v. Rogers*, *supra*, as to the effect of such a stipulation in a mere mortgage. That is to say, it is not

an absolute undertaking on the part of the mortgagee to pay off the incumbrance as it would be in case of a grantee by paying what he would otherwise pay to his grantor, such mode of payment being selected by the parties. But it is, at most, only a contingent liability, as the court said, to protect the property by paying the incumbrances if necessary. It is not an agreement made for the benefit of the creditor at all, as in the other case. And it is a serious question whether the person holding the incumbrance could maintain, under these authorities, an action in such a case. But, assuming that he might, if the agreement remained, I am unable to see why a mere contingent agreement, of that sort, may not be waived by the person with whom it was made without any new consideration.

But if consideration be needed, as I have already said, it is found in the change of securities. When Ware sent to Goulding the deed of July 11, and Goulding accepted it, he thereupon had, and all those standing in his shoes had, a right in equity, to compel Goulding to surrender all his prior securities and stand upon that. And Goulding's consent to stand upon that, at a different date, and, in this case, covering property in some respects different, is sufficient consideration to support the release.

It seems to me that, upon all these considerations, plaintiff has failed to make out the truth of his allegation that the defendant assumed to pay, or, at the beginning of the suit, was liable, upon any assumption, to pay the mortgage notes on which he seeks to recover from him, and the judgment will be for the defendant.

Wm. Worthington, for plaintiff.

E. P. Bradstreet, for defendant.

68 TRANSFER OF RIGHT TO VOTE STOCK—RAILROADS.

[Superior Court of Cincinnati, General Term.]

GEORGE HAFFER V. N. Y., L. E. & W. R. R. CO. ET AL.

1. A contract by a majority of stockholders to convey their right to vote to a person acting in the interest of another corporation in consideration of its guaranty of six per cent. dividends to them, is illegal, as giving one corporation the rights of a stockholder in another and as ignoring the rights of the minority, and as a stockholder cannot part with the right to vote.
2. Acquiescence by part of the minority is not an estoppel, nor admission that the contract is executed. Nor must pecuniary injury be shown in order to obtain an injunction.
3. That the beneficiary railroad was a party to the contract will not prevent its seeking injunction, there being a *locus poenitentiae*.
4. That plaintiff prayed only partial relief will not prevent entire relief if the partial relief would be no protection to him.

In the year 1882, certain contracts were entered into between the New York, Lake Erie & Western R. R. Co., Hugh J. Jewett, and Messrs. Hooper, Hanna and Werk, trustees, representing certain stockholders owning the majority of the shares of the capital stock of the Cincinnati, Hamilton & Dayton R. R. Co., wherein it was agreed, that the said stock should be registered on the books of the company in the name of Jewett, who was then president of the N. Y., L. E. & W. R. R. Co.; that he should from time to time deliver to the appointee of the directors of the last named company an irrevocable proxy, authorizing him to vote upon

the shares for directors at the elections of the C., H. & D. R. R. Co.; that the certificates of stock should remain in the hands of the three trustees, Hooper, Hanna and Werk (the last named afterwards resigned and Bishop was substituted in his stead); that said trustees should issue to the owners of the stock "pool certificates," in a form agreed upon and in amounts equal to the par value of the shares owned by the respective stockholders; and that the N. Y., L. E. & W. R. R. Co. should guarantee to the owners of said certificates a perpetual, semi-annual dividend of three per cent. The instruments setting forth the contents, were executed, and the parties proceeded to carry them out. The shares were placed in the hands of the trustees, registered in the name of Jewett, the certificates issued, and during the years 1882, 1883 and 1884 the dividends were regularly paid thereon, but the payments were made out of the earnings of the C., H. & D. R. R. Co., which were found sufficient for the purpose and rendered it unnecessary for the other company to pay anything to make good its guaranty, and during the same years the vote of the "pooled" stock was cast at each election for the persons designated, by the directors of the N. Y., L. E. & W. R. R. Co., while the certificates were frequently sold in the stock market at Cincinnati. The form of certificate on its face referred to the contracts, and set forth the guaranty.

In May, 1885, the plaintiff filed his petition herein, setting forth the substance of the contracts, that he is the owner of a large amount of the stock of the C., H. & D. R. R. Co., not included in the "pool," claiming that the contracts are illegal and void, and praying that Jewett be enjoined from delivering the proxy to vote upon the shares at the approaching, or any ensuing election to the appointee of the N. Y., L. E. & W. R. R. Co. Plaintiff also moved for a temporary injunction in accordance with the prayer of his petition.

The N. Y., L. E. & W. R. R. Co. filed its answer and cross-petition, setting forth substantially the same facts, as in the petition, but with greater fullness, and including copies of the contracts; also alleging that plaintiff was aware of the execution and contents of the contracts at the time they were entered into, and made no objection thereto prior to the commencement of this suit.

This cross-petition prayed in the alternative, that the contracts be enforced for the benefit of the N. Y., L. E. & W. Co., and that Jewett be required to deliver the proxy as therein stipulated, or, in case the court should find the contracts to be illegal, that they be wholly rescinded, and that Jewett be enjoined from voting upon said shares either in person or by proxy, at the approaching, or any future election. The company moved for an injunction as prayed in its cross-petition.

Plaintiff replied to the cross-petition, admitting that he was aware of the guaranty, of the registry of the stock in the name of Jewett, and that it had been voted upon by him at the three elections held since the making of the contract, but denying that he knew it was a part of the contract that the stock should be voted upon as directed by the N. Y., L. E. & W. Co., or that he knew it was so voted.

Plaintiff also demurred to that part of the cross-petition which prayed for the rescission of the contract.

Any other facts necessary to an understanding of the decision will be found stated in the opinion.

The questions arising upon the motions for temporary injunction, and the demurrer, were reserved to the general term.

PECK, J.

The first point to be determined is, what is the meaning of the contracts, for upon their construction depend nearly all the questions in the case. Taking them all together, and considering the relations of the parties, we find the object of the contracts to be plain and simple. The intention of the stockholders of the C., H. & D. R. R. Co. was, to secure from the N. Y., L. E. & W. R. R. Co. a perpetual guaranty of six per cent. dividends upon their stock, and the intention of the last named company was to secure the voting power of a majority of the stock of the C., H. & D. R. R. Co., so as to control the election of directors of that road. To effect these objects, Messrs. Hooper, Hanna and Werk were constituted the trustees of the pooling stockholders, charged with the duty of collecting and distributing the sums necessary to make good the guaranty, and otherwise carrying out and enforcing the rights of such stockholders, and Mr. Jewett, then president of the N. Y., L. E. & W. R. R. Co., was made trustee of the interest of that company in the voting power of the "pooled" stock, charged with the duty of delivering to the appointee of the directors of the company from time to time an irrevocable proxy, authorizing such appointee to vote upon the stock. From the uncontradicted allegations of the pleadings, together with the contracts themselves, we find that Mr. Jewett had no personal interest in the stock, or in the contracts; he neither paid, nor agreed to pay anything; had no beneficial interest, and undertook no obligation other than that which always rests upon a trustee, to faithfully perform his trusts. His company assumed all the burdens, and was, and is entitled, to all the benefits stipulated in it, if the contract be a valid one.

Before we can proceed to the question as to the legality of the contracts, it is necessary to dispose of the objection made by defendants, to the right of plaintiff to relief in this action. It is claimed that plaintiff had knowledge that the contracts were made, and that by permitting them to be put into operation without objection until this time, he is now estopped to demand relief in a court of equity. This cross-petition asserts full and complete knowledge of the entire transaction on the part of plaintiff. The reply of plaintiff thereto denies that he was aware of the provision that the vote should be cast as directed by the board of directors of the N. Y., L. E. & W. R. R. Co., or that it was cast in pursuance of any direction given by that board. The position of plaintiff was, and is, that of a stockholder, whose shares were not placed in the hands of the trustees, and not included in the guarantee. He was not a party to the contracts, nor was he directly affected by them. He was not represented in the transaction by any agent or trustee, and in that respect he is not on the same footing as a stockholder, who stands by and permits illegal action to be taken by the board of directors without objection.

A number of such cases have been cited us by counsel for the N. Y., L. E. & W. R. R. Co., e. g. *Chapman v. R. R.*, 6 O. S., 120, in which it is held that if such a stockholder waits until the mischief of which he complains is accomplished, and money is expended on the face thereof, and public interests created, he must be held to have acquiesced in the change—the board of directors are the trustees of the stockholder and it might well be said that if one stands by and permits action to be taken by an agent or trustee on his behalf, on the faith of which other interests have been created, he shall not afterwards be permitted to come into court, demanding relief injurious to those interests. Such is not the

position of the plaintiff here. The parties to this contract in no way represented him. He was not interested in the shares, the subject matter of the contract. Ordinarily a sale of shares by other stockholders would not concern him. Why should he be put upon inquiry about a transaction which related only to the property of others? His admitted knowledge of the guaranty, of the registry of the shares in the name of Jewett, and of the voting upon them by the latter, are all consistent with the supposition which he might reasonably have entertained that Jewett in nothing represented the wishes and directions of the owner of the shares. As the case is before us upon the pleadings alone, we must accept the allegation of the reply that he had no knowledge of the provision requiring Jewett to vote as directed by his company, or that he did in fact vote pursuant to such direction. As to the information and circumstances which may work an estoppel, we have a series of carefully considered decisions by our Supreme Court. In the case of *Wright v. Thomas*, 26 O. S., 346, it was held that where a party had full knowledge of the commencement and construction of a public improvement, to be paid for by assessment, no part of which improvement was on his land, he was not estopped to enjoin an assessment sought to be levied upon his property to pay for the improvement. In *Stephan v. Daniels*, 27 O. S., 527, an averment that the party "had actual knowledge or the means of knowing," was held insufficient to estop him from disputing the assessment, and *Wright v. Thomas* was approved and followed, as were both the foregoing cases in *Teegarden v. Davis*, 36 O. S., 601. All of them were carefully distinguished from *Kellogg v. Ely*, 15 O. S., 64, relied on by counsel for defendants.

In the cases cited, as in that at bar, the estoppel was claimed to rest on a failure to arrest a legal right at the proper time. There, as here, no element of falsehood or suppression of fact existed. We cannot even go so far as to say, that plaintiff "knew or had the means of knowing," as was alleged in *Stephan v. Daniel*, *supra*. On the pleadings he did not know the material facts—and the utmost that can be claimed as to his means of information is that he might have ascertained the facts. He was not in a position to demand the information, as he was not a party to the contracts, and they were not the acts of the corporation of which he was a stockholder.

Applying the law as given us by the Supreme Court to the facts as they appear, we cannot hold that plaintiff is estopped to demand the relief sought by him.

Has he made out such a case as to entitle him to relief?

These are contracts which place the voting power of a majority of the stock of an Ohio railroad company entirely at the disposal of a New York railroad company. They invest the directors of the latter with the power to appoint the directors of the former. That one corporation cannot become a stockholder in another is a rule too well established in Ohio to admit of a question. *Franklin Bank v. Commercial Bank*, 36 O. S., 350; *State v. McDaniel*, 22 O. S., 354, 368; *Straus v. Eagle Ins. Co.*, 5 O. S., 59.

That a corporation cannot by such arrangement as this indirectly obtain that control over another which it could not directly secure by becoming the owner of stock, is upon principle quite as plain, and unless there is something in the statutes to confer such authority, it does not exist. Sections 3300, (as amended, 79 L., 35) 3301, (amended, 79 L., 111) and 3302, confer power upon railroad companies to purchase or lease

connecting lines, not competing with the line of the purchasing company, and grant a large discretionary power as to running arrangements between such companies. The line of the New York, Lake Erie & Western railroad connects with that of the Cincinnati, Hamilton & Dayton railroad through the line of the New York, Pennsylvania & Ohio railroad, which the first named company holds by perpetual lease. It is suggested that these facts bring the N. Y., L. E. & W. and C., H. & D. railroads within the meaning of the word "connecting," as it is used in the statutes, and that the arrangement consummated by the contracts in question is within the spirit, if not the letter, of the statutes authorizing sales, leases, and running arrangements. Granting, for the sake of argument, that they are connecting lines, we cannot perceive how this arrangement can come within the meaning of the most liberal construction of the statutes mentioned. All such authorized contracts are to be made between the companies, by their authorized officers, and the companies respectively receive any benefits that may accrue, which is plainly an arrangement for the interest of all stockholders alike. But these contracts, leaving out of view the agents and intermediaries, effect an agreement between one company and a part of the stockholders of another. As already pointed out, their result, so far as the control of the C., H. & D. Ry. is concerned, is the same as if the N. Y., L. E. & W. had bought the stock outright, and the difference between obtaining the control of the property and franchises of a company by the purchase of a majority of its capital stock, and by direct purchase, lease, or other arrangement with the company itself, is too plain to be overlooked. The one ignores the rights of the minority, the other does not—and a statute authorizing only the latter, cannot by any fair construction be made to include the former.

There another objection to this contract. The law has confided the care of the franchises and property of this company to the stockholders, and it is the duty of each stockholder to vote for directors of the company with an eye singly to its best interests.

Here is a large number of the stockholders, for a valuable consideration, have attempted to confer their right to vote upon the directors of another company. This transaction, apart from the want of power in the N. Y., L. E. & W. R. R. Co., to enter into it, is plainly illegal. It places in the hands of persons, in this connection unknown to the law, the powers which have been confided to the stockholders, to be exercised by them according to their judgment, will and discretion, for the joint benefit of all concerned. The law presumes that the pecuniary interest of a stockholder will be a motion to impel him to vote in such a manner as will promote the interests of the company. Such a motive is entirely lacking in one who is not a stockholder—and if such a person be empowered to vote for directors, he may be subject to interests and motives other than such as would conduce to the welfare of the company. A sale by a stockholder of the power to vote upon his shares is illegal, for very much the same reason that a sale of his vote by a citizen at the polls, or by a director of a corporation at a meeting of the board, is illegal. Each is a violation of duty; in effect, if not in purpose, a betrayal of trust. The adjudged cases appear unanimous on this point. *Gurnsey v. Cook*, 120 Mass., 501; *Woodruff v. Wentworth*, 133 Mass., 309; *Fuller v. Dane*, 18 Pick., 484; *Jones v. Scudder*, 2 Cin. Sup. Ct. Rep., 178; *Fremont v. Stone*, 42 Barb., 169; *Noel v. Drake*, 28 Kansas, 265.

Both, upon the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder cannot barter away the right to vote upon his stock, we hold these contracts void.

Such being the case, we are met with the objection that they are executed, and cannot now be interfered with. Many of the cases holding that an executed illegal contract will not be undone by the courts, rest upon the doctrine that the parties to such contract are *in pari delicto*, and for that reason the court will not interfere. Such is *Hooker v. DePalos*, 28 O. S., 251; and see 1 Wharton on Contracts, sec. 352, *et seq.*

It is obvious that the rule as to executed contracts cannot be applied to plaintiff for any such reason as that last mentioned, for he was not a party to the contract. There are other cases wherein special circumstances made it imperative as a matter of good faith that the contract should not be interfered with, and others where the protection of interests acquired by innocent parties caused the courts to refrain.

We find in this case no special circumstances which in justice and good faith forbid interference with the further execution of this contract, and as to innocent parties, there is no suggestion that there are any except the purchasers of the pool certificates issued by the three trustees to the stockholders; but these, from the nature of the interest purchased, as well as from the instrument by which it was evidenced, received notice of the contract, and are, therefore, in no better or different position from that of the original holders of such certificates. In many respects the case is at this point parallel to *Thomas v. R. R. Co.*, 101 U. S., 71, where it was held that an illegal lease of a railroad, which had been in force and carried out by the parties for five years, was not so far executed as to give a party to it the right to insist on the remainder of the term, and that it was not only the right, but the duty of the parties to put an end to it. There, as here, it was not sought to undo the executed portion of the contract, but it was the unexecuted portion which was in question. So far as this case, and the remedies sought in it, are concerned, the contracts are not executed, but executory. By virtue of them, the same acts are to be performed year after year; on the one side the casting of the vote, on the other the making good of the dividends, and in this respect their analogy to a lease is very strong. On the facts now before us, there is nothing to show that the termination of the contracts at this time will do violence to the legal or equitable rights of anyone.

It is also suggested by counsel for the defendants, that plaintiff has not shown that he has, or will suffer, any pecuniary injury by reason of these contracts, and that as he is not a party to them, he cannot be granted the relief he seeks in this action. To this it is sufficient to say, that each stockholder in a company has a right to a fair and lawful election of the directors. *State v. Bonnell*, 35 O. S., 10.

And if one could not resort to a court of equity to prevent unfairness, when he had reason to apprehend it, until he could show pecuniary injury, he might be made the victim of any sort of fraud or conspiracy, without even a remedy in damages after the injury was done.

We therefore conclude that plaintiff is entitled to have his motion for a temporary injunction, as prayed for in his petition, granted.

Coming now to the motion for an injunction, made by the N. Y., L. E. & W. R. R. Co., we find that a large part of the cross-petition is disposed of by what has already been said. That portion of the prayer which asks for the enforcement of the contracts by injunction must be

denied, but there is a part of the other alternative of the prayer which remains to be considered. We are asked to enjoin Hugh J. Jewett, in whose name the stock is registered, "from casting any vote upon said stock at the ensuing or any other election." The prayer of plaintiff is limited to restraining the delivery of the proxy to the N. Y., L. E. & W. R. R. Co., or its appointee. The granting of that prayer leaves the trustee, Jewett, with the stock registered in his name, and it is alleged in the cross-petition of the N. Y., L. E. & W. R. R. Co., that he threatens to cast the vote of the said stock without reference to the interests or wishes of that company. This allegation is not denied in the reply, and Mr. Jewett, although summoned, has not answered. It seems clear that he will have power to do what it is alleged he threatens to do, if we grant only the relief prayed for by the plaintiff. It is well settled in Ohio and elsewhere, that the person in whose name the stock is registered, if only a trustee, is entitled to vote upon that stock, either in person or by proxy, at an election for corporate directors. The officers charged with the conduct of the election cannot take notice of the rights of any person other than the one in whose name the stock stands upon the books of the company. *Franklin Bank v. Commercial Bank, supra.*

Plaintiff objects to any relief being granted this defendant, because the latter is one of the parties to an illegal contract, and as such is not entitled to any equitable remedy; but such is not the law when the relief is sought against the act of an agent or trustee of one of the parties to an illegal agreement. Thus in *Tenant v. Elliott*, 1 B. & P., 3, an agent who had collected the money on an illegal policy of insurance, after a loss plead the illegality of the transaction as a reason why he should not pay over the money to his principal, but the court said that such a plea coming from him could not avail. See also L. R., 8 Ch. App., 149; *Ehrman v. Ins. Co.*, 35 O. S., 324; 1 Wharton on Contracts, sec. 357.

It is further to be said that in a case where a party, directly against the other party to an illegal contract not yet executed, seeks relief, such as tends to prevent the execution of the contract, it will be granted. As said by the Supreme Court of the United States, in *Spring Co. v. Knowlton*, 103 U. S., 60, there is a *locus penitentiae* in such cases, and the N. Y., L. E. & W. R. R. Co., as to that part of the relief asked for, which we are now considering, occupies the position of a penitent. The plaintiff seeks to enjoin the execution of this contract on the ground that it is illegal, and we have found it to be so; but the casting of this vote by Mr. Jewett, according to his discretion, would be not less illegal than if he were to cast it according to the direction of the company, for whose benefit he received the right. The authorities cited show that it is not permitted either to a corporation, or an individual, to purchase the right to vote upon corporate stock.

The relief asked by the N. Y., L. E. & W. R. R. Co. is a necessary result of the case made by plaintiff. We cannot ignore the fact that the relief sought by plaintiff is such as may place the trustee in a position to do that which might work great injury to his *cestui que trust*. We have already seen that the trustee is not entitled to take advantage of the illegality of the agreement, and as it is the act of the plaintiff which would place him in a position where he could do that, we think the company is entitled to this relief both as against him and the plaintiff. "The contracts are illegal," says the plaintiff, and he asks that their execution be in part restrained. "If they are illegal," responds this defendant, "I ask that all action under them be restrained."

One of the grounds upon which a court of equity will sometimes interfere with the enforcement of rights in courts of law is, that complete justice may be done between parties, which cannot be done in a court of law, when it is shown that there are other relations existing between them which would render the enforcement of a single lawful claim unjust. As a half truth may be a whole falsehood, so partial relief may be total injustice. A court of equity will hardly grant partial relief when by administering a more complete remedy the rights of all parties will be better protected.

These principles are in our judgment applicable to this case—and the motion of the N. Y., L. E. & W. R. R. Co., to restrain Mr. Jewett from casting any vote upon the stock mentioned at the ensuing or any other election, is granted.

The demurrer to part of the cross-petition, being only a demurrer to a part of the prayer, is overruled.

FORCE and HARMON, J. J., concur.

Ramsey, Maxwell & Matthews, for plaintiff.

E. A. Ferguson, for the C., H. & D. R. R. Co.

Benjamin F. Bristow and Hoadly, Johnson & Colston, for the N. Y., L. E. & W. R. R. Co.

STREET IMPROVEMENTS.

87

[Superior Court of Cincinnati, General Term.]

†SCHERER V. CITY OF CINCINNATI ET AL.

†For this opinion see 6 Ohio Dec. Re., 1233. (a. c. 14, Am. Law Rec., 111.)

BREACH OF CONTRACT.

108

[Superior Court of Cincinnati, General Term.]

†LEOPOLD BURCKHARDT V. FREDERICK BURCKHARDT.

General considerations in ascertaining damages, for breach of contract of dissolution, by solicitation of old customers, after the decision in this case.

PECK, J.

As the case stands upon the record, we have now nothing to do but assess the damages to which defendant is entitled by reason of plaintiff's breach of the contract of dissolution. The rules by which we are to be guided, have been laid down by the Supreme Court in its last decision, and they are such as to bring this within that class of cases wherein it is impossible to attain to any great degree of accuracy, in estimating in dollars and cents, the amount of the injury for which compensation is to be made. We may, however, point out some of the general considerations, which have assisted in bringing us to the conclusion we have reached.

The plaintiff, after selling out to defendant, went into a competing business January, 1872, and continued therein until July, 1873. His business consisted almost altogether of the buying and selling, and selling on commission, of carbon and lard oils. In these lines it competed with the business of Burckhardt & Co., but the latter were, and the old firm had been in various lines of business into which Leopold Burckhardt & Co. either did not go at all, or but very slightly. These were the man-

†See a prior decision in this case, 5 Ohio Dec. Re., 185.

ufacture of lard oil and stearine, a business from which a large portion of the profits of the old firm were derived, the sale of whisky on commission, also a large and profitable part of their business, and the sale of peanuts on commission. In the lines in which the two houses did compete, the plaintiff and his agents solicited the trade of a large portion of the customers of the old house. In some cases the solicitation was ineffectual, in others it had but slight effect, while in others there was substantial damage.

It is, from the nature of the case, impossible to trace out all or even a great portion of the effects resulting from such solicitation. In many cases it would probably prove to have been only a waste of words, in others its effect may have been far-reaching and destructive. This is a sort of damage at once difficult to trace and easy to exaggerate.

We cannot find from the testimony that the results of the operations of plaintiff were such as to wholly destroy, for the time being, the value of the good-will of the old firm, in the lines of business in which he engaged. Many of the old customers continued to deal with the successor of the old firm, and such successor was, throughout the whole period, actively engaged in the trade in carbon and lard oils, yet we have no doubt that the operations of plaintiff caused serious injury to the trade of defendant. Perhaps the most serious damage was in the diversion of consignments of carbon oil. There was one brand of this oil—that made by Crane & Minshall, of Parkersburg, W. Va., in which the old firm had built up an extensive business. It was something of a specialty. No other house in Cincinnati had that oil. By his personal exertions plaintiff induced Crane & Minshall to withdraw their consignments from the successor of the old firm, and to ship only to him. Other instances of similar damage are shown.

An examination and comparison of the profit and loss accounts of Burckhardt & Co., before and after the dissolution, does not, however, disclose any reduction in the profits of the firm during the period of competition. Prior to dissolution the profits had been about \$40,000 a year, and for the two years thereafter defendant seems to have realized rather more than that amount from the business. It is claimed and it is probably true, that part of this is due to his unusual activity, and to success in lines of business not before undertaken, yet it does not seem probable that he could have achieved such results if the acts of plaintiff were as damaging to him as he claims.

We have carefully considered the testimony of the experts as to the value of the good-will before and after the acts complained of, and have endeavored to give it due weight, but we do not regard it as by any means conclusive for several reasons, one of which is that the hypothetical questions, put to most, if not all, of these witnesses, assume that the competition extended to the entire business, whereas we have seen that it did not.

Taking all the circumstances together, and estimating the damage as best we can from the testimony and the reports of the master, we have concluded that the sum of ten thousand dollars will compensate defendant for all injuries caused him by the unlawful acts of plaintiff, on which sum defendant is entitled to interest from August 1, 1878.

FORCE and HARMON, J. J., concur.

W. L. Avery and L. Maxwell, for plaintiff.

E. W. Kittredge and A. F. Perry, for defendant.

[Superior Court of Cincinnati, General Term.]

†J. H. PUTNAM V. NEWS PUBLISHING CO.

. For this opinion see 6 Ohio Dec. Re., 1231. (a. c. 14, Am. Law Rec., 56.)

FACTOR SELLING IN HIS OWN NAME.

110

[Superior Court of Cincinnati, General Term.]

STEVENS, DAIR & CO. V. MAURICE PINCOFFS.

A factor for distillers, who contracts in his own name, to sell and deliver on board the cars by transfer of bill of lading barreled spirits in bond for export, and does so deliver them, undertakes by implication that the barrels shall be fit and properly filled for such transportation, and is liable for leakage caused by the breach of such undertaking, though such leakage was due to latent defects in the wood of which such barrels were made.

HARMON, J.

Plaintiffs in error, distillery brokers, agreed with defendant, to sell and deliver to him on board the cars for New York, in bond for export, 1,500 barrels of alcohol. They did so deliver them by transfer of bills of lading, and received payment on delivery. Pincoffs sued them for damages, averring that they were bound, knowing the alcohol was for export, to properly put it in fit barrels for that purpose, but failed to do so with respect to 740 barrels thereof, and that in consequence a large quantity leaked out before it reached its destination, at Marseilles, France. Plaintiffs in error denied generally. Verdict and judgment were for Pincoffs.

After examining the record, which sets out all the evidence, we cannot say that the verdict was against the weight of evidence. The loss between here and New York was shown to have been much greater than between there and Marseilles, which also was large, although the barrels were carefully repaired and recoopered at New York before reshipment. Both losses were very greatly in excess of the usual leakage in such cases. This certainly tended to show that the barrels were defective, or filled too full so as to be strained by natural expansion, or both, and there was evidence of defective wood in the barrels by witnesses, who examined them both in New York and Marseilles. This was met by evidence of due care in the selection of the materials, and in the making and testing of the barrels, and in the filling. But it was not a question of care. If the sellers were liable at all, they were liable upon an implied undertaking or warranty, that the barrels were reasonably fit for the purpose to be accomplished, an obligation which covered defects, no matter how completely hidden, one which imposed upon them the risk of such defects, which, had there been no such obligation, must have been with the buyer. And the question was properly left to the jury whether the leakage was due to defects in the barrels or improper filling, or to causes intervening in transit.

It is contended that the court erred, both in the charges given and in those refused.

After explaining the rule of *caveat emptor*, and the effect of failure to inspect when there is opportunity, the court told the jury that "if these goods were only delivered by the delivery of bills of lading after they had been closed up in the cars, why then there would be no opportunity to inspect, and defendants would be held to have warranted that the pack-

ages were in proper condition for shipment," etc. It was not disputed that the delivery was made in just that way, and that the rules and regulations of the revenue service, which were in evidence, prevented any examination until the arrival of the goods in New York, when, under the revenue laws, it would have been too late to reject them, and the only object of inspection is to enable the buyer to reject if he wishes. There was therefore no question as to opportunity for inspection to be left to the jury, and the discourse upon the law was certainly not to the prejudice of the party now complaining.

But was this a case in which the buyer was bound to inspect if he had had the opportunity? It was not a sale of specific chattels, as was the fact in the cases cited for plaintiffs in error, but an executory agreement to deliver spirits properly filled in proper barrels for exportation. They were to be selected by the sellers. From the very nature of the contract the buyer had a right to trust and did trust to the judgment of the sellers. Had the buyer been notified to come and examine the goods after they had been set apart at the distillery, he would have had the right to decline, and demand the fulfilment of the seller's contract, which was, to deliver to him on the cars the spirits properly placed in proper barrels.

In such cases there is always an implied term in the contract, which, after delivery and payment, may be called a warranty, that the things supplied are reasonably fit for the purpose for which, to the seller's knowledge, they are intended. Benj. on Sales, sec. 657; *Rodgers v. Niles*, 11 O. S., 48; *Dayton v. Hoogland*, 39 O. S., 671; *Randall v. Newson*, 2 Q. B. D., 102.

Nor does it matter that in this case the sellers were not manufacturers. First, they were brokers for the manufacturers, who were to make and barrel the spirits, and contracted in their own names. Their liability, therefore, is just the same as that of their principals would have been had they disclosed them. And, second, it is the nature of the transaction in cases of this kind, not that of the business in which the seller is engaged, which, if anything does, puts the risk of fitness for the purpose intended upon the seller. Because manufacturers usually do not sell specific articles, but undertake to produce articles for special purposes, they usually do take such risk, but dealers may enter into similar contracts, and when they do, their obligations are just the same. The rule expressly includes both. Benj. on Sales, sec. 657 (4thly); *Rodgers v. Niles*, *supra*.

We are not considering the effect of the seller's relation to the article sold on the question of implied warranty in other classes of cases.

Such being our judgment of the nature of the case upon the law and the facts, we must overrule the exceptions to charges refused. The parts of them which were proper and applicable to the case, were fully covered by the general charge.

It not being contended that plaintiffs in error had any special defense or set-off against Reid, the agent through whom Pincoffs dealt with them, we can see no bearing which Reid's not having disclosed his principal can have on the case.

Judgment affirmed.

FORCK and PECK, J. J., concur.

J. H. Perkins, for plaintiff.

C. H. Stephens, *contra*.

NATURAL GAS BENEATH MINES.

112

[Jefferson Common Pleas.]

JEFFERSON IRON WORKS V. GILL BROS.

1. A person who sells a freehold interest in coal under the surface without reservation of any rights does not have a way of necessity to reach what lies under the coal from the surface by sinking a well through the mines.
2. In the present state of knowledge of controlling natural gas it is so probable that its perils cannot be mastered, that the owner of a freehold in subsurface coal can enjoin the surface owner from sinking a gas well from its surface through the mine into the gas region below the mine. He is not obliged to submit to the perils of its escape into the mine.
3. An injunction will not be granted against a mere act of trespass; hence, on petition by owner of a freehold estate in coal under the surface against the surface owner, who threatens to bore for natural gas through the mines, alleging that the gas is dangerous and explosive, will frighten off miners and endanger the mines, and enhance the cost, an answer denying these perils it not demurrable, for it eliminates the element of irreparable damages and leaves the petition asking an injunction against an ordinary trespass, as if defendants were about to sink a well for water.

(Early this month, at Steubenville, Ohio, in the court of common pleas for Jefferson county, Hance, J., presiding, an important suit, exciting widespread attention among gas and coal interests there, and in Brilliant, Wellsburgh, Pittsburgh, and elsewhere, was tried, and opinions have just been rendered. It is thought to be the first time the question has arisen, and counsel felt somewhat embarrassed by lack of precedents.

The question originally arose through the following chain of circumstances: Years before natural gas was thought of, the administrators of one Stokely deeded to the Jefferson Iron Works, the plaintiffs herein, a freehold estate in the coal underlying the premises in question. The deed was without any express reservations.

Recently Gill Bros., the defendants, as lessees of the surface owner, the Stokely estate, commenced to sink a gas well from a point on the premises over the defendant's coal mine.

Whereupon the latter applied by petition to the probate court for a temporary injunction, thereafter to be made perpetual, and set forth that the sinking of a gas well through their coal mines would be a trespass and a nuisance, and thereby and through its operation and maintenance great and irreparable injury and damage would be done them and their mine; alleging that the gas was a dangerous and explosive substance, which with no certainty could be controlled; that it would increase the risks of mining, frighten the miners, render their mine of less marketable value, increase the chances of flooding, increase their expenses and reduce their profits, and that the same could not be fully compensated for in damages.

The injunction was allowed.

The matter was now taken to the common pleas, and the defendants filed their answer, in which they denied that plaintiff had any other than coal interests in the said land; that their property—the gas—was a product of great value, and that the plaintiffs had already sunk three wells through its coal mines and were using the gas in its manufacturing operations; that defendants had no way to reach their property, the gas, except by boring through plaintiff's coal field, and this they claimed a right to do.

They denied that such a well, properly constructed and maintained as they propose to do, was attended with the perils or dangers depicted in the plaintiff's petition; but, on the contrary, all such dangers were readily avoidable, and they prayed for the dissolution of the injunction.

The cause now came on for trial. By a special arrangement between counsel, it was agreed that a certain clause in the answer concerning an alleged abandonment of that part of the mine through which it was desired to sink the well should for the time being be stricken out, and the balance of the answer be demurred to, upon the understanding that if the demurrer was sustained the defendant's case would be ended; but if it was overruled, that would establish the defendant's abstract right to sink the well, whereupon the case would then proceed to be tried upon the merits, leave being given to refile an amended answer with the above clause re-inserted.)

HANCE, J

We have here a petition, to which petition a defense is interposed in the shape of an answer. To the answer so made a demurrer is interposed. Now, in disposing of the demurrer, it is necessary to keep in view the specific relief sought by the plaintiff; and the question to be determined, as presented by the demurrer, is: Do the statements of the answer, which the demurrer admits to be true, serve as a defense or as a bar to the specific remedy sought? That is the question which I feel called upon to decide, and in deciding that question I shall leave wholly undisposed of the question of right that has been discussed here.

Indeed, for the purposes of this demurrer, I might concede—but I do not concede it as a conclusion to which I have arrived—but for the purpose of the demurrer, or in disposing of the demurrer, I might concede that the right is with the plaintiff.

Now, it will be borne in mind that this is not a common law case. It is a case upon the chancery side of the court, and it asks as remedy a preventive means. The object of the bill is to obtain an injunction restraining the defendants from putting a hole through these strata of coal. Now, it does not follow by any means that if the chancellor should find that the case presented was not one for injunction, that the party would be without remedy. From this standpoint the case may be disposed of without determining the right, leaving the party to other appropriate remedy.

Now, upon the case made in the petition, conceding the right to be—as for the purpose of this demurrer I do concede it, but only for such purpose—if a demurrer had been interposed to the petition, making the concession which I do, the case would be with the plaintiff. But, this side of the petition, we have the statements of the answer, admitted by the demurrer to be true (the elimination suggested being supposed to have been made).

By way of illustration, I will suppose that a man joining my farm is about to cut a tree from my land—about to commit a trespass. It would not follow by any means that a chancellor would interpose by injunction to restrain what would be a mere trespass, unless great and irreparable injury would result if the party were not restrained. The presumption in the case which I put would be that if the man did wrongfully, and as an act of trespass, cut the tree or a number of trees upon my land, I would have ample remedy at law, and might recover my damages.

Now, it is conceded, by this demurrer, that the only injury which will result from the putting down of this hole will be, first, a violation of the right of property on the part of the plaintiff, and a destruction of so much coal as will be displaced in the making of the boring and inserting of the necessary casing.

Now, the chancellor might well say, if that is all that is going to result from this alleged wrong, the party will have ample remedy at law.

Take another case: I sell to a party a stratum of coal—or all the coal, if you please—underlying my farm. It is known that this stratum of coal lies 75 feet beneath the surface. After that I have sold and conveyed to him—thus severing the freehold; creating two freeholds where but one before obtained; granting an absolute freehold to him—I am about to improve my farm—put buildings upon it—and I want, for family use, a supply of water. The only means whereby I may obtain water is by boring. The vein of water in that place is 125 or 150 feet beneath the surface. I cannot bore without perforating this stratum of coal which I have conveyed away. Conceding that I would be a trespasser in so doing, a wrongdoer; that I would be violating the right of the grantee to the exclusive enjoyment of the portion of freehold, subject only to the right of eminent domain on the part of the state; concede all that, and yet the chancellor would not stop me from getting a supply of water. He would say the owner of this freehold will have his remedy at law; the damages will not be irreparable; they will be such as may be estimated and paid.

Now, that is the light in which this case stands at present; whereas did the demurrer and answer not change the aspect of the case as presented by the petition viewed from the same standpoint, a directly opposite conclusion would be reached.

We have now under this answer and upon the demurrer eliminated from the case the elements which would entitle the case to favorable consideration with the chancellor. The great and irreparable injuries which the petition anticipates and presents are now entirely eliminated—eliminated by the answer and the demurrer. The petition sets forth that this gas, being a subtle agent, has hitherto and probably will continue to be uncontrollable by human appliances; that explosions have and in all probability will continue to result from letting it loose; that these explosions will greatly injure the property, if they should take place, of the plaintiffs; that the fact that their property will be liable to such increased hazard will increase their difficulties and the expense in the way of procuring their coal to be mined. The answer sets up a different condition of things; says that this gas is subject to control, and that by the adoption of proper appliances these dangers which are anticipated in the petition can not and will not arise. The demurrer admits that condition of things.

This resolves the case then into the simple question of whether a party whose right of absolute dominion over his own property is about to be violated, can invoke the aid of the chancellor in a case in which ample amendments may be made by a suit at law.

I think the doctrine is very clearly settled in equity—and I have had occasion to review it since I have been furnished with this petition—that the chancellor will not interpose to prevent, by injunction, a mere act of trespass, unless it be stated that that trespass will result in great injury, and that the party will be without adequate remedy at law.

The demurrer to the answer, therefore, will be overruled.

Upon the following day the amended answer was filed, as per the agreement between counsel above noticed, and the case was tried and submitted without further argument.

The court, as a preface to his opinion, said "that he regretted the hurry that had been pressed in this case, as its novelty and importance demanded that it should have received more care and attention than he had time, in the brief interval, to give to it."

It should, however, be stated that the parties to the action felt that their business compelled as speedy a decision as possible.

HANCE, J.—The conclusion at which I have arrived, may, perhaps, be other and different from what I would have reached had further time been afforded me for investigation. I presume that the books will afford no precedents, but that the question necessarily must be referred to its appropriate controlling principle—and when a question thus presents itself, too much time can scarcely be taken for its determination.

At a time long before the discovery of natural gas before its existence was even suspected, the coal underlying the property of the late Mr. Stokely was conveyed to and is now held by the plaintiffs. This sale and conveyance created a separate and distinct freehold, giving to the grantee of Stokely's administrator, a freehold estate in the coal underlying the premises, and reserving to Stokely's heirs what was above and also what was below the coal. The conveyance of the coal was without reservation of any rights whatever in the portion of the premises thus conveyed.

At the time of the conveyance, as before remarked, the existence of valuable substance underneath the coal was not thought of nor suspected. Since that time, however, a well-founded belief has obtained that far below this coal a substance of great value does obtain in these premises. To reach this lower and valuable substance a way must be excised through the coal which Stokely had conveyed. Does the doctrine of a way of necessity apply to this case? I think not. Therefore, Stokely making the sale without reservation, although he did not part with any substance lying beneath the coal, yet, having cut himself off from access to such lower substance, his right to dominion is a barren sceptre. He can only—and when I speak of him I include of course those claiming under him—he can only reach such lower substance by trespass upon the rights of his grantee, and, as remarked yesterday, if such trespass would be but an ordinary trespass, involving none other than direct damages, such as were then spoken of, there would be no case whatever for the interposition of the chancellor, and an injunction would not be the proper remedy; and the only ground upon which the chancellor could consistently interpose would be that there is reasonable ground to apprehend other and different damages. Though the party committing the trespass might not be liable to be enjoined, it would not follow by any manner of means that his act would thereby be declared rightful, but the remedy of the party against whom the wrong had been committed, would lie in a court of law.

Now, does the proof disclose that condition of things, or grounds for such apprehensions, as justify the interposition of the chancellor?

That this substance being sought after, is a dangerous substance, one which can only be handled with the greatest care and the happiest appliances, is conceded, not by all the testimony, but conceded by Mr. Gill. Hence, shall a party be subjected to the hazards attendant upon the in-

roduction of such substance into and through his premises, when he can not exercise any influence, control or direction over the manner of handling such substance?

It is conceded here that should this gas escape from the appliances which would be used for the purpose of bringing it to the surface, and permeate the mines of plaintiff, the consequences might be serious indeed, and not only influence that territory, but all the territory of the plaintiffs which was opened up and in communication with the premises through which this well penetrated.

Without going into detail further, and inasmuch as the efforts heretofore made to handle and use this gas are but experimental—for that is the truth, and history discloses it, notwithstanding the confident opinions, honestly entertained, no doubt, of witnesses—I regard all the dealings with this gas as but experimental. It may be controlled, probably. The preserving ingenuity of man, prompted by considerations of interest, will induce him to incur any hazard whatever, and will surmount the obstacles which have heretofore obtained in the way of its management, but I think that period has not yet been reached, and it may be that this subtle agent will prove the master.

Therefore I think these parties should not be subjected to the hazards which the introduction of this substance into and through their mine would exert.

The decree will be in favor of the plaintiffs.

W. P. Hayes, attorney for plaintiffs and the demurrer.

Walden & Mansfield, attorneys for plaintiff and against the demurrer. (Citing 13 N. J. Ch., 322, 341; 55 N. Y., 358; *Edwards v. McClurg*, 39 O. S., 41; *College v. Yeatman*, 30 id., 276, and from *Bainbridge on Mines*, ch. 2.)

PARTNERSHIPS.

143

[Superior Court of Cincinnati, June 9 and 19, 1885.]

† CATHERINE JUNG ET AL. V. SUSANNA WEYAND ET AL.

1. Good will of an establishment is inseparable from it. If the establishment has a good will, when taking in an experienced partner, on dissolution he takes his skill and experience, and the establishment takes the good will, it not having enhanced.
2. A managing partner cannot object that an excess of interest is charged against him, if he knew of it, and did not inform his copartners until after dissolution, and after yearly results have been reported to those were not aware of the alleged overcharge, for they have a right to rely upon the reported results.
3. A partnership between debtors and their assignee for creditors, if it contemplates paying debts in full with less delay, is not illegal.
4. But if illegal such partnership would not defeat distribution of assets between partners, on winding up of affairs.
5. To reform an instrument the evidence must be clear: First, that the contract is erroneous; Second, that a specific contract was made; Third, to prove definitely the terms of the contract as made.

FORCE, J.

This case of Jung against Weyand and Hellman has been argued at length—so fully that I shall dispose of it at once, because where a case

† The Supreme Court refused leave to file petition in error in this case, March 15, 1887.

is so fully argued that everything about it is presented, it is better to dispose of it at once while all considerations are fresh.

In this case, where there have been various interlocutory orders, and it is now brought up for final distribution, upon argument several matters were presented which go to the right to relief at all. One claim set up was that the contract of partnership was against public policy, and illegal and therefore void, and therefore, as I understand, is not to be carried out, and that one of the partners shall not be treated as a partner. The ground upon which that is based is that Mr. Hellman, one of the firm, being assignee for the benefit of creditors of the old firm of Weyand and Jung, while being such assignee made an agreement with the Jungs and Weyands to pay off the creditors and form a partnership with them, and that an agreement of that sort is one which the law will not permit.

In this case the agreement was that the creditors should be paid off in full, that money should be raised to pay them off in full quicker than they could be paid by ordinary course or process of law. An agreement that a debtor shall be paid his claim in full is not an agreement that that debtor can complain of, and an agreement that it shall be paid quicker than the ordinary course of things is not an illegal agreement against him or one that he can complain of. With regard to the other parties, Mrs. Jung and her family, and Mrs. Weyand and her family, one of the families is not making the complaint. As to the other, which makes the complaint, I cannot say this, that the entering into this partnership (being entered into as it was after the creditors were paid off in full), the entering into the partnership, the having a partner, the carrying on of a partnership, was not an illegal thing. The thing about which complaint could attach would be the agreement during the pendency of the assignment to enter into the partnership at the close of the assignment. If it were true that that agreement were not in accordance with the law, the party might have objected to entering into the agreement, but having made that agreement and having waited until the parties could properly form a partnership, and then, being persons *sui juris*, entering into the partnership at the time, it was lawful to enter into the partnership. Having carried on the partnership for the full term of five years, and the time having expired, it is not in accordance with the law as I understand it that the objection could be pressed, if the objection were of better foundation originally. There is this further objection. Suppose the contract were itself illegal and this were claimed to be an action to distribute the proceeds of an illegal enterprise. The motion here is to distribute the proceeds in the hands of the receiver. Now, it is held that even where there is an illegal contract, a contract to carry on business prohibited by law, if money is put into the hands of a third party, for the use of another party, or one of the parties to a contract, that third party is bound to pay over and cannot object. Even where an illegal insurance is made, and the loss having happened, the money is put in the hands of a broker to be paid to the assured, the broker has to pay it and the assured has a right to recover it by action. And quite lately our Supreme Court has held that in the case of a pooling railroad contract, where the contract for the distribution of the pooled money was unlawful, yet still where the roads went into the hands of a receiver, and money earned under that contract was in the hands of a receiver, it should be distributed by the receiver in accordance with the contract. The money came into the hands with

a trust, and he will have to carry out the trust. But this case is not such a contract as has been held to be illegal in the case of another brewing firm, in which the contract, as alleged and discussed, was a contract where the assignee and the assignor were to become partners pending the assignment, not for the purpose of paying off the creditors in full, but for the purpose of getting the claims from the creditors at the smallest possible rate instead of paying them in accordance with the law; and that is the contract which was discussed and was held to be illegal.

But it is claimed that the contract should be reformed before it shall be acted upon. One of the parties makes the claim that the contract should be reformed. I am not sure that I am entirely clear what the reformation is to be, but I understand it is to be that it shall be so reformed that one of the persons, Mr. Hellman, is to receive the capital put in and not drawn out, and profits declared upon the books to be divided. The rule as to what sort of evidence is required to reform a contract is clear. It requires very cogent evidence, clear evidence, first, that the contract as written is erroneous and does not express the contract as made; second, to prove that a specific contract was made; and third, to prove definitely the terms of the contract as it was made. The evidence given does not fill those requirements. Mr. Charles Weyand gives evidence, which evidence is in some respects contradicted by Mr. Hellman; but taking it to be uncontradicted, and accepting the whole of it as it was given, the evidence is that by agreement Mr. Hellman was to put in his capital, and was to receive his capital in profits. That, I understand, is the agreement as written and the agreement which is to be disposed of here. Now this written agreement was an agreement which was not made hastily. It was made after months of conference and consultation. It was drawn by the counsel for all the parties, the counsel for Mrs. Weyand as well as the counsel for Mrs. Jung. It was read over and copied and signed by all parties after such conferences, and it can not be said now, after this contract was made in that way, after months of discussion, after it was drafted and copied by counsel for the case for Mrs. Weyand as well as for Mrs. Jung, after it was entered into and signed in his presence, it can not be said that the contract so made, so drawn, so advised, so signed, was not the contract of the parties.

Upon the matter of the reformation of the contract, I find, therefore, that there is no evidence made out to warrant the substitution of another writing for this; and giving all the evidence that Mr. Weyand offers, its full effect and weight and claim, still such as it is would make no material change in the contract, it would not affect the rights of the parties even if it would affect the language.

There is one other matter which has been litigated in this final hearing. That is, it is claimed by Mr. Hellman that the mode in which the interest account of the firm has been kept should be corrected; that it was erroneous as against him. At the time of the formation of the firm, it was agreed in writing that he was to put in his capital as it should be needed for investment, that he should invest in the firm his capital as it should be needed to carry on the operations of the firm; and that was done with the understanding that he could not put in his capital at the time, but it must be put in from time to time, and some \$12,000 was put in at first and the rest was put in from time to time, so far as it was put in, he charging himself and paying interest upon this amount not put in. Now, one of the other members of the firm (at one time it was Mrs. Jung, and at another time Mrs. Weyand), allowed un-

drawn profits to the amount of over \$20,000 to remain in, and according to the books he paid interest upon the difference between the amount which he had put in and which was put in by the other members of the firm (which ever one it was for the time being), who had in the largest amount. He claims that he should have paid only the difference between what he put in and the amount which he ought to have put in.

Now, whatever be the precise rule as to the way in which interest should be calculated, this fact remains, that Mr. Hellman was the manager of the business. He employed the bookkeeper. The bookkeeper was under his direction. The books were kept under his direction. He was the person to sign checks and receipts and bills. He was entire manager of the whole business. He was aware that interest was charged against him in this way. He spoke to the bookkeeper about it, and the bookkeeper said according to his understanding that was the correct way. It is true that Mr. Hellman says that he told the bookkeeper then that he might go on and that it would be corrected at dissolution when all accounts were revised. Mr. Hellman did not speak to the other members of the firm. The attention of the other members of the firm, or the other persons interested in this business, was never called to it. His conversation with the bookkeeper has no effect except to show that he knew; it does not tend to show that the others knew. The testimony shows that the others did not know. So the case is simply this, that this method of keeping books was his method of keeping books, because it was made by the bookkeeper, who was under his direction, and after the bookkeeper said that that was the correct way, he said, "you may continue to do so until the close of the firm." So that that was Mr. Hellman's way of keeping books. The results were known, that is, the general results as to the way in which the firm stood, were known to the different members of the firm at the end of the year. They had a right to rely upon it. And, therefore, this method of keeping the books which he kept, being his method, a method which was not known by the others—at least the details of it were not known by the others, the results only were known by the others, and the others necessarily had a right to rely upon the results at the end of each year, as to how they stood—it is too late to ask to have that changed. There is this further to be said, that the change in any way, whatever theory is adopted, would not vary greatly from this. If he was to put in his capital by using his name in the market so as to see that at all times the firm had the amount of capital necessary to carry on the business, then if that was the obligation upon him he has paid rather more than was necessary for that purpose; if by his name in the market he did always keep the firm supplied with all the capital that was needed, he charged himself with more interest than the amount of interest and discount paid by the firm. If he was to pay the amount of interest based upon the difference between the money which he had put in as capital at first, excluding undrawn profits, and the amount of capital which he ought to have put in, then the amount of interest charged against him was less than that which was due; but by holding that the undrawn profits were turned into capital, in that case only it would be held that he paid more than he perhaps might have been charged with. But the charge being made in the way in which it was during the whole life of the firm, with Mr. Hellman's knowledge, and without that knowledge being communicated to the others, whatever it is it cannot now be charged.

The only matter left then is to divide the money, the proceeds of the sale, and on what terms. The mode of distribution depends of course upon the terms of contract of partnership, and the great contest has been as to what the terms of the partnership amount to, what is their proper effect. Now, the old firm of Weyand and Jung having become insolvent, at least gone into the hands of an assignee, and while in the hands of the assignee, both Mr. Jung and Mr. Weyand died, each leaving a family, a wife and children, the ownership of the property, subject to its liability, as it then was, in the hands of the assignee, belonged to Mrs. Jung and her children, and Mrs. Weyand and her children. Mr. Hellman was the assignee. The assignment must have been wisely carried on, because it gradually paid off, and at the time they began negotiations had almost wholly paid off, or paid off seventy-five per cent of the debts, and was in the way in the course of time to pay them all off. The approach of the time when the assignment should be raised by the payment of all the creditors in full necessarily brought the Jungs and the Weyands, the families, face to face with what should be done with this property then. The discussion and negotiations disclosed the fact that the two families were at variance in their views, and with such a difference between them that they could not carry on the business. Something else was to be done. It was proposed that there should be an appraisement, and that one should buy out the other, and the one who bought out should form a partnership with Mr. Hellman. That could not be carried out. And finally it was agreed that Mr. Hellman should raise money to pay off all the creditors twenty-five per cent., pay off everything in full, and then these three should constitute a firm, Mrs. Jung representing her family, Mrs. Weyand her family, and Mr. Hellman himself. It was ascertained by an appraisement taken of the property, the establishment, and an appraisement and inventory of their liabilities taken together, that the net value was about \$135,000—estimating the real estate, the machinery, the ice, the beer, the hops and the malt, the bills receivable and everything together, that the net value was about \$135,000. It was agreed that Mr. Hellman should put in what was called an equalized third, that was one-half of that net value. That I take to be the meaning of that phrase, which has been somewhat discussed. His equalized third of the firm was the half of the net value of the property that was put in by the Jungs and Weyands; that is \$67,500. It was agreed that at the termination of the five years partnership, the real estate should be withdrawn and that Hellman should have no interest in that.

Now, what is real estate? Of course where there is a manufactory, or house containing machinery, questions sometimes arise as to what is included in the phrase "real estate." But the law is settled that the parties may agree among themselves as to what is included in real estate, and these parties by their appraisement have explicitly agreed as to what is included in real estate. The real estate does not include in this case the machinery, or what might be called fixtures ordinarily, or stock on hand, or anything of that sort. It is the land and the structures upon it. That is all that in the agreement of the parties "real estate" involves. So that by the terms of the partnership, at the termination of the partnership, the Weyands and Jungs were to withdraw the land and structures, and in that Mr. Hellman should not have any interest. The agreement does not specify that the other things shall not be withdrawn, and of course the agreement could not specify that, because while they con-

tributed the use of the land and structures, they did not contribute the use of the ice that would be consumed, the malt that would be used up and the beer that would be sold, the horses and vehicles that would be worn out and replaced, or even machinery that should be replaced; for by looking over the successive appraisements, it appears that by the end of the firm at least one-half of the machinery that was in the building was new machinery that had been put in by the firm during the continuance of the firm. The agreement therefore specifying that real estate should be taken out in specie, not only leaves the inference that the other was not to be taken out in specie, but that understanding was merely in accordance with the fact that it was impossible that the other could be taken out in specie, because it would be used up long before termination of the partnership.

The agreement was, that Hellman at the termination of the firm would take out his capital put in, with his share of assets and profits. Now, there has been much discussion as to what was meant by his share of assets and profits. His share is whatever he was entitled to, not more, not less. It does not say one-third of assets and profits, or any other aliquot part, but is the part that he would be entitled to. What is it that he would be entitled to? First, what is to be done with the machinery, the horses, the wagons, the tubs, the cooperage, the beer, the hops, the bills receivable? If the money interest of Mr. Hellman could be ascertained in them all it would be a simple matter to hand that money value so ascertained to Mr. Hellman, and he receiving all, the other two could go on with the business if they so agreed. If they could not ascertain the money value by appraisal, or, having agreed upon an appraisal they could not, by want of harmony or agreement, carry out that appraisal, so that the property would have to be sold, then the sale of the property, if it varied from the appraisal, would be a correction of the appraisal, and the proceeds of the sale would show what was the value of the material on hand, and the appraisal would not; and if the sale differed from the appraised value of the goods, why the share of each member of the firm, Hellman as well as the others, would vary in accordance with that difference—it might be more, it might be less. The rule would be in this firm as in any firm, and the clause in question, that a member of a firm was to receive on retirement or dissolution his capital and his share of assets and profits, is merely a statement of what of course would be the natural rule in the absence of any provisions of a firm of three at least: Simply when the firm is dissolved, and everything is sold and turned into money, after the debts and costs and expenses are paid, the partners are equalized by those who have not drawn out their declared dividends, drawing them out, if there are any; then what is left is capital and profits. If what is left is more than the capital that was put in, the capital that was originally put in, being taken out, the surplus is profits, and that surplus is to be divided by the members of the firm. Now, in this case that rule is qualified by the clause that the land shall be taken out. That by agreement is not to be sold, that is to be taken out. So that if it so happens that the land is sold; if upon dissolution, to make things sell well, it is sold as a going concern—the land and all is sold—the value of the land will have to be ascertained as well as it can, and take that out, and that amount, whatever it may be, greater or less, will take the place of the appraised value of the land.

So that, in general, the distribution, after paying off costs and liabilities, will be to deduct whatever you call the land (after this I shall have discussed the good-will), to deduct the value of the land and then add to that the rest of the capital that was put in by the Weyands and Jungs, and then Hellman and his capital, and then what surplus there is, to be divided equally, one-third each.

The question has been discussed at a good deal of length about the figure the good-will cuts in this case. Was there any good-will? Was the good-will at the time of the sale greater, or less, or the same as, when the firm was first formed? Is Mr. Hellman entitled to a share of the good-will? Is he entitled to a share of the increment of the good-will if there is one?

Now, far be it from me to attempt to say just what good-will is. Without defining it, it is enough to know for present purposes that good-will in an establishment is an element of value in that establishment. The good-will of an establishment is inseparable from the establishment. It is not a thing which can be taken from the establishment and sold to one party while the establishment itself is sold to another. It is perhaps like the flavor of the wine, which gives character and value to the wine, but which can not be extracted from the wine and sold apart while the wine is sold to some one else. Good-will, like a flavor, may be lost by mismanagement, but it can not be separated from it, and sold apart from it. The good-will of this establishment, then, was some element of value which it had when it was formed, and when it existed, and when it was sold. From the evidence of witnesses we can form some idea of the way in which it was constituted. The position, the locality of this brewery, was an advantage. It has a commanding situation with reference to the upper Mill Creek valley out beyond the Brighton House. It has an advantage over all the other breweries in that territory by reason of its locality. It had an advantage from the fact that the Weyand and Jung Brewery, or the Western Brewery of beer had a reputation of being good beer, better than common beer. It had the advantage also of having a number of good customers, substantial customers, enough to use the product of the brewery. The question is, had it those advantages to a greater degree when it broke up than it had when this firm was formed. The locality is the same, the reputation of the beer is the same, the list of customers is about the same with scarcely a change, and the testimony of witnesses who speak is almost unanimous that what may be called the good-will of this establishment, such as it had, if it had any, but such as it had was about the same at the dissolution of the firm as it was at the formation of the firm. The good-will of the brewery, it appears in evidence, is of more frail tenure than the good-will of many other sorts of business; that the best business of a brewery is its city business; and that city customers apparently from the evidence are connoisseurs; that a brewery may have the best reputation, but if it ventures to give beer that is not satisfactory, the customers will hesitate in a week, in another week they will object, and at the end of three weeks they will quit using it; so frail that they say that the reputation of the best brewers is destroyed by giving bad beer for three weeks. The frailty of a thing, then, is a thing which will affect the estimation of the value, and that will account therefor, for the reluctance or the inability of the witnesses to express in dollars the value of the good-will at any time. I doubt if more than a single witness undertook to specify in dollars the value of the good-will of this or any brewery. In this case the brewery had the advantage

perhaps in the nature of a good-will aside from these during the formation of this partnership. It is clear that Mrs. Jung and her family and Mrs. Weyand and her family could not have carried on the business together; they could not have co-operated with any harmony; and if they had attempted to carry on the business by themselves, in all probability it would have resulted in early disaster; it would have been likely. Mr. Hellman in the conduct of the assignment evidently showed that he was a man well fitted for carrying on business of this sort, and the result shows that it was well that he should have been a member of the firm.

The firm brought into it the good-will proper of the firm; he brought into it the advantage such as it was, of his executive ability and his financial skill and reputation. When they separate, the establishment takes with it the good-will of the establishment, and he takes with him all the advantage which arises from his executive ability, his financial skill and his reputation as a business man. Each takes his own. Mr. Hellman, then, has no right to claim an interest in the good-will, unless he could show that the good-will which was taken away is one which has enhanced in value by the firm of which he was an eminent member. The evidence, I think, does not show that there has been such an increment, or that the establishment now carries with it a good-will, he having left, which is greater than the good-will that it had before. It has the same locality it had before. It has beer of the same reputation that it had before. It has substantially the same list of customers that it had before. In the original appraisement there was no mention made of good-will. Neither was there any mention made of the value which Mr. Hellman would bring into the firm, connected with his personal capacity, and the value of his ability, and in the separation there can be no specific appraisement of either; but such as it is, whatever it may be, he takes with him, and the firm takes it with it. It will be necessary, however, in the distribution to make allowance, so far as the evidence will admit an allowance to be made, of the way in which good-will affects the value of the establishment and the way in which it would affect the value or the part which goes to the Weyands and the Jungs.

Now, we come, then, to the distribution of the proceeds of sale in accordance with the principles, so far as I understand them, and as I have attempted to state them. The sum in hand is \$351,000.

There has been a question in the case, whether or not the amount credited Mr. Hellman on the books shall be called undrawn profits, or called capital. There being enough to pay all capital at least, it is of no sort of consequence in the distribution whether you call it capital or undrawn profits. I will then discuss it, calling it capital, simply because that is a more convenient way of treating it. There being \$68,000, then, drawn out on account of costs and expenses and general creditors, and Mrs. Jung's undrawn dividends, the residue is to be divided. First should be deducted the capital, that is, the capital that was put in and the good-will. We have the appraisement of the entire property, item by item, and then we have sale as a lump. Now, taking the appraised value, simply for general purposes, general purposes without reference to the market or what anybody would buy it for, taking that as we have that in the appraisement, we have to find from that what would be its value as a part of the proceeds of the sale. I take it that the real estate sold as a part of this concern, of this going concern, and add to that the good will of the establishment, together, I will call it, \$140,000.

I take it that by the articles the Weyands and Jungs at the close of the firm take the land in bulk, in corpus, as it is, the other things are reduced to cash and sold. But it so happening that the land here is reduced to cash, you have to find out what cash it is that represents that land, and that they take out without reference to the fact whether it is more or less than the value of the land as it was estimated when the firm was formed. Now, the appraisement of the things sold being about \$224,000, and the sale producing \$351,000, the question is to determine what proportion of that \$351,000, goes to the land, which itself was appraised at \$97,000. In the absence of anything qualifying the value of any particular item, the rule would be, I suppose, simple proportion; as 224 is to 97, so is 351 to the proportion that the land would produce.

But to my mind there are some things which qualify the proportion, and show that just so proportion would not fairly represent the proceeds of the particular items.

Now, the land, in December, 1879, was appraised at \$87,000; in 1881, at \$89,000; in January, 1882, at \$89,000; in January, 1883, \$90,000; January, 1884, \$90,728; December, 1884, \$90,278; and at the former hearing the witnesses agreed, I think they all agreed, that the land had remained about the same in value; that there had been, at all events, no increase in the value of the land in that region. Now the appraisement was \$97,000, in place of \$87,000, as originally appraised, by adding to it some small improvements that had been made from time to time, one year \$773, and so on. This rise from \$87,000 to \$97,000 was made by the addition of improvements put upon the land by the firm. Now the land here is appraised, just prior to the selling, at \$10,000 more than it was when it was put in, and all the witnesses agreed, that it had not in fact increased in value, in so far as we had witnesses on the trial. I take it that this appraisement of the land in the appraisement by item gives to the land its pretty full value, and that so far as the land is concerned it is less apt to have brought more than the appraisement, in the estimation of purchasers, perhaps, than other things.

Now as to the chattels, what are the changes? The machinery was appraised at \$12,000 and odd at the formation of the partnership, and the firm have added about eight thousand dollars to that in the course of the partnership. But in the appraisement of the machinery by the appraisers of sale, they appraise the machinery at \$12,000 even, that is less than the original appraisement by some hundreds of dollars. They have added to the machinery implements of two-thirds of its value, and yet at the appraisement for sale it was appraised at less than the appraised value in 1879. Now as to the matter of beer. The beer at the appraisement for sale was appraised at \$3.50 a barrel. I suppose that being considerably less than the selling price of beer in barrel, in bulk, being the appraisement where it was sold by item, it was an appraisement for beer, making allowance for its being taken from the place where it was, and carried and transported to some other place, which would be a very considerable item. But the \$3.50, I am inclined to think, represents not the value of the beer, but the cost of producing it, and that the value in wholesale would be considerably more than this. The whole effect of this is simply that in making the appraisement the appraisers gave at least the full value of the land, take it as real estate for general purposes, and that the chattels were appraised at much less than their value where they were, but with reference to their being scattered about.

Now, there is this other consideration which I took into account in making the proportion, and that is this. Here is an establishment where is gathered together, put in place, and having in use machinery, cooperage, hops, horse feed, stationary, coal, malt, barley, beer, office furniture, everything already selected, bought, paid for, in place and in use. Now, suppose them to cost any sum you please, eighty thousand, ninety thousand, a hundred thousand dollars, whatever you chose to call it, it is not likely that a person who had the money in his pocket could go out in the market and get these same things and put them in place for that sum. And in fitting up the brewery the delay and the expense of the use of things and the pay of persons while completing the thing would be a very material item. Now, having these things all in hand, producing income on the very day of sale, producing income to the purchaser on the very next day of sale, materials on hand for doing the work the moment the property was handed over, beer on hand, customers on hand selling beer and paying for it at the very day that it was completed, is a reason why a person purchasing the brewery would give not less, but would give more for these things than the ordinary purchaser, than the ordinary value in the market. It is the immediate productive capacity. To some extent that applies even to bills receivable. Where no ordinary purchaser would pay for \$38,000 worth of bills receivable, for a good lot of customers, the face value, yet a person having the brewery to which there was attached a lot of customers, to such person \$38,000 bills receivable is a matter of very material value as giving them a lien on the customers, an attachment to the customers, a means of holding them in hand. So these are reasons why I take it that in estimating the proportion that goes to the land and the proportion that goes to the chattels, I don't think it would be fair to take a mere proportion; that the increment on the chattels is greater than the increment on the land.

Now, as to the detail of it. The Weyands and Jungs take out from this the proceeds of the land, whatever it was, and I think take out the proceeds of the good-will of the establishment. Mr. Hellman takes out the good will attached to his business capacity and financial credit, and carries that with him to his new business. Now, as to what is the value of that good will, I did not undertake to say, and do not. The witnesses, brewers, men who owned breweries, and men who are interested in breweries, refrained, I believe, all but one, from undertaking to state in dollars and cents what it was, and I don't wish and am not ambitious to undertake to surpass them in knowledge of their own business. One witness, the one that testified, called the good-will somewhere between forty and fifty thousand dollars. The other witnesses mentioned not that amount nor other amounts, but they spoke of the interests in good will of a brewery as being a more uncertain property than the good-will of any other business, from the character of the trade, its liabilities to destruction and alienation in a few weeks; so that I take it that the liability to destruction is a matter which has to be taken into account in estimating the value of the good-will. I do not, therefore, feel inclined to dissect the lump for the Weyands and Jungs on account of real estate and on account of good-will, but make it simply one figure.

On re-argument as to figures the court re-examined them and proceeded to decide as follows:

I believe we have got down to a single point now, one figure. Suppose we find out what share of the proceeds of the sale represents the land,

the point to determine is what was that land inventoried at in the inventory upon which the partnership was formed, the land and the structure on it. Now in this account here, real estate \$104,491, and \$4,500, and so on, are values partly of land and partly of other things. What we want to get at, is the value of the land as valued by the parties, not the net result of the land subject to incidents or improved by credits. The question is, what is this \$81,941 here. The way I took it that the land as originally valued stood valued at \$100,491.66, and therefrom had been sold one lot called the malt-house, which sold for \$13,500; that deducted from the others would be the value of the land remaining, if \$13,500, the selling-price of the malt-house, represented its original appraisement, but that I assumed. That does not appear to be the fact. Now what does this \$81,941 represent? I could not make it out from the figures. There was evidently a charge of \$87,000 real estate, subject to a charge of \$5,000 in some way or other, how that came I could not tell, but I think that appears from the memorandum which Judge Avery handed me; that is, that the malt-house lot was subject to a mortgage of \$18,549.78, although it only sold for \$13,500, and applying the proceeds, \$13,500, the whole proceeds of sale, to paying off the mortgage, left a balance of \$5,049.78 to be paid off from the other assets. So that after paying off that mortgage there was left the value of \$81,941. Now, I assumed before, in disposing of the case, that the proceeds of sale represented the former appraised value of the malt-house; we don't know that it did. If it was mortgaged for \$18,941, it is likely it was appraised as being worth at least what it was mortgaged for, and take that to be the case, that would leave \$81,941 the value of the land, and as is said, we want to get not only a value of the land, but necessarily the value of the surplus and the other things. The chattels appear to be valued at \$53,000. Now I suppose I shall have to say that, as claimed by counsel, that \$81,941 represents the land and the \$53,000 represents that which is not land, in accordance with the agreement of the parties which constituted the basis of the agreement of partnership. Now this valuation of the land at \$81,941, which was then valued at \$97,000 at the appraisement of sale, enforces the suggestion I made yesterday, to the effect that in that appraisement for sale the land apparently was valued at its full value while the chattels were under-valued, and that the increase in the value over and above the appraised value of the property and the value of the good-will, was merely the increase first of the actual value of the articles constituting the chattels, and in the value of the chattels as enabling the parties to go on at once and earn money, instead of being put to the labor and expense of gathering together the various articles. I therefore think that the proportion of the increase of the proceeds of sale over the appraised value of the sale was a small matter as far as the land was concerned, and was mainly in the other, and that, taking such increase of land and the good-will together, would produce \$140,000 as I held the other day, and deducting from that this \$81,941 in the original appraisement as land, that would bring for the two parties the \$58,000 representing the chattels, the other than land in the original capital to be deducted. So that upon taking out costs, charges, debts, dividends declared and undrawn, if there were any, then in order to take out capital, take out first \$140,000, the land and the good-will; then \$53,000 representing the value of the other than real property belonging to the Weyands and Jungs, and then the \$67,500 representing the capital of Hellman, and then divide the surplus equally between the three, and

if as matter of fact any have overdrawn, of course that is a mere matter of arithmetic, that could be corrected by any man who has overdrawn, retaining one-third of the over-draft and given one-third to each of the other two.

Now, I don't know whether it is proper to say, but I think I may as well say that I don't remember any case where an establishment of this value has been wound up in so short a time as this has been in the course of litigation: It is something out of my experience, and it is something also equally out of my experience that litigation of this character and this amount should be carried on with so little cost. The cost of selling and distributing \$351,000, and winding up of the firm, and paying off and settling with all creditors of all sorts, will be less than \$10,000. I think the counsel may be congratulated, and their clients also.

Long, Avery, Kramer & Kramer, attorneys for Mrs. Jung; Paxton & Warrington, for Mrs. Weyand; Storer and Harrison, for Max Hellman.

The following is a decree entered in this cause:

Catherine Jung et al.	} 40,315.
vs.	
Susanna Weyand et al.	

This cause now came on to be heard on motion of Max Hellman and the other parties for distribution, and was heard upon the pleadings, exhibits attached thereto, the files and evidence, and counsel, requesting a finding of facts, the court find that Catherine Jung, Susanna Weyand and Max Hellman were partners, and the other parties were interested in the partnership in manner set forth in the articles of partnership and attached papers, attached to and filed with the pleadings. That the term of said partnership expired on the 15th day of December, 1884, but that the partnership and business were continued until the appointment of the receiver herein.

That Catherine Jung and Susanna Weyand contributed jointly, each contributing one-half, capital appraised at \$135,061.99, of which sum the real estate contributed was appraised at \$81,941.88, that by agreement of parties said real estate did not include the machinery or cooperage, that \$53,120.11 represented the net value of machinery, cooperage and all of the chattels, supplies and credits, diminished by debts recognized as partnership debts. That Mr. Hellman contributed as capital, \$67,530.99½, by paying the same cash at the formation of the firm and other installments of cash from his share of earnings, and by paying the interest and discount of all money borrowed by the firm, in this way at all times keeping the firm supplied with sufficient funds, to make his money contribution equal to his due share of the capital, \$67,530.99½. That he in fact paid interest upon a large amount of borrowed money that was needed to equalize his share of capital, and the excess of interest so paid by him in the course of the partnership, aggregated \$1,700. That Max Hellman was the manager of the firm, appointed the bookkeeper, who so from time to time charged him with excess of interest and the interest was so charged during the life of the firm with the knowledge of said Max Hellman.

That at the time of the sale of the brewery and assets made herein, Max Hellman had no undrawn dividends standing to his credit, and had of his capital remaining undrawn \$57,956.90. That Mrs. Catherine Jung had standing to her credit \$21,977.75½ undrawn dividends, and also the whole of her capital which was one-half of the real estate, and also \$26.-

560.05½ in addition. That Susanna Weyand had no undrawn dividends standing to her credit, and had standing to her credit \$90,072.00 of the capital, that is to say, one-half of the real estate and \$20,072.00 in addition.

That at the date of the formation of the partnership the brewery had a valuable good-will which had not appreciately increased in value at the date of the sale made by the receiver in this cause. That said good-will was not estimated in the capital contributed by Mrs. Weyand and Mrs. Jung.

That the brewery and business, sold as a going concern, including good-will, real estate and all assets, brought the price \$351,550.00.

That the mortgaged debt on the brewery and other property, was not a debt of the firm, but the individual debt of the Jungs and Weyands.

That in appropriating the proceeds of the sale, \$140,000 represents the real estate and good-will attaching thereto, and \$211,550 represents all the assets.

As conclusions of law the court finds that Max Hellman is not entitled to draw out now the \$1,703.31 excess of interest, but it must stand as part of his contribution of \$67,530.99½ of capital; that Max Hellman is not entitled to any portion of the proceeds which represents the good-will attaching to the real estate.

And the court coming now to find the amounts for distribution, find that from the \$351,550 are to be paid costs \$273.01 which with the expenses, taxes and firm debts already paid amount to \$28,318.47, and leaves a balance of \$323,231.53, to be distributed among the parties. Of this amount is to be paid first to Mrs. Jung her undrawn dividends, amounting to \$21,977.75½; next that the parties draw out respectively the amount of capital remaining undrawn by each, that is, that there be paid to Catherine Jung \$96,560.05½, to Susanna Weyand \$90,072, and to Max Hellman \$57,956.90. And that the residue, being \$56,664.82, be divided equally among the parties, that is to say, that of it there be paid to Catherine Jung, widow of Daniel Jung, Sr., deceased, Catherine Jung, administratrix of Daniel Jung, Sr., deceased, Katie E. Jung, and Phillip Krug, the plaintiffs, \$18,888.27½; to the defendants, Susanna Weyand, widow of Peter Weyand, deceased, Susanna Weyand, administratrix of the estate of Peter Weyand, deceased, John Weyand, Peter Weyand, Charles Weyand and Maria Marmet, and Frederick Marmet, her husband, \$18,888.27½; and to the defendant, Max Hellman, \$18,888.27½. And thereupon came the plaintiffs by their attorneys, and by their motion in writing, duly filed, moved to set aside said findings, and for a new hearing and trial, upon the grounds stated in said motion; came also the defendants, Susanna Weyand, widow and administratrix, as aforesaid, John Weyand, Peter Weyand, Charles Weyand, Maria Marmet, and Frederick Marmet, her husband, by their attorneys, and by their motion in writing, duly filed, to set aside said findings, and for a new hearing and trial upon the grounds stated in said motion. Came also the defendant, Max Hellman, by his attorneys, and by his motion in writing, duly filed, moved to set aside said findings and for a new hearing and trial, upon the grounds stated in said motion. And the court upon several considerations of said motions overruled each of the same, to which said overruling the parties filing said motions severally except.

And the court now proceeding to order distribution find that hereinbefore under orders of court at a former term there has been paid by the

receiver, on account of the distributive shares of said partners, to Max Hellman out of the proceeds of sale \$37,500; to Susanna Weyand, widow and administratrix as aforesaid, John Weyand, Peter Weyand, Charles Weyand and Maria Marmet and Frederick Marmet, her husband, out of said proceeds of sale \$37,500; and to Catherine Jung, widow and administratrix, as aforesaid, Katie E. Jung and Phillip Krug \$55,000, making with the mortgage assumed by them according to the terms of the order of sale, including interest thereon to the day of sale \$65,275; and that allowing the amounts of capital which it is hereinbefore found the partners respectively are entitled to withdraw with the equal share of the residue to each as found, their shares are as follows, that is to say, the share of said Hellman is \$76,845.17 $\frac{1}{2}$, the share of the Weyands is \$108,960.27 $\frac{1}{2}$, and the share of the Jungs is \$137,428.08 $\frac{1}{2}$, from which amounts respectively deducting the said payments, on account of the distributive shares made by the receiver as aforesaid, and deducting from the shares of the said Weyands and said Jungs one-half from each, the Krippenstoppel judgment of \$100.88 hereinbefore ordered paid by the receiver, and at the same time equalizing the indebtedness of the said Weyands and Jungs, as between themselves upon the mortgage assumed as part of the purchase price by charging one-half the amount thereof to said Weyands and crediting the one-half to the said Jungs, the balances are as follows to the credit of each and which each are entitled to be paid, that is to say, to the credit of said Hellman, \$39,345.17 $\frac{1}{2}$, to the credit of the said Weyands, \$66,272.33 $\frac{1}{2}$, to the credit of said Jungs, \$77,238.14 $\frac{1}{2}$.

It is therefore ordered that the receiver first pay the costs herein, \$273.01, and that he then pay and distribute to Max Hellman, or to Bellamy Storer, Esq., his attorney:

Of the notes in the hands at one and two years, the amount of \$21,345.17 $\frac{1}{2}$, apportioning the same as nearly as possibly between the notes at one year and the notes at two years, and with power to said receiver of receiving from said Hellman, cash for any one of the smaller notes and interest, in order to enable payment of said amount of \$21,345.17 $\frac{1}{2}$ to be made to said Hellman, and that said receiver further pay and distribute to the plaintiffs, Catherine Jung, widow and administratrix, Katie E. Jung and Phillip Krug, or to Long, Avery, Kramer and Kramer, their attorneys, the amount of \$71,238.14 $\frac{1}{2}$, and to Susanna Weyand, widow and administratrix, John Weyand, Peter Weyand, Charles Weyand, Maria Marmet and Frederick Marmet, her husband, or to Paxton and Warrington, their attorneys, the amount of \$60,272.33 $\frac{1}{2}$, said payment and distribution to be made of cash and notes as follows, that is to say, the said receiver of the cash in his hands of said proceeds of sale, being \$6,580.65, and \$500.00, in addition this day paid him by the said Jungs as purchasers to make up the full amount of the cash payment by them, making in all \$7,080.65 cash in his hands, shall pay to the said Jungs or their attorneys \$3,885.73, and to the said Weyands or their attorneys \$3,194.92, and of said notes at one and two years, to the said Jungs or their attorneys the amount of \$67,352.41 $\frac{1}{2}$, and to the said Weyands or their attorneys the amount of \$57,077.41 $\frac{1}{2}$, apportioning the amount to each as nearly as possible between the notes at one year and the notes at two years, and with power to said receiver, for the purpose of making exact amounts, to cash any of the smaller notes at their face and interest.

And for further order of distribution of the \$18,000 money as by the balance hereinbefore found to the credit of said Max Hellman, and \$6,000 fund to the credit of said Weyand's, the cause is passed. To which

findings and order of distribution the said parties, the said Max Hellman, the said Catherine Jung, widow and administratrix, Katie E. Jung and Phillip Krug, and the said Susanna Weyand, widow and administratrix, John Weyand, Peter Weyand, Charles Weyand, and Maria Marmet and Frederick Marmet, her husband, severally except, and present their bill of exceptions in behalf of each, which is allowed, signed, sealed and made part of record.

DEEDS—CONSIDERATION.

167

[Miami Common Pleas, 1885.]

HARRIET O. HOLMES V. WM. SULLIVAN ET AL.

1. Parol testimony is not admissible to vary the kind of consideration mentioned in a deed for land. If it is a voluntary conveyance for "love and affection, and one dollar in hand paid," the parties will not be permitted to show that the conveyance was for a valuable consideration.
2. The naming of one dollar consideration in connection with that of natural love and affection, where the property is of great value, does not make it a valuable consideration.

WRIGHT, J.

This case is one in which Harriet O. Holmes, the plaintiff, seeks to set aside a deed made by Sidney L. Chaffee to his daughter, on a claim that was in existence at the time the deed was made, and against Sidney L. Chaffee. There is no dispute about the merits of the claim, and the only question was, whether the court ought to set aside the deed, and allow the property to be sold.

Plaintiff relies on two grounds as to her right to set aside the deed. The first is, that the deed is a voluntary conveyance, and has a good consideration, only, and not a valuable consideration, and consequently, no testimony of any valuable consideration between Sidney L. Chaffee and his daughter is competent. Secondly, if competent, the testimony shows, in fact no valuable consideration between Chaffee and his daughter at the time the deed was executed. The court had to consider whether testimony is admissible to vary the deed. That is on the theory, as claimed by the plaintiff, that it is a voluntary deed for a good consideration, viz.: love and affection. The deed reads: "love and affection, and one dollar in hand paid." But it is alleged, on behalf of the plaintiff, that the dollar is merely nominal, and the true consideration is "love and affection" only. On the other hand, it is claimed that a dollar is a valuable consideration, and that where a dollar is named in the deed, any other valuable consideration may be shown. It is alleged they have a right to show that more than one dollar passed between the parties at the time the deed was made. A good deal of testimony was taken, subject to that objection.

What is the real consideration passing between Chaffee and his daughter?

The first question was the admissibility of testimony to vary the instrument. On behalf of the plaintiffs the case of *Houston v. Backman*, 66 Ala., 559, is cited. The fourth point in the syllabus reads:

"The conveyance of land by a husband to his wife, which purports to be made in consideration of 'love and affection, for the sum of one dollar in hand paid, the receipt whereof is hereby acknowledged, is

purely voluntary, and void as against the existing creditors of the husband, and, when assailed by them, parol evidence can not be received to show that it was founded on a valuable consideration."

Counsel insists this case is exactly in point, and there is no doubt it meets it squarely. The only difference is, the deed in the Alabama case was to the wife; in this it is to the daughter, a difference in no wise affecting the principle involved. It decides adversely to the claims of the defendant.

It is insisted that in Ohio a different rule prevails, and that the reason of the rule is not sufficient; that the naming of one dollar makes a valuable consideration, and that it may be shown that it was more than the amount, or less than the amount named in the deed. There is no doubt that the rule of law is that where a valuable consideration is named in a deed, it may be varied by parol testimony, as to the amount. The rule is, a consideration of some kind may be shown, but not different from what is named in the deed itself; but the rule is strict that it must be "in kind." It is a well established rule that a written contract cannot be varied by a parol testimony. I have examined all the Ohio authorities cited, and none of them have passed on this question, and I must say I failed to find a case that meets the issue as the Alabama case meets this; and none of them throw any light on this precise question.

The case of Burrage's Lessee v. Beardsley, 16 O. 438, is cited, the syllabus of which reads: "Where a deed purports to be executed for a valuable consideration, and, is impeached by proving that no such consideration passed, it cannot be sustained by proving that it was executed in consideration of natural love and affection."

This case simply holds that you cannot change from one kind of consideration to another by parol evidence. There is no doubt of that rule; it is recognized in all courts, and by all authorities. I say the courts of Ohio have never come to that point, but I think, in principle, they would have decided that where a valuable consideration is named in a deed, as a part of the consideration, in connection with love and affection, the court would not allow parol testimony to vary the kind named in the deed. The only question, then, in this case, is whether one dollar shows a valuable consideration where the words "love and affection," are used in it?

I say we have no authorities except the Alabama decision, and that seems to be based on a decision made by Justice Washington, of the United States Circuit Court, and that was not a court of last resort. But this Alabama court approves of the decision of Justice Washington, and says it is law. Now, we have no other decision which meets that question squarely, or decides otherwise; and I have not been able to find one where a court has taken a different view, and held that the naming of one dollar is a valuable consideration. They, the Alabama court, go on to say that the naming of such an insignificant sum as one dollar is *prima facie* evidence of fraud.

The mere naming of one dollar, in connection with natural love and affection, ought to strike the court that it is based on sound reason that the parties mean simply a good consideration, and not a valuable consideration. One dollar is universally considered as merely nominal, and is never treated otherwise, especially if the matter in dispute is of large value, many thousands of dollars, which it is in this case. The naming of this sum is, in my judgment, so insignificant, it means simply that; and the parties did not intend a valuable consideration should be expressed

therein. And this deed was made by Mr. Chaffee to his daughter solely on the ground of love and affection, and hence, is void as against creditors in existence at the time the deed was made.

In view of the Alabama case, with no other authority to contradict it, I will follow it, and hold that parol testimony is not admissible in the case at bar, to show a valuable consideration. That being the rule, the investigation of the testimony in the case is not necessary; and the decision of the court is: This deed is fraudulent as against the plaintiff, and should be set aside.

J. A. & E. H. Kerr and Lee, Brown & Lee, for plaintiff.

Sullivan & Earnhart, for defendants.

†CONDITIONAL SALES—FIXTURES.

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[Harrison Common Pleas, April Term, 1885.]

†JOHN M. GARVEN, ASSIGNEE, v. HOGUE & DONALDSON ET AL.

1. Machinery, essential and necessary to a mill, after being placed in the building and permanently fastened to the same, becomes a part of the real estate, and is covered by a real estate mortgage on the mill property.
2. Where A., in establishing a mill, contracts with B. to furnish, set up and properly fasten in the building the necessary machinery, the title to the same to remain in B. until fully paid for, and a chattel mortgage to be executed to B. on the machinery to secure his claim, B., by his own act, under such contract, converts such machinery into part of the real estate, by permanently fastening it to the building; and a real estate mortgage, subsequently given by A. to a third party, on the mill property, to secure loans made in carrying on the milling business, such mortgagee having no actual knowledge of the chattel mortgage or claim for payment of the machinery, the real estate mortgage will take precedence to B.'s prior chattel mortgage.
3. B. should have taken a real estate mortgage or a mechanic's lien to secure his claim after fastening the machinery to the building.

PEARCE, J.

P. purchased a small parcel of ground and erected thereon a substantial, permanent and suitable frame building for a steam flouring-mill, and contracted in writing with the Case Mfg. Co. and The Mansfield Machine Works—both manufacturers of mill machinery and steam motive power—for the machinery and motive power of said mill. By their agreement they were to place said machinery and power in said building and annex the same thereto, in a substantial manner and in the usual way of doing so with such power and machinery. This they did. The engine was fastened to a stone foundation, built for it, by iron bolts passing through the bed-plates of said engine and thence into said stone foundation, which was embedded in the ground. The boiler was encased in and suspended between two brick walls, each about six feet high and arched over. The engine and boiler were taken into said building through an opening, left for that purpose, in the foundation wall of that part of the building appropriated to said boiler and engine, and said opening was afterward weather-boarded over to close it up. The machinery for the several purposes of cleaning, grinding, separating, etc., were fastened to the floors of said building, by means of iron bolts, passing from the under side of said floors up through the same and then through the frames of said machines, and secured by nuts, except the bolting chests, and two or three other machines, which were held to the floor by their own weight, etc., and the buhrs which were supported upon iron hursts, resting on brick foundations embedded in the ground.

†Affirmed in circuit court, Harrison county, May term, 1885. The Supreme Court modified this judgment so as to give the Case Mfg. Co. priority; see opinion, 45 O. S., 289.

realty had been appropriated—that of the milling business. And that all this was done by the parties themselves and not by another of his own wrong, and without their consent.

The question as to the legal effect of affixing this machinery in the way it was affixed, and permitting it to remain that way, and be used in connection with the balance of the premises for mill purposes, was not in all probability canvassed, or even thought of by the parties at the time of the sale or when they put the machinery into the mill.

They then, no doubt, believed that the stipulation for the retention of the title was valid and binding, not only as between themselves, but also as to everybody else, and so intended it to be. But this did not make it so.

Their rights depend upon the application of certain well settled principles of law and equity to all the facts of the case—including their acts as well as their language.

I admit that under the law of this state, and perhaps in a very large majority of the States of this Union, that it is competent for the seller and purchaser of personal property, to contract that the title shall remain in the seller until the property is paid for; and that such a contract is binding between them and all persons taking the property from such purchaser with notice of the contract. But I deny that such a contract is binding upon a subsequent purchaser for value and without notice.

Learned counsel for these sellers have cited and read a great many cases and authorities in support of the above rule, and whilst I admit, as I have before stated, that it is a rule of law, yet I deny that it is applicable to this case.

I now turn to notice briefly the cases and authorities from which I have derived most help, and upon which I have mainly relied to guide me through the wonderful conflict of opinions and decisions upon the question here involved, to a conclusion that would be satisfactory to my own mind.

I admit that there are numerous cases and authorities opposed to my conclusion, but I think that the better doctrine is with those favoring it, and I have therefore followed them, and reason in so far as I had the ability to do so.

The case of *Teaff v. Hewitt*, 1 Ohio St., 511, I rely upon mainly, for the purpose of showing what is the true criterion of a *fixture*. Applying the requisites there laid down, to the facts of the case at bar, it seems to me that they make these machines, the boiler, engine, etc., *fixtures* as to these mortgages. The machines were actually annexed to the building and ground of these premises, and for the purpose for which the ground had been bought and appropriated, and the building erected thereon, and with the intention on the part of Patton, the owner of the freehold, to make them a permanent and substantial accession to the freehold.

It is reasonable to presume that such also was the intention of the sellers, for they certainly expected to be paid for their machines and motive power, or they never would have put them in the mill.

By their contracts they simply sought to secure a lien on the machines sold for the unpaid purchase money. And it may be they did as against Patton and all having notice of their contracts, but in my opinion not as against any other one. They should have taken a real estate mortgage, and had it recorded, or perfected their lien under the Mechanic's Lien Law, which now includes mill-machinery. Had they done either, they and all others would have been protected against loss.

On page 289, 2 vol. Smith's Leading Cases, 6 American Edition, I find this language: "The wisdom of treating any permanent structure as personalty, because it is not built into the soil, or because it has been erected under circumstances which show that it was meant to retain that character, may well be doubted; and the better as well as older rule seems to be, that everything which the eye of a stranger or purchaser would regard as a freehold, shall be in substance what it is in appearance, and however subject to equities between the original parties and those claiming under them, shall yet pass with the land to every one to whom it is subsequently transferred in good faith and for value."

All the machinery was essential to constitute the system—the roller—adopted for the manufacture of flour, with the capacity of from fifty to sixty barrels in twenty-four hours, as guaranteed by the Case Co., and not one machine could be taken out without destroying the system or lessening the capacity; and the engine and boiler, with their attachments were the only motive power to drive this machinery—each machine, then, was essential to the use of all the others, and the motive power was essential to the use of the whole.

The next case is that of *Fortman v. Goepper et al.*, 14 Ohio St., 558, and I refer to this mainly for the able discussion of the subject and citation of cases, etc.,

by the learned judge who delivered the opinion. He recognizes the ingredient of essentiality which is in the case at bar.

The next case is that of *Brennan v. Whitaker et al.*, 15 Ohio St., 446, which I regard as a strong case, and decisive of the question before me. It is nearly authoritative, if not entirely so, though this is stoutly denied by counsel for the sellers.

The next is the case of *Simons v. Pierce et al.*, 16 Ohio St., 215, which is in point on the question of notice.

These are the only decisions of this State that seem to be applicable to the case at bar.

The next is a Massachusetts case—that of *Pierce v. George*, 108 Mass., 78. I quote the syllabus:

"The owner of a machine-shop, gave a chattel mortgage on the machinery therein, before it was set up, but in contemplation that it should be set up and annexed to the building. He afterward, and after it was set up, gave a mortgage on the land and building. *Held*, that the second mortgagee could hold the machinery against the first mortgagee."

"A mortgage of a machine-shop covers machines, pulleys and shaftings, bolted and screwed to the building; also, essential parts of the machinery, although they can be detached therefrom without injury."

The italicizing of the word essential is mine.

Also, the case of *Southbridge Savings Bank v. Exter Machine Works*, 127 Mass., 542. The property in question in that case was a boiler, composed of distinct sections, and placed by the owner of a machine-shop inside of a brick casing built on the ground, and could, with its connections of water, pipes, etc., be taken out without disturbing the brick work. The boiler, in connection with the engine, shafting, etc., was adapted to the machine-shop business, and used in such business. *Held*, that the boiler was a part of the realty as between mortgagor and mortgagee, and that an agreement between the seller of the boiler and mortgagor—owner of the shop—that the seller should retain the title to the boiler until paid for, is not binding on the subsequent mortgagee, without notice. In the opinion in this case it is said: "Whatever is placed in a building by the mortgagor, to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes a part of the realty, though not so fastened that it cannot be removed without serious injury either to itself or to the building."

The case of *Davenport v. Shants & Co. et al.*, 43 Vermont, 546, is the case of a machine sold under condition that the seller was to retain the title until paid for, but it was held that after the machinery was put in its place in the mill, and would pass under a mortgage of the real estate, that the equity of a subsequent mortgagee, without notice of the seller's claim, and in reliance upon the vendee's title being absolute, was paramount to that of the sellers.

This is quite a lengthy case, and I notice it no farther.

In the case of *Bringhoff v. Munzenmaier*, 20 Iowa, 513, which was a contest between the holder of a prior chattel mortgage upon personalty, which had been attached to realty, and a subsequent vendee of the realty, who had purchased, etc., without actual notice of the former mortgage, Judge Dillon delivering the opinion of the court says: "If the defendants, prior to their purchase from Rawson, had visited the premises, they would have seen the property in question, constituting in all appearance part of the real estate. There would be nothing on the ground and nothing in the nature of the property to advise them of the plaintiff's adverse right of ownership—Rawson, and not plaintiff, it seems, was in possession. If defendants should then examine the records of real estate transfers, they would then discover nothing advising them of the plaintiff's claim. They are therefore entitled to, and do stand clear from it."

In the case *Sowden & Co. v. Craig*, 26 Iowa R., 156, the contest was between the holders of a chattel mortgage and a mechanic's lien. The mortgage was taken before the machinery was annexed to the realty, by being placed as fixtures in a mill. The mechanic done work on the mill, but without any actual notice of the chattel mortgage. It was held by a majority of the court—Dillon, J., dissenting—that the chattel mortgage having been duly filed, was constructive notice to the mechanic and as effectual to protect such mortgagee's rights under his mortgage as actual notice would be.

I quote from Judge Dillon's able dissenting opinion:

"The proposition upon which I stand and which with deference to the opinion of my brothers, I maintain to be the law of the case, is, that, by the affixion, with the plaintiff's consent and co-operation, of the chattels to the realty, they became by

this act *de facto*, by operation of law, part and parcel of the land, and necessarily lost their chattel character, so that they could not be replevied as chattels, but would pass to a purchaser of the land of which they visibly constituted a part. The plaintiffs having consented to the conversion of this chattel property into real property, their right to claim property as chattels under their mortgage ceased at the precise moment of time when, by their consent, it ceased to be chattels and became realty. The plaintiffs might afterwards enforce a mechanic's lien, but could not replevy their property by virtue of their mortgage." In support of this opinion he cites the case of *Bringholff v. Munzenmaier* in 20 Iowa, before mentioned.

I note the following authorities in addition to the cases above cited:

Hare and Wallace's note to the case of *Cleves v. Mane*, reported in 2 vol. *Smith's Leading Cases*, American edition, top pages 267 to 288, Star pages, 248 to 261; 1 *Washburne on Real Property*, 4 ed., 20, 21, 23, 24—; 1 *Jones on Mortgages*, 444 to 452; 1 *Schouler's Personal Property*, page 150.

I now turn to notice the cases cited and most confidently relied upon by counsel for the Case Company and for the Works, omitting those in relation to the law as to conditional sales of chattels, which in their nature are personalty and generally so treated, and about which there is no disagreement between us, so long as they remain disconnected from and do not constitute a part and parcel of the realty for the use and purpose to which the realty has been appropriated by the owner thereof.

The first is the case of *Goddard v. Gould*, 14 Barb., 662, which I admit, if I read it rightly, is an authority against my holding, but I will show further along, that the doctrine of that case has been repudiated in this State. The next case is that of *Ford v. Cobb*, 20 N. Y., 344—the Salt Kettle's case. This case in the opinion, cites the case of *Goddard v. Gould* with approval, and no doubt is based upon it. But the case of *Ford v. Cobb* was expressly repudiated by Judge White and the decision of our Supreme Court, in the case of *Brennan v. Whitaker*, 15 O. S., 446, before referred to.

The next is the case of *Tift et al. v. Horton et al.*, 53 N. Y., 377. This case also cites with approval the case of *Ford v. Cobb*, and no doubt was controlled by it.

The contest was between the sellers of an engine and boiler, under an agreement reserving the ownership until paid for, and a *prior* mortgagee of the lands, and yet the court go outside of the case to declare that the rule is the same, whether the mortgagee be a prior or subsequent mortgagee.

The machinery in this case was set up after the giving of the mortgage and was not of consideration in the mortgage transaction. As against so strong an equity I think that the mortgagee should be held to his strict legal rights under his mortgage, and to have nothing more than that upon which he relied in taking his mortgage and to which he gave credit.

There is not the greatest harmony among the N. Y. cases upon this doctrine of fixtures; for instance, it is said in the case of *Voorhees v. McGinnis*, 48 N. Y., 278, "that giving a mortgage on chattels which are subsequently annexed to the realty, the chattels become a part of it and cannot be taken by the mortgagee by virtue of the mortgage."

Judge Mullin, in referring to this case in his opinion in the case of *Kinsey v. Bailey*, 9 Hun., on page 456, says: "The case of *Tift v. Horton*, if it does not overrule this proposition, so far qualifies it that there is practically nothing left of it."

Still, I consider it a very good case, especially for its definition or description of a fixture as well as for its view upon the question in point. It is precisely in agreement as to the requisites of a fixture with the case of *Potter v. Cromwell*, 40 N. Y., 287, and the case of *Teaff v. Hewitt*, 1 Ohio S. R., 511.

The doctrine of the N. Y. decisions, that chattels may, by agreement of the parties, be made to preserve their character of personalty, after they are annexed to the realty and for its use, is good enough doctrine, and equitable as between the parties themselves, and all having notice, but it is certainly bad doctrine and inequitable when extended beyond them to purchasers for value and without notice.

I can easily understand why the courts of New York, in cases like the one at bar, should hold the machinery to be personalty as against the mortgagees of the mill property; for in that state mortgages of realty are held not to convey any estate or interest in the realty *as realty*, but are simply chattels—mere securities—the mortgagees standing precisely in the shoes of their mortgagors. This, certainly, is not law in this state, nor in any other of this country, so far as I know. I admit that in some of the N. Y. cases in which this question has arisen, and been decided, contrary to my holding here, that they were cases of absolute conveyances of deed for value, and without notice; and are authorities against me; but I believe without

the better reason. The Pennsylvania decisions, and perhaps a few other states, are in accord with those of New York; but the majority, I think, is against them and more in harmony with the spirit of our registry laws and principles of equity. The other cases cited by counsel are no stronger for them than the New York cases, and I will not therefore give them any further notice or consideration here.

I am of opinion, then, that the mortgages of Hogue & Donaldson and the F. & M. N. Bank are entitled to preference over the claims of "The Case Mfg. Co. and the Mansfield Machine Works," and to be first paid out of the fund in the hands of the assignee after payment of costs and the amount due Fairbanks, Morse & Co. for their scale; which I hold still continued to be personalty until paid for. The scale was not an *essential* part of the realty for mill purposes. It was a mere convenience, and more for the accommodation of the citizens of the vicinity than the mill itself. It could be detached and removed without injury to itself, or materially lessening the value of the premises for any other than mill purposes.

I admit that there is some room for doubt as to whether the status of the bank mortgage as against the claims of these sellers, is as favorable as that of the Hogue and Donaldson mortgage; but as there was no question of the kind made on the argument of the case, I do not propose to trouble myself with any further consideration of it in this opinion. It is not necessary to notice here the mortgage of M. & N. Patton further than to say it is postponed to all the other claims.

Decree accordingly.

Estep and Estep and W. G. Shotwell, for Hogue & Donaldson.

D. Cunningham, for the F. & M. N. Bank and P. & P.

D. K. Watson and David A. Hollingsworth, for the Case Mfg. Company.

Hollingsworth, for the Mansfield Machine Works and Fairbanks, Morse & Co.

PUBLIC CONTRACTS.

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[Cuyahoga Common Pleas, 1885.]

†FRANCIS J. WING V. CLEVELAND (CITY) ET AL.

An advertisement for fire department hose, merely stating the required diameter, is not specific enough, though a particular hose need not be adapted beforehand.

BLANDIN, J.

This action was brought by Francis J. Wing, a taxpayer of the city, to enjoin the city of Cleveland and the Board of Fire Commissioners from entering into a contract for the purchase of 4,000 feet of hose for the use of the fire department of the city.

Upon filing the petition a temporary injunction was allowed, as prayed for in the petition, and the defendants now move for a dissolution of that injunction on the ground that the facts stated in the petition and supported by the affidavit accompanying it, do not warrant the injunction. The facts appearing by the petition and affidavit, and which are uncontroverted by counter-affidavits, are, that on June 5, 1885, at the request of the Chief, the Board of Fire Commissioners resolved to purchase 4,000 feet of hose for the use of the department, and directed the secretary of the board to advertise ten days for proposals therefor, and that thereupon on the 10th day of June, 1885, the secretary caused to be published the following notice:--

Office of the Board of Fire Commissioners.

Cleveland, O., June 10, 1885.

Proposals will be received at this office until Friday at 6 o'clock p. m., June 19, 1885, to supply the Cleveland Fire Department with four thousand (4,000) feet of 2½ inch hose.

†See, for a subsequent decision, *post* 000.

The board will determine which kind to buy from the nature of the bids, reserving the right to accept or reject.

A. J. Spencer, Secretary.

Various bids or proposals were received for various kinds and qualities of hose of the size required in the notice, ranging in price from 75 cents to \$1 per foot. The petition avers that the contract was not awarded to the lowest and best bidder who furnished satisfactory security for the performance of the contract, but that the board accepted the proposal of The American Fire Hose Manufacturing Company for 2,000 feet of hose, at the price of 95 cents per foot, and it is the execution of these proposed contracts that are sought to be enjoined. These proposed contracts are claimed by plaintiff to be illegal for two reasons: first, because ten days notice of the receiving of proposals was not given as required by the law, and second, because the notice was insufficient and indefinite in point of specifications as to the article the board contemplated purchasing.

Section 2460 of the Revised Statutes in general terms confers upon the Board of Fire Commissioners power to make all necessary repairs of houses, engines, or other apparatus belonging to the department, purchase all necessary supplies, locate and build such fire cisterns and plugs as it may deem necessary, and contract, in the name of the city, for new houses, cisterns, or apparatus; provided that all contracts exceeding \$500 in amount shall require the approval of the Counsel. Section 2461 provides that "at least ten days" notice shall be given in some newspaper of general circulation in the city of the reception of proposals for the performance of any contract exceeding \$500 in amount; such contracts shall be awarded to the lowest and best bidder who furnishes satisfactory security for the performance of the same; and all contracts exceeding \$500 in amount shall be subject to the approval of the Counsel.

These contracts exceeded \$500 in amount, and clearly under these statutes required at least ten days' notice that proposals would be received, while but nine days' notice was given, excluding the last day on which the proposals were in fact received. The language of the statute is too plain to need any construction, and it is equally clear that where the statute creating a corporation and giving it power specifically points out the mode in which such power is to be exercised, that mode is exclusive and must be pursued, or the contract will be illegal and will not bind the city. In *Head v. Insurance Company*, 2 Cranch, 127, Chief Justice Marshall says: "The act of Incorporation is to them (a corporation) an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them the mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." This is a clear and very forcible statement of the rule of law universally recognized and followed by the courts. It follows that no one of the ten days' notice could be dispensed with by the Board of Fire Commissioners, any more than all of the ten days; and no contract exceeding \$500 in amount could be lawfully made without at least ten days notice as required by the statute.

Nor do I think the notice is sufficient in substance. Clearly the purpose of the requirement that notice shall be published for ten days, is to invite and secure competition among bidders, for the public advantage. The only specification contained in the notice is the diameter of the hose required; but of what material it is to be composed, whether of rubber, or cotton, or other material, what pressure it shall be required to bear,

or which of the many qualities or varieties there might be in the market for sale of the required size, bidders are not informed by the notice. The statute requires "notice of the proposals for the performance of the contract," and such "contract" shall be awarded to the lowest and best bidder, etc. Fairly construed this requires the notice to contain substantially the information which will enable a bidder to make a proposal responsive to the notice definite enough, so that, when accepted it shall in itself constitute a contract. Bidders should be informed either by the notice or by specifications in the proper office to which it refers, of the terms or principal stipulations of the contract which each successful bidder is to enter into. Failure to give this information as to the work to be done or materials to be furnished, may to some extent prevent competitive bidding, and at least *prima facie* increase the contract price. No one would doubt the correctness of this view of the requirements of the statute, if the proposals sought were for the erection of an engine house, and yet the same statute applies to every contract exceeding \$500 in amount.

Authority for this construction of the statute will be found in *Kneeland v. Furlong et al.*, 20 Wis., 437, and cases there cited.

I do not wish to be understood as holding that it is indispensable that the board should decide beforehand the particular hose they will adopt and purchase, and confine their notices to proposals for that alone. Doubtless they may in one notice lawfully solicit proposals for various kinds, qualities, and grades of hose, and are then vested with discretion to accept the lowest and best bid received. That this may be done, was decided by the Supreme Court of Michigan—26 Michigan, 263. But in such notice, as was done in the Michigan case, specifications of each variety or quality to be bid for must be contained in, or referred to by the notice, and when this is done, the board may accept the lowest and best bid received pursuant to such notice. For those reasons I think the motion to dissolve the temporary injunction should be overruled.

F. S. & G. C. Wing, for plaintiff;

Brinsmade, Sherwood and Bunts, for defendants.

PATENTS.

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[Hamilton Common Pleas, August, 1885.]

STANDARD COMBUSTION CO. V. FARR.

1. Plaintiff purchased certain inventions and patents, for smoke-preventing and fuel-saving devices, of defendant, paying him a valuable consideration therefor, and relying on his representation that they comprised all his discoveries, applications, etc., relating thereto. Subsequently it was found that at the time of such purchase, defendant had on file in the patent office an application for substantially the same devices as those assigned to the plaintiff, and upon which he has since obtained a patent. *Held*, that plaintiff was entitled to an assignment of of such subsequent patent and to have plaintiff restrained from transferring the same in the meantime.
2. Defendant was also a director and superintendent of plaintiff corporation and had used his position to injure its business, which the petition prayed he should be enjoined from continuing. *Held*, that the suit was not for infringement of a patent, but was one growing out of agreement of the parties, and that this court has jurisdiction of the same.

HUSTON, J.

This was a motion by defendant to dissolve injunction, submitted as upon demurrer to the petition. An amendment to the petition has been filed since the filing of the motion, but it will not be considered in passing on the motion.

The dissolving of the injunction is urged upon two grounds:

First—That the petition contains no averment that defendant agreed to convey any more than he has already assigned.

The petition does allege that about June 10, 1884, the defendant represented that he was the inventor and owner of a certain invention called "An Improvement in Gas Burning Furnaces," and four certain patents, giving their numbers; that said invention, for which an application was then pending and a patent subsequently issued, and said four patents embraced all his interest of every description, in inventions, applications, etc., relating to smoke-consuming and fuel-saving appliances and that the same fully protected his said invention. That the plaintiff, relying upon such representations, paid the defendant \$4,001 for said invention and patents, and took an assignment thereof. Subsequently, it was ascertained that defendant had, at the time of such representations and sale, on file in the patent office, another application for a patent, upon which, in May, 1885, a patent was issued to him, which it is alleged covers substantially the same device as the invention assigned to plaintiff. It is also alleged that the defendant, who is a director and stockholder of the plaintiff corporation, and who has acted as its superintendent in building furnaces, has recently been representing that the plaintiff did not have a valid patent; that the furnaces put up by plaintiff under defendant's supervision were not covered by plaintiff's patent, but by his recent patent, and in various other ways has been seeking to injure plaintiff in its business.

A temporary restraining order was allowed as prayed, restraining defendant from transferring the patent issued to him in May, and from the representations and conduct prejudicial to plaintiff's business.

The allegations of the petition, if proved, will in my judgment entitle plaintiff to an assignment of the patent recently issued to defendant. In equity the plaintiff owns it and is entitled to have its right protected until the final decree of the court herein. The first ground is not well taken.

Second—It is urged that this court has no jurisdiction because the question is one of infringement, of which the U. S. Circuit Court has exclusive cognizance. On the other hand it is claimed that the case presented is one of contract and not infringement. The parties are all residents of this State, and the federal court could only have jurisdiction through the subject matter. Does the matter in dispute arise out of or under the patent laws, or the laws of the United States, or under a contract between the parties governing their rights in relation to the invention? Is the relief sought founded on the patent laws, or on the contract? The answer to this question determines the jurisdiction.

I have carefully examined the cases cited by counsel on both sides. I deem it unnecessary to refer in detail to any except *Hartell v. Tilghman*, 99 U. S., 547. The syllabus of that case is as follows: "1. A suit between citizens of the same State cannot be sustained in the circuit court as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters-patent, and a subsisting contract is shown governing the rights of the

parties in the use of the invention. 2. Relief in such suit is founded on the contract, and not on those laws."

The suit was upon a patent for a sand blast process and came upon appeal from the U. S. Circuit Court, E. D. of Penna. The bill was filed by the patentee setting out a contract with the defendant for use of his invention, payment of royalty for a time, and alleged violation of contract by defendant and his refusal then to allow defendant to further use his patent process, and charges defendant as an infringer. The defendant admitted the validity of the patent, his use of it and his liability to plaintiff for such use under the contract; he pleads the contract (parol) and tenders all that is due and readiness to perform.

The opinion of the majority of the court held the case not cognizable in the courts of the United States by reason of its subject matter, and ordered the dismissal of the bill. The court referred to the following cases as sustaining such action: *Burr v. Gregory*, 2 Paine, 426; *Littlefield v. Perry*, 21 Wall., 205; *Wilson v. Sanford*, 10 How., 99; *Good-year v. Union Co.*, 4 Blatchf., 63; *Blachard v. Sprague*, 1 Cliff., 288; *Hill v. Whitcomb*, 1 Holmes, 317.

The dissenting judges admit, that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws. But where infringement of the patent is the ground of action, and redress is sought therefor, the case does arise under the patent laws and is cognizable in the federal courts, —no matter what collateral issues may be raised by the defendant. See also *Walker on Patents*, section 388.

In the light of these authorities I think there can be no doubt of the jurisdiction of this court of the action now under consideration. It is in no sense a suit for infringement. It is a case growing out of and governed entirely by the agreement of the parties. It does not involve the construction of the patent laws, but a determination, according to the principles of the common law and of equity, of the rights of these litigants by virtue of such contract, express or implied, between them.

The motion will therefore be overruled and the injunction continued.

Harper & Blakemore, for plaintiff.

Wilby & Wald, for defendant.

ADMINISTRATORS.

214

[Miami Common Pleas, 1885.]

HENRY TEN EICK ET AL V. GRAYSON DYE.

1. Where the administrator of a decedent's estate is sued in his individual capacity for a portion of the money received by such administrator out of decedent's estate, by another creditor of the estate, and he files an answer setting out that he holds the money as administrator and not as an individual, and a trial is had upon the merits, such defendant will not be granted a new trial because of defect of parties defendant, and be allowed to file an answer as administrator.
2. Where a decree is rendered for the payment of money against an individual in a case wherein he has answered, setting out that he holds the funds as administrator, the estate of the decedent will be bound equally with the defendant.

This was an action wherein the plaintiffs, who were creditors in common with the defendants, of the insolvent estate of Thomas C. Dye, deceased, and of which estate the defendant was administrator, sought to recover of the defendant their share, as such creditors, of the said estate, of a judgment in favor of said estate of \$5,000, which came into the hands of the defendant as such administrator, and from which he had made disbursements under the direction of the probate court, from which his letters of administration had issued.

The defendant by his attorneys, Walter S. Thomas and Samuel Craighead, filed an answer, wherein he set up that he held said funds as administrator of the estate of Thomas C. Dye, subject to the order of the probate court. The defendant was not made party as administrator, and the estate of Thomas C. Dye was in no manner represented in the case. The case came to trial, with the pleadings in this shape, was tried on the merits, and a decree was rendered in favor of the plaintiffs. The defendant now comes in, as the administrator of Thomas C. Dye, and asks that the decree may be set aside, and a new trial granted, and that he, as the administrator of Thomas C. Dye, be permitted to come in and answer.

WRIGHT, J.

This case comes on for hearing on a motion to set aside a decree heretofore rendered in this case, in favor of the plaintiffs, and against Grayson Dye, as administrator, etc.

It is insisted by Mr. Kerr, of defendant's counsel, that the court has the right to set aside the entry at any time during the term; but the court should not do that simply because it has the power; it must have some reason for doing it. If there is a good reason, there is no doubt of its power. The reason assigned for setting it aside is this: that the trial, hearing and decree are such that it will prejudice the estate of Thomas C. Dye, inasmuch as Grayson Dye, his administrator, was not made a party. The facts are, Grayson Dye was made a party individually; he came in as an individual and answered, and his only ground of defense was, that he holds that money as administrator of Thomas Dye, deceased, and as such administrator has made some disbursements. He has no individual defense—none except as administrator. While Grayson Dye, as an administrator and as an individual, are two different persons in law, they, in fact, answer as in the same capacity here, and are as fully identical as if they had been made parties. The result of setting aside the decree would be that he would get two trials simply by his own negligence. He says he is not protected as administrator; he ought to have known that long ago. Now he wants to try the same issue over; by allowing that, the result would be, he would get two trials. That would be inequitable and very unfair. The Code provides, that parties may be brought in where they have an interest, and, I apprehend, the court might allow it, no doubt, where it would work prejudice to some party by reason of the fact that he didn't have an opportunity to come in and make some defense.

Now, is Dye, as administrator, prejudiced? Certainly not, for the defense, and the only defense made, was in favor of the estate. It is alleged that this decree will not protect Grayson Dye against his creditors; but he made a defense for Dye's estate, and made no objection as an individual; that he was not joined as a defendant administrator, and can-

not now be permitted to come in, and thereby get two trials of the same issue.

The Supreme Court of the United States has held, in a case in principle precisely the same, *Birdsell v. Shaliol*, as reported in "the Reporter," of date of Feb. 11, 1885, where the court says this: "That a licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger; an action at law for the benefit of the licensee must be brought in the name of the patentee alone; a suit in equity may be brought by the patentee and licensee together."

And that is very likely what Grayson Dye would have done if he wanted protection.

"But when a suit in equity has been brought and prosecuted in the name of the patentee alone, with the licensee's consent and concurrence, to final judgment, from which, if for too small a sum, an appeal might have been taken in the name of the patentee, we should hesitate to say that the licensee, merely because he was not a formal plaintiff in that suit, could bring a new suit to recover damages against said defendant for the same infringement."

I think that is the only sensible doctrine, that where a man goes through a suit, and then says, I want another trial, it is not right, and not just, and I find by the Supreme Court of the United States it is not law. So Grayson Dye has had his day in court, and the estate is bound, just as well as Grayson Dye individually. That being the case, there is no ground for opening it, even if I had the power.

The motion is overruled, to which ruling and opinion of the court defendant excepts.

J. A. & E. H. Kerr, for the motion;
Sullivan & Earnhart, *contra*.

NUISANCE.

224

[Hamilton Common Pleas, 1885.]

HENRY F. SCHLUETER ET AL. v. DAVID L. BILLINGHEIMER.

1. Where various neighbors are alike deprived of the ordinary comforts of life in the occupancy of their homes, by a nuisance, they may properly be joined as plaintiffs in the same action to restrain its continuance, although they may own distinct property interests.
2. Noise may become a private nuisance, and on the complaint of those specially injured may be restrained in a proper case.
3. Where the proprietor of a public resort located in an otherwise quiet neighborhood—occupied for years by dwellings—introduces extreme features of amusement, as a roller-coaster or gravity-railroad, causing unusual noise, and in a substantial degree depriving others, having ordinary sensibilities, of the ordinary comforts of life, such as rest and sleep at night, peace, quiet and rest on Sunday, disturbing family conversation, etc., he creates thereby a private nuisance, and where the proof is clear, certain, and satisfactory that he has wrongfully done these things working a serious injury, the court will restrain him from its continuance, without the intervention of a trial by jury; and the mere fact that complainants waited until after the roller-coaster was constructed and in operation will not estop them, when they did not know the character and degree of the noise, nor that it would be operated at unreasonable hours and times.
4. The injunction will be limited to nights and Sundays, if the noise is not clearly proved to be a nuisance at other hours, and when there is extreme sickness certified to by two reputable physicians.

BUCHWALTER, J.

This cause has been tried upon oral testimony. The plaintiffs reside upon the easterly side of Ohio avenue, and complain of the defendant that he maintains a nuisance by the erection and operation of a roller-coaster, or circular gravity-railroad, on the hill-side opposite and near by their dwellings; that the noise incident to the mechanical running of the cars, and the shouts of the passengers, interrupt conversations and social intercourse between the members of their families and their visitors in the day time; prevent sleep and rest at night; prevent peace, quiet and rest on Sunday; alleging its operation at late hours of the night and during Sundays, and a general deprivation of the ordinary comforts of human existence.

The defendant denies operation later than midnight; denies the shouts and disorder of passengers, or that the roller-coaster in operation makes a noise of the degree claimed, or to the annoyance of the complainants, and avers that he keeps a public resort for the rest and pleasure of his patrons; that he erected this roller-coaster at an expense of about \$4,000, upon premises leased and controlled by him, as one of the means of entertainment and recreation afforded the population of a large city. He further claims that the complainants are estopped to restrain him, because they did not object, but by their silence assented to the erection and operation of the roller-coaster for a long time prior to the filing of their petition.

During the hearing some question was raised as to the joinder of parties plaintiff, but no pleading has been presented directed to such alleged defect, and if it were a misjoinder, it is waived by want of pleading.

But they all allege a property interest either as owners in fee or by leasehold, and all by the proof are occupants, dwelling with their families in the immediate vicinity of the roller-coaster and of each other.

The annoyance complained of has one source, and it operates in the same general manner against all, so that while their property interests are distinct, they are in general alike effected. The gist of their complaint is, that the defendant maintains a nuisance which deprives each and all of them alike of the ordinary comforts of life in and about their homes.

They therefore may be properly joined as plaintiffs in one action to restrain the nuisance they complain of. *Robinson and others v. Baugh*, 31 Mich., 290; *Reid v. Gifford*, *Hopkin's Chy.*, 416; *Peck v. Elder*, 3 Sandf. Sup. C. R., 126; *Grant v. Schmidt*, 22 Min., 1; *Cadigan v. Brown*, 120 Mass., 493; *Palmer v. Waddle*, 22 Kan., 352.

A nuisance in law has been defined to be a wrongful annoyance or injury, or "any thing that worketh hurt, inconvenience or damage," 3 Black Com., 215.

A public nuisance, such an offense or wrong done as annoys a whole community in general alike.

A private nuisance, a wrong done to the hurt, or annoyance of the person or of the lands, tenements or hereditaments of another.

Justice Fields defines in 108 U. S., 329: "That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."

In general, one cannot personally recover for a nuisance inflicting injury to a whole community, of the character and kind by him suffered; but if he has sustained special damages, he may maintain an action for

such loss, whether it be caused by what may be termed a public, or private nuisance. Bouv. Inst., 503, and notes, and see recent case in 16 Reporter, 431, Ken. Ct. Appeals, *Cooley v. Lancaster*.

It was held in *Soltau v. DeHeld*, 2 Simons, N. S., 133, that a bill may be filed to restrain a public nuisance, without making the attorney-general a party if the plaintiff sustains special damage from the nuisance.

A nuisance may be both public and private in its character, public in general, private as to a few, by reason of a particular feature of the annoyance causing a special damage—in such cases, the few may invoke the protection of the courts, though in general the State alone can complain of the public nuisance. *Peck v. C. & S. R. R. Co.*, 43 Iowa, 626; *Adams v. Popham*, 76 N. Y., 410; 20 Amer. Law Reg., 656; note—of citations.

As I understand the complaint in this case, it is that plaintiffs are disturbed and annoyed in their physical comfort in the occupancy of their homes, by the noise in question created by the defendant, to such degree as to be a nuisance, and that any injury to their real estate is but an incident or follows as a consequence of the annoyance to the occupants.

The case of *Goodall v. Crofton*, 33 O. S., 271, is not an authority to aid us in this controversy. In that case the landlord did not occupy the property; his sole claim was damage to real estate, from an adjoining useful industry, and injury sustained which could be estimated in damages, and in such case the right of trial by jury intervenes before any relief in equity.

Our statutory provisions, with regard to nuisance, sections 6919 to 6928, are penal; but it cannot be maintained that they provide for the punishment of an injury of the kind complained of in this case, and it is clear, if they did, those suffering any personal or special damage are not deprived of their remedy because the State could prosecute criminally. See *Harvey v. Dewoody*, 18 Ark., 252, and cases therein cited. Besides it is not equitable that the State could punish the offender, and yet the wronged citizen not be protected from or compensated for the injury. The common law rule was, "That a person may not lawfully erect anything, even on his own land, which will materially disturb his neighbor in the enjoyment of his," but to this rule exceptions have grown up, arising out of compromises belonging to social life, as where some apparent natural individual right, or pleasure, has been abridged in favor of a more general need or convenience of the community.

The argument has been made that injury by mere noise was not a private nuisance in this State, and in its support *Parrot v. R. R. Co.*, 10 O. S., 624, is cited. The same case was before the Supreme Court in 3 O. S., 331, on demurrer to the petition, and in the later case the hearing was on a demurrer to the answer.

As I understand the case, it is simply a holding that where the railroad was duly authorized by law to operate by steam upon its track and right-of-way duly ceded in a public street, and is in fact lawfully operated, without any unnecessary noise, smoke, or other discomforts, then the plaintiff owning property and living on such street has no special damage as from such noise, smoke, etc., incident to a proper operation of the railroad—that it is not as to him a private nuisance, and he can not recover.

The idea as here partially expressed is more fully stated by Justice Field in 108 U. S., 317, *The Baptist Church of Washington City v. R. R.*: "where a railroad authorized by law to occupy a public street, operated

with reasonable care, produces only that incidental inconvenience which unavoidably follows such additional occupation of the street, by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is accommodated. The necessary annoyance from running cars with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But in this case it is an unreasonable use, so as to annoy plaintiff in the occupation of its church, rendering it uncomfortable as a place of worship" (by locating its roundhouse adjoining to church, and operating during church service), and the railroad was restrained from operating.

I think these cases are in accord with each other, and that it is overstating the Parrot case to say that under its authority noise cannot create a private nuisance in this State. No such distinction is intimated or claimed in authorities elsewhere.

In *Davis v. Sawyer*, 133 Mass., 289, it was held that ringing factory bells at 5:30, 6 and 6:30 A. M., to awaken hands and their boarding house keepers, was a nuisance to dwellers near by, in disturbing their rest, and the ringing of the bells at those hours was enjoined.

In *St. Mark's Chimes* case, 3 Weekly Notes (Phila.), 384, the noise of the chimes at various times of the day and night was declared a nuisance and enjoined.

In *Briggs v. Vattier*, 4 Weekly Notes, (Phila.), 272, the noise of a bowling-alley at night was declared a nuisance to the occupant next door and enjoined.

In *Bishop v. Banks*, 33 Conn., 118, the bleating of calves kept by a butcher over night for slaughter, was held to be a nuisance to those dwelling near by, and relief granted.

In *Frey v. Auer*, 10 Phila., 356, the noise of a goldsmith's beating factory in a quite neighborhood was declared a nuisance.

In *Walker v. Brewster*, 5 Eq. L. R., ---(1867), the court held, that fire rockets, loud shouts of a crowd, and the music of bands in and about a music hall on grounds of public resort, was nuisance to one dwelling on the next lot.

In *Inchbold v. Barrington*, 4 Ch. App., 388, the noise of a circus entertainment to continue eight weeks, at a distance of about eighty-five yards from a tenant's house, was a declared nuisance to him and was restrained.

Where an individual suffers annoyance inflicted by another in carrying on some useful trade, and such injury is less than the loss or injury caused to the defendant or the public good by granting a restraining order, the court will remit the complainant to his action for damages. See *Rhodes v. Dunbar*, 57 Pa. St., 274; *Att'y Gen'l v. Nichol*, 16 Ves. Jr., 338; *Brown v. Carolina Central R. R.*, 83 N. C., 128.

And if the chancellor be of opinion that on the proof it is a doubtful case, he will not act until complainant has established his right by an action at law. *Heuckenstein's Appeal*, 70 Pa. St., 102; *Rhodes v. Dunbar*, 7 P. F. Smith, 287; *Richards Appeal*, 7 *id.*, 113.

While the trial court may have general rules of law to guide it in determining whether the thing complained of be a nuisance, and whether it be of such character as that damages will be an adequate remedy, or that the proper relief is alone by a restraining order, yet each case has its own peculiar facts, dependent upon the location, the surroundings and the peculiar rights of the parties, the nature and necessity of doing the thing

complained of, which enter into the determination of the particular case to be heard.

The case at bar has in it many novel aspects. The thing itself complained of, as adapted to entertainment, by the proof seemed to most of the witnesses a novel construction, peculiar in its operation and noise. It certainly was such to the court. So far as I am aware, no nuisance of the kind and character has heretofore been adjudicated by the courts, and I fully appreciate the responsibility of determining the issue here made in this case (with all that it involves for the parties), and that I cannot approach its determination with too much care.

The proof of the case is not so irreconcilably contradictory, as to the construction and operation of the cars, or as to the character of the noise complained of. Various witnesses claim to be quite differently affected by it, and differ as to the degree of the noise---many of whom hearing it under very different conditions, locations, and states of mind.

As to the effect of the noise, I must in the main determine the truth from the testimony given on the trial, in connection with all the circumstances in proof. But, being requested by counsel for the respective parties to visit the premises, and test the noise by my own senses, it is to be expected that I will apply such measures in connection with the testimony from witnesses, and the condition under which it was tested, as to the character and degree of that noise.

In arriving at the truth, I find it very material as to where the witness is located who tests the noise, the habits of life, the occupation, and the nervous temperament of the witness.

The complainants and the roller-coaster are all located within what may be called a hill-top basin of elliptical form, with a section broken out at the southerly end, down which are the steps leading from this basin to the city proper. Ohio avenue is in the center of the basin. The roller-coaster is on the side hill west of Ohio avenue. The complainants live opposite on the east side, some of them down in the basin on a lower level by about 100 feet, and others on the easterly rim or ridge, on a higher level than the roller-coaster. To the north is located the Stallo residence, and between it and the coaster is the dance hall or pavillion, the latter enclosed with two fences and the grounds filled with shade trees. Parker avenue is just behind the Stallo residence, and descends from Ohio avenue by rapid grade behind "Bellevue Hill," likewise Cliff, Elesion and East Graham streets, back of Morrill residence and on the side hill to the east of ridge. There is a gradual ascending grade from the roller-coaster north-easterly to the Messrs. Gray, Morrill and Avery residences, with some foliage. There is a high stone retaining wall and ridge back and east of Messrs. Jackson, Schlueter and Meyers residences, and back of the coaster is higher ground to reflect the sound. The configuration of the ground, the location of improvements, buildings, etc., (without regarding a presumed prevalence of south-westerly winds) makes it manifest that the complainants and their families, and the witnesses living in their vicinity, would reasonably hear the highest degree of sound produced by the roller-coaster.

It is further manifest that of the witnesses testifying, those living on Ohio avenue north of Parker avenue, on Parker avenue, and on Cliff, Elesion and Graham streets east of the Morrill residence, and on the slope or hill-side, would hear the lowest degree of such noise. The east ridge of the basin intervenes. The sound waves may bound up the east slope over the ridge or hill-top, passing over the houses in the Vine street valley and strike

the hill-tops of Mt. Auburn, of about the same height. Such movement certainly accords with the laws of acoustics. If this be correct, it fairly reconciles the testimony given by Messrs. Post, Doan, Talbert, Dodd and Mrs. Ramsey of Mt. Auburn, all of whom heard the roller-coaster noise; some of them testifying that the noise was like a train running over a bridge or trestle-work, and that they were awakened and disturbed in sleep by it, with the testimony of various witnesses on Parker avenue, Cliff, Eleston, East Graham, and Vine streets; some of whom seldom heard the noise, and others in such a degree as not to annoy or disturb their rest.

The testimony given by Mr. and Mrs. Bogan, living on the first floor, and Mr. Gregory living on the second floor No. 50 Ohio avenue, is more contradictory in its effect, and stands out with more force against the testimony on behalf of complainants. I have no reason to doubt the integrity of purpose with which it was given, but it is to be remembered that they were located at a greater depth (which I estimate to be 100 feet or more) below the level of the floor of the roller-coaster than any other witness of that vicinity; that there were no windows in the northerly wall, or their bed-rooms, opening towards the coaster; that there were no retaining walls or hills in the rear to reflect sound into their rooms, and that Muller and others in the third story were on a more direct line, or nearer the level of sound. Yet these conditions only modify the force of the contradiction. The proof remains that these three witnesses living near by under these conditions were not annoyed by the operation of the roller-coaster; but they are opposed by various representations of nine different families in that vicinity.

Several witnesses employed in the immediate operation of the inclined plane, one who roomed for a time in that vicinity, and the operators of the coaster, and a watchman at the car stables, testify that there is no annoyance; but I can not overlook the fact that their sensibilities are hardened to noise by their very occupation.

Such is the condition of the defendant and his family, occupying the Stallo residence, in the midst of the noise of the hill-top resort, and as they say, where the street car turns on a curve, immediately around their house, and beneath the windows of their living and bed-rooms, from early morning till twelve o'clock at night.

There is no doubt in my mind but that some of the complainants, who believed this roller-coaster was a loud intrusion upon the peace and comfort of their homes, being often disturbed and wakened from sleep and rest, as they may have thought unjustly, and fretting under this noise, have become hyper-sensitive, and in honestly describing the effect upon them, have magnified the degree of the noise, and yet I am equally certain that the defendant, his family, employes, and those in similar service about the incline plane and resort, have hardened the ordinary human sensibility to noise, to them in a large measure it was profit, to the complainants it was loss, diminution of property rights, annoyance and intrusion upon home comforts. Such feeling to both are but human, and time is not likely to wear away their different estimate of the degree of noise in controversy between them.

I am of opinion, and of clear conviction, that this noise has been uselessly, wrongfully inflicted upon the complainants; that it has deprived them of the ordinary comforts of human life; that as now operated it is an annoyance, preventing and disturbing such sleep and rest as those of ordinary sensibilities who work by day must have at night. It is also to

be remembered that those of ordinary sensibilities must, as a part of human life, at some time become sick as well as aged.

Such by the proof has been the condition of members of some of complainants' families during the operation of this coaster. The law is not brutal and inhuman, it will protect the sick and the aged conditions of life. It will not require that they shall be driven from home because they may not be able to at all times maintain their ordinary sensibility. It has been impossible for me to forget the testimony about the little boy, who when well, rather relished the racket of the coaster, but when sick, perhaps feverishly delirious, with arms around his mother's neck, would scream when he would hear it, that the roller-coaster would catch him.

The proof has shown a substantial, a material injury to these complainants, and I can not say that I am in doubt as to the existence of any essential facts, which would be submitted to a jury in an action for damages. Has this enterprise of the defendant such merit as means of recreation for an entertainment of the public, that for the public good, or to prevent loss to him, I ought to impose this noise on complainants, and remit them to an action for damages for the injury done? I can not say that I ought. While it may be an industry of profit to defendant, yet whether it be a useful industry, or an amusement, is to be determined by the character of the thing.

The car carries passengers, not for travel, not for business, but purely for their amusement, that it is a business for defendant is but an incident.

What is the amusement? Is the sensation pleasant, that one wishes to continue, or is it the curiosity to know the feeling one has, to ride to the motion of a run-a-way train, about to leave the track over a high trestle-work, yet with the assurance from experiment that it is safe?

Has American life become so rapid, so absorbing, that this swift feature must be introduced as a recreation for public good?

A court ought not to be critical of the kind of recreation others may harmlessly seek; but when the proofs show it to be an extreme feature, and exercised to the injury of others, there should be less hesitancy in stopping it, to prevent the wrong to others, than if it were an ordinary, an accustomed amusement.

Certainly individuals are not required to make extreme concessions of comfort and property rights to such an extreme feature of amusement. In this case it is not necessary that I consider the damage to property. The wrong is to the personal comfort of complainants and their families. It is an incident only that dwelling property will depreciate, as the personal home comforts of the occupants are cut off, yet I think it is manifest that this property, improved and given up only to dwellings, with no business surroundings except the Bellevue resort, on a street, or rather a *cul de sac*, with no travel by vehicles, except for their own accommodation, would be damaged more by the continuance of this roller-coaster, as heretofore operated, than would defendant lose by removing it, at least more than if he would construct it on solid ground, as he can do at great expense by excavation and fill, thus lessening the noise by that degree existing between a train in rapid motion on a trestle-work and on solid road-bed. Other ways of lessening noise have been suggested, some by rubber wheels, by rubber under the iron rail, or perhaps it maybe lessened by the use of rubber tire, on the principle of the bicycle. Be that as it may, it is not for the court to suggest how it is to be remedied. I have only to deal with it as it is. By the proof it has been and is now

operating as a nuisance to complainants. It is claimed, however, that they are estopped. This is claimed as a defense, but the facts by a preponderance of proof are, that one of complainants, Mr. Morrill, objected twice during the construction of the roller-coaster, and afterwards protested to the authorities; that a witness and resident in that vicinity, Mrs. Judge Avery, made personal objection to the defendant. It has only operated during this summer with any vigor, before that as an experiment. Besides, complainants say they never saw or heard such mechanism or construction before, and were ignorant of its character. If they did not know its character, did not know it would be a nuisance, they did not assent, and will not be estopped by delay to sue until it was put in operation. See 22 N. J. Eq., 25; 16 Rep., 431.

In *Wood on Nuisances*, Sec. 798, it is stated that: "The acts of the party affected by the nuisance must have been such as to make any attempt on his part to stop the nuisance, or recover damages therefrom, a positive fraud."

The mere erection of the track and car on these premises, even though known to these complainants to have been to operate and make a noise of the character in proof, would not be ground for inference that they assented to its operation on Sunday and till mid-night of week days.

The night is the usual time for sleep or rest. Noises of business which can as well operate by day usually cease at night-fall.

When these complainants located upon this quiet hill, they had a right to presume upon a reasonable degree of quiet for rest. It was not even a place given up to the noise of the ordinary industries of a city.

It is manifest, a degree of the nuisance is greater by night than by day, when operated. There is authority as well as reason for this distinction. See *Davis et al. v. Sawyer*, 133 Mass., 289, enjoining the ringing of early call bells for the factory men, and 11 Weekly Notes (Phila.), 18, *Dillon v. States et al.*, enjoining meat-chopper's noise at night.

Likewise, they live in a community, which, by common consent, rest from labor on Sunday, and by law as a police regulation it is made a day of rest, when boisterous noise and common labor shall cease, and in this regard it is unnecessary to consider any religious feature or theory as to Sunday observance. It is enough to know that the complainants and the people in that community have for a long time chosen Sunday as a day of rest. There is no theory of personal freedom on which defendant can fairly claim the right to create a noise---a nuisance on Sunday as well as any other day.

The most liberal rule as a first principle for the just regulation of a community is laid down by Herbert Spencer is his "Social Statics" to be that. "Every man has freedom to do all that he wills, provided that he infringes not the equal freedom of any other man." By this rule, a man may violate the proprieties of the day in the opinion of his neighbor, but he cannot do what he wills, if by doing it he prevents his neighbor doing what he wills to do; he cannot make a noise which prevents his neighbor from resting, or even from worshipping. The defendant in this case has even violated the rule of equal freedom.

The injuries in proof are irreparable, and are to be continuous unless restrained. As said Judge Cooley, "no man holds the comfort of his home for sale, no man is willing to accept in lieu of it an award for damages." *Edwards v. Mining Co.*, 38 Mich., 48.

I am of opinion that I can make a more just determination of this case by now enjoining the defendant from operating the roller-coaster on Sunday, and between the hours of 9 P. M. and 8 A. M., on week days, with a reasonable provision in case of extreme sickness when noise endangers the patient, and with a reservation of leave to the defendant to apply at the end of this term for a modification of the injunction upon the testimony already heard, and any testimony bearing on further experiments in the meantime made, as to abating the noise.

Healy & Brannan, McGuffey & Morrill, Albert Bettinger and Harry Muller, for complainants.

Stallo, Kittredge & Wilby, Paxton & Warrington and — Workum, *contra*.

Cases cited on behalf of complainants: Ball v. Ray, L. R. 8 Ct. App., 467; Dennis v. Eckhardt, 3 Grant's Cases, 390; Fish v. Dodge, 4 Denio, 311; Ross v. Butler, 4 C. E. Green., 294; Duncan v. Hayes, 22 N. J. Eq., 25; Dargan v. Waddell, 9 Ired. Law, 244; Cleveland v. Gas Light Co., 20 N. J. Eq., 201; Scott v. Firth, 10 L. T., (N. S.) 240; Harrison v. Rector, 12 Phila., 259 S. C. 3 Weekly Notes of Cases; Davis v. Sawyer, 133 Mass., 289; Bishop v. Banks, 33 Conn., 118; Walker v. Brewster, L. R. 5 Eq. Cas., 25; Inchbald v. Robinson, L. R. 4 Ct. App., 388; Crump v. Lambert, L. R. 3 Eq. Cas., 409; Soltan v. DeHeld, 2 Simons (N. S.), 133; Walter v. Sells, 15 Jurist, 416; Elliotson v. Feetham, 2 Bing., N. C., 134; Francis v. Schoellkopf, 53 N. Y., 134; Baltimore & Potomac R. R. Co. v. 5th Baptist Church, 108 U. S., 311; Galbreath v. Oliver, 3 Pittsburgh, 78; Wallace v. Auer, 10 Phila., 356; Robinson v. Baugh, 31 Mich., 290, also 10 Weekly Notes of Cases, 481; 4 *id.*, 272; 11 *id.*, 18; Parrot v. R. R. Co., 3 O. S., 330; Tipping v. St. Helen's Smelting Co., 3 B. & S., 66; Cooley on Torts, 1st ed., 598; 20 Am. Law Reg., 649.

Cases cited on behalf of defendant:

70 Pa. St., 102; 23 N. J. Eq., 199; Crofton v. Goodall, 33 O. S., 271; Parrott v. R. Co., 10 O. S., 624; Cooper v. Hall, 5 Ohio, 321; McElroy v. Goble, 6 Ohio St., 187; Gas Co. v. Freeland, 12 O. S., 392; Tootle v. Clifton, 22 O. S., 247, 253; L. R. 9 Ch. App., 705; Owen v. Phillips, 73 Ind., 283.

The following decree was rendered in this case:

ENTRY.

This cause came on to be heard upon the pleadings and evidence and was submitted to the court, and upon consideration the court finds the equities of the case to be with the plaintiff.

It is, therefore, ordered, adjudged and decreed that the defendant be and he is hereby enjoined from operating the roller-coaster, described in the petition, on Sunday during the entire day, and on the other days of the week between the hours of 9 o'clock P. M. and 8 o'clock A. M., and also at such times as extreme sickness may exist in the family of any of the complainants endangering the life of the patient, upon notice to defendant accompanied by the certificate of two reputable physicians, but leave is hereby reserved to the defendant to move at the end of this term for a modification of this injunction upon the testimony already heard and further testimony which may then be offered as to the means taken by the defendant to lessen the noise of said roller-coaster, so that the same is no longer a nuisance; and it is ordered that the defendant pay the costs of the case, and execution is awarded therefor. To all of which the defendant excepted and hereby gives notice of appeal herein. Bond fixed at \$——

BENEFICIAL ASSOCIATIONS.

[Franklin Common Pleas, 1885]

ELIZABETH KENT V. ODD FELLOWS' BENEFICIAL ASSN.

1. Courts will not review the expulsion of a member from a mutual order, on due notice and trial for irregularities, but will for fraud or collusion.
2. It will not be presumed that the trial was while the party was insane, although he had been insane before, but insanity must be proven by a preponderance of evidence.

BINGHAM, J. (orally)

The case against the Odd Fellows' Beneficial Association is a case commenced by the plaintiff, in which she alleges her husband, William R. Kent, was a member of the Odd Fellows' Beneficial Association, and that he was entitled to certain benefits as a member of class A., B. and C. of that association. It is further alleged that he was not upon his death in arrears to his lodge, the Capital Lodge of the I. O. O. F. of Columbus; that no dues remained unpaid; that he was in good standing and that he was not in default for payment of any assessments that had been made upon him by the defendant, the Odd Fellows' Beneficial Association. There is also an amended petition, and also further averments in regard to the standing of the plaintiff's husband, William R. Kent, in his lifetime, in the Capital Lodge.

The averment is made that there was an attempt to expel him by the Capital Lodge because of certain charges preferred against him, and charges are made in the petition that the defendant, the Odd Fellows' Beneficial Association, and the Capital Lodge, were in collusion, and confederated together to injure and defraud the plaintiff's husband, and to expel him from the lodge because of the fact that he was sick and had become sick sometime before the commencement of these proceedings by the Capital Lodge, and had been declared insane, and was liable to be of great expense to the lodge while he lived, and at his death his relatives or his beneficiaries in the insurance which he had in the defendant, would be entitled to a large sum of money. And to prevent this, it is claimed by the plaintiff, in her petition, that the lodge and the association confederated together and conspired for the purpose of fraudulently and wrongfully expelling him from the order and from this lodge.

Now, the issues which are made here, which probably may be considered as decisive of this case, and which are decisive of it in my judgment, are raised from the averments of the petition made in this respect, because it is contended by no one but that the matters contained in the charges preferred against William R. Kent by the Capital Lodge, were matters within the proper jurisdiction of the lodge. They had the jurisdiction and the right, according to the by-laws and rules and regulations of the order, to prefer charges of that character against him, and to try him upon those charges in accordance with the rules and regulations of the order.

Now, if they acquired jurisdiction,---if the proper steps were taken to acquire jurisdiction, and they did acquire jurisdiction, and there was no legal impediment to their proceedings, then their decision would be unquestionably final as far as courts of law are concerned. No court of law would undertake to intervene and try this case upon its merits after it had been tried upon its merits by a lodge having acquired proper jurisdiction.

tion over the subject matter. That I think is very clear. Neither would a court undertake to try or hear or determine whether or not their proceedings were in every respect legal, or in every respect free from error, or whether or not they had committed some error in the course of the proceedings, which might be cause for setting aside a judgment in a properly reviewing court upon error. I take it that no court of law under our statutes and constitution would take cognizance of the case in that aspect, as a mere court of error, and undertake to reverse or set aside the finding or decision of the lodge for mere errors in the proceedings, it being admitted that the court had jurisdiction and proceeded to try the case in good faith, and especially would that not be the case where relief is provided for errors committed by the lodge in course of their proceedings in the organization itself, it being shown in evidence that there are higher bodies in the lodge to which appeals may lie and in which proceedings in error may be prosecuted to trials had in lodges of this description and order.

But what this court would undertake to do as a court of equity, I think, and for that reason the demurrer to the amended petition was overruled as I remember it,---this court would undertake to set aside a judgment of such a tribunal if it was procured by fraud and collusion.

Because in that case it would be a nullity, and in that case a party would not have to, necessarily, and ought not to be required to go through the farce of going to a higher tribunal of that order upon a judgment that is in and of itself a nullity, for the purpose of procuring its reversal. And in this case, it must be remembered that this is an action by a third party, a beneficiary, to recover the benefits accruing to this decedent, as it is alleged, by reason of his membership in the beneficial association. But it being a rule of that association that before an order can be obtained from the association upon the treasurer for the payment of the money, that a certificate must be furnished by the lodge to which the deceased member belonged, certifying to the fact that he was not in arrears for dues for six months prior to his death, and that he was a member in good standing at the time of his death (perhaps that covers all that is required by the certificate; I don't remember distinctly as to that) ---inasmuch as that is required, and inasmuch as in this case it was not given, it became necessary for this plaintiff to notice that fact and to excuse it, and in so doing it became necessary for her to recite the history of the expulsion, or the attempted expulsion, as is claimed by the plaintiff, of her husband, William R. Kent, from this lodge, and to aver that it was illegal and was obtained and brought about by the collusion and fraud and wrongdoing of the defendant, the beneficial association, together with this lodge, confederating together for that purpose, and to ask that it be set aside. That of course is merely a formal matter, for there is no particular necessity of setting it aside if it is a nullity. And yet it is all right in form and it is lawful for a court of equity to set it aside, like the judgment of any other tribunal that is sought to be set aside, upon a proceeding instituted for that purpose and charging fraud and collusion as a ground. And hence it was necessary to ask that this judgment be set aside, in order that the proceedings of the lodge itself, and the judgment rendered upon the record there, might be brought clearly within the jurisdiction of this court. There is another allegation made, that the judgment of this lodge was not legally obtained,---that is, legally entered; that it was not entered in such a way as to be of any force or weight. In other words, the constitution and by-laws of the order

required that a certain vote is necessary in order to expel one from the lodge. It is alleged by the plaintiff that this vote was less than the number required by the rules and regulations of the order,---was not two-thirds, the number required by the rules of the order,---but was one less, and therefore the judgment was illegal. There are also averments as to the specifications preceding the vote on expulsion, to the effect that those were not sustained by the requisite number of votes, but that the presiding officer declared them so sustained, and so entered them upon the record, as being sustained by a two-third vote. I take it that all of the matters in relation to these proceedings and the votes taken there in the lodge up to the time of the final vote upon expulsion, would be matters that would relate to the proceedings or irregularities in the proceedings, and not relate to the power of the court or the tribunal undertaking to pass judgment.

Now, there is no question but what the second specification of the charge was sustained by the requisite two-thirds vote. That embraces a charge for drunkenness, and conduct unbecoming an Odd Fellow and a gentleman, and was such conduct as was calculated to disgrace his family and the order of which he was a member. That was sustained by the requisite vote. Now the charge itself was not sustained, the vote of 19 to 10 is not two-thirds, but the vote on expulsion was sustained by the requisite number of votes, 20 for to 9 against,---being more than two-thirds. So that in my judgment disposes of that question, and it will not be necessary to return to it. In my judgment the plaintiff is not entitled to recover on that account. That is to say, the judgment of the order is not void for that reason. All such matters of error, which are argued by counsel, are simply matters which might be taken to a court authorized to take notice of the proceedings simply as a court of error, but as a court of equity you can only look to that which relates to the power or want of power of the court passing judgment, and to the questions of fraud and jurisdiction. You can look to no irregularity or error in the proceedings if the court has lawfully acquired jurisdiction, as a sufficient reason for setting aside this judgment; that would constitute no reason; that is, no good reason for a court of equity, to set aside this judgment. And, therefore, the expulsion having been by a legal vote, and the vote upon one specification at least being sustained by a legal vote, embracing matters which would be sufficient, if true, to authorize a judgment of expulsion, whatever irregularity there may be in this proceeding, whatever error there may be in it, it is not a void proceeding. The judgment is not void. If anything, it is nothing more than voidable, and if it is simply asked to set aside because of irregularities and errors in the proceedings, it is beyond the jurisdiction of this court in this proceeding.

Now, as to the question of fraud. In my judgment the evidence fails to show that there was any conspiracy on the part of this defendant, the Odd Fellows' Beneficial Association, with the Capital Lodge, for the purpose of fraudulently and wrongfully putting Mr. Kent out of the order. That there may have been some improper proceedings; that some members may have entertained an improper feeling toward Mr. Kent, which was not in accord with the principles inculcated and taught by the Order itself, may be true; but there is no such thing as a conspiracy proven by the testimony in this case, nor is there any proof of fraudulent course of conduct on the part of this defendant, the Odd Fellows' Beneficial Association, with the Capital Lodge, for the purpose of producing that result. The judgment of the Capital Lodge in the matter, under all

the circumstances, and under all the evidence, may not be such as this court would be inclined as an individual merely, simply considering its own feelings and opinions to render upon the evidence produced before it; but if I had such an opinion; it would have nothing to do with what we should do as a court in this case. We have no right to review, as I said sometime ago, the proceedings of this Order in a case over which they have acquired the proper jurisdiction of the subject matter and of the person, upon its merits. You can only do so for fraud and conspiracy, or for want of jurisdiction. There is no question about the jurisdiction of the person in this case, because Mr. Kent was there by himself and by his attorney. And as to the question of fraud and conspiracy, I have already outlined my views upon that subject.

There is one question further to be considered in this matter, and that is this: There is an allegation that William R. Kent at the time of his expulsion was insane.

I think that if it was clearly shown that Mr. Kent, at the time he was brought before his lodge for trial, was insane, or his mind was so deranged that he was not capable of making an intelligent defense to the proceedings instituted against him, or failed to comprehend their effect and meaning, that this would be a ground for setting aside the judgment. For the law expressly provides that anybody who has become disabled in this respect and is not possessed of his powers of reason, or is not in a sane condition, cannot be made the subject of legal proceedings on the part of anybody claiming to exercise judicial powers, except as is provided for by our statute enacted for the purpose of taking care of the insane.

The evidence shows that William R. Kent had been adjudged insane and had been sent to the asylum and kept there for a period of time and then discharged. It is not very clearly shown that he was discharged because cured, nor is the contrary shown. But he had been at that time for quite a long period out of the asylum,---at the time of his expulsion. I think the evidence shows, about a year, or perhaps a little more than that. This expulsion occurred in August, 1877, and I think the evidence shows that he was discharged from the asylum about that same time in the month of August, 1876, or possibly it may have been in July. The evidence as to his mind, after he came from the asylum, up to the time of this expulsion, and for some time afterwards, seemed to show that he was one having his reason. He was at times transacting business of his own, and seemed to be possessed of his reason. It is claimed by the defendants that his sickness was brought about possibly by his own dissipation.

There is some controversy in the evidence as to whether his sickness did arise from that or not, but he seemed to have the possession of his faculties and his reason. He seemed to be irritable, but notwithstanding rational. I think it is true that, at that time, he was possessed of his reason.

Taking all the evidence together, of course, under such circumstances, something is due to the fact that he was before a tribunal of men for trial, who were probably interested in being relieved of him, but were bound by very strong obligations to do justice by him. And if he had at that time been bereft of his reason, or insane, the insanity was not apparent and hard to be discovered, and not susceptible to ordinary observation. It would hardly be presumed that they would trump up matters against him and prefer charges against him as to his conduct while he was insane, as not being that of a gentleman, and in accordance

with Odd-Fellowship, and then while he was insane try him and expel him from the order. I say it would hardly be presumed that that would be so. It would require proof, and satisfactory proof,---by a fair preponderance of the evidence, to show that such was the fact. I am inclined to think that the evidence does not show that such was the state of facts, and I am of opinion that he was possessed of his reason. Col. Groom, who was his counsel at the time of the expulsion, testifies that he does not think he was a crazy man, or that he was a lunatic; but he sometimes thought that he was not exactly right in his mind in some respects. This is the expression of Col. Groom, that he was not a crazy man nor a lunatic; that he was not a perfectly sound minded man, but still not a person who could be called a lunatic or an insane man. That perhaps is about as strong testimony as there is upon that subject.

There are somethings in relation to these proceedings, as the evidence now develops the matter to the court, and as the record presents them to the court, which I must confess I can hardly understand; but not being a member of the organization, and not understanding its mysteries, this may probably account for matters which otherwise I might understand, relating to this proceeding. As I said before, I consider myself barred from inquiring into the merits of this question, as to whether Mr. Kent ought to have been expelled or not by this order. I think that is very clear that a court of equity cannot interfere to merely rectify errors and irregularities in the proceedings. Upon that point I think the authorities all agree that the adjudications of the Order itself are final, and of course the law will not intervene to set them aside, for mere irregularities or errors of judgment in the proceedings where they have acquired jurisdiction of the person and have jurisdiction of the subject matter, and are acting within the scope of their authority. Under such circumstances this court and no other court of law will undertake to reverse their judgments or interfere with them.

And that excludes most of the questions which are made by counsel for plaintiff in their argument. It is hardly contended by counsel for plaintiff, and it is not argued by them, that they have succeeded in showing the conspiracy which is charged in the petition. I think it is argued that the proof shows that Kent was insane at the time of his expulsion.

After having given the testimony upon that question a full consideration, to which the importance of the case entitles it, it is my opinion that there is not a preponderance of the evidence showing that he was insane. It is contended also that this vote of expulsion is not a legal vote. The record shows that it was 20 to 9. There are some witnesses who testified in the first instance that they were members and that the vote was 19 to 10, but when their attention is called to the record they waiver in their faith as to their being right in their recollection, and they are not willing to say but what it might have been as the record discloses, 20 to 9.

I hold that the judgment in this case is to be for the defendant. Of course there is a large amount of testimony in this case, which, in the view the court has taken of it, becomes entirely irrelevant, and it may be said ought to have been so regarded by the court at the time of the trial and rejected. But counsel will remember that our ruling upon these subjects, during all this time was, that this evidence might be, to some extent, however remote, competent as reflecting upon the question of good faith on the part of these societies, and the questions of fraud and con-

Hardacre et al. v. Dalton et al.

spiracy charged in the petition, and, therefore, this evidence was all permitted to be introduced, relating, of course, to the merits of the case which is supposed to have been produced before the lodge, but a presentation of the facts and circumstances more or less which were probably produced before the lodge.

I find against the plaintiff on the question of fraud and conspiracy, and hence a great deal of this evidence becomes entirely irrelevant in the case except so far as it relates to the question of insanity, and the question of insanity and the question of jurisdiction, and we pass upon those questions as we find a preponderance of the evidence requires.

(Plaintiff notes an exception.)

Byrne, Peters & Ewing, for plaintiff.

Col. J. T. Holmes, for defendant.

INJUNCTIONS—ELECTIONS.

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[Hamilton Common Pleas, 1885.]

GEORGE W. HARDACRE ET AL. V. DANIEL J. DALTON, ET AL.

1. Injunction against counting illegal returns by a clerk and justices, and issuing certificates upon them, is within the jurisdiction of courts, especially, as to legislative offices, where a remedy by contest is not adequate, and the legislature cannot consider the case until it is in session, and the contestees have become members of it.
2. Electors, and candidates, in the capacity of electors, may join as plaintiffs.

BUCHWALTER, J. (orally.)

This case is before me upon a motion to dissolve the temporary restraining order heretofore granted, and upon a general and special demurrer as hereafter stated to the petition and amendment thereto.

The petition alleges that on the 13th of October, 1885, the plaintiffs were electors of this county, and as such were eligible to be elected, and were each candidates on the Republican ticket for the office of Senator, to be elected to the General Assembly from this county at that election; that they have received a plurality of all the legal votes cast at said election over and above all other candidates, and are entitled to receive from the Clerk certificates of election as appears by the returns in his office. That by the legal returns as made to said Clerk they have a plurality of all the votes cast over and above all other candidates at said election for said offices, and are entitled to certificates of election; that said defendants have canvassed and abstracted the returns, from nearly all the precincts of said county, and are about to declare the result of the same, and to issue certificates of election in pursuance of said result.

They further aver that defendants have canvassed and abstracted certain precincts named, which returns are wholly illegal and not the true and lawful returns of said precincts, which defendants have no authority in law to canvass, and which being so canvassed by them will deprive the plaintiffs of their certificates of election to said office, to which they have been legally elected, and which certificates they are rightfully entitled to; but that said defendant, Dalton, as Clerk, is about to issue certificates to each of their said opponents, James C. Hopple, John Brashears, Robert Kuehnert and Moses F. Wilson, candidates on the Dem.

ocratic ticket at said election. Then follows a more specific allegation as to the illegal returns about to be canvassed; and there is an averment by the way of an amendment to the petition that each of the plaintiffs in his own behalf has filed, and now has pending in the circuit court of this county a petition for a preemptory writ of mandamus, to require the defendants to determine to whom said certificates shall issue, declare the result of said election upon such returns, and to make all proper orders; and that unless the defendants are restrained from canvassing and abstracting such illegal returns, and from declaring the result, which is not the true result which should be declared from the legal returns of said election, he would issue said certificates to said Democratic candidates for said office; that the hearing and determination in said circuit court will require about ten days, and that if not so restrained as aforesaid, great and irreparable damage and injury will be done the plaintiffs, who will be deprived of their certificates, and being without any adequate remedy at law, they pray, therefore, a restraining order from this court.

After formal notice upon the defendants a temporary restraining order was granted at 5:30 P. M., October 21, 1885, and on the following morning a hearing was at once begun, upon the motion of the defendants to dissolve the temporary order, on the ground that the petition does not state facts sufficient to constitute a cause of action; and also upon the demurrer to this petition and the amendment thereto, first, for misjoinder of parties plaintiff; second, because the petition does not state facts sufficient to constitute a cause of action between the plaintiffs and the defendants; third, that the petition contains no facts entitling the plaintiffs to a permanent injunction or relief; fourth, because the court has no jurisdiction of the subject-matter of the proceeding.

It is manifest that the demurrer raises every point suggested by the motion.

Only a brief time has been taken by this court to consider such important legal questions as here involved, but the canvassing work of defendants should not be unduly delayed.

As to the first question raised by the demurrer: Is there a misjoinder of the parties plaintiff?

Every elector can be heard in any proper proceeding before the constituted tribunal to determine the result of an election. These petitioners sue in two capacities, that of electors and candidates. As electors, each is interested in the result as to all and each of the four offices of State Senator; that by virtue of his rights and duties as an elector, each then has a common interest in the result of the controversy as to the other, and as to the petition of the other filed in mandamus. See 7 Clarke, Iowa, 397, holding that eighty-three informants (voters) of the precincts, suing in the name of the State, asking a writ of mandamus to compel a canvass of the votes, cast herein were parties beneficially interested. In this aspect of the case there is no misjoinder, and it is not necessary to consider whether, if their averment had been solely as to their right as candidates, there would be misjoinder; upon that subject I should entertain grave doubts. It was recently held in this court in *Sclueter v. Bellingheimer*, ante, 000, in what was known as the roller-coaster case, that although the plaintiffs, who sought to enjoin the continuance of a nuisance, by noise, which affected all of them substantially alike, only varying in degree, being a common injury, may have had separate individual property rights, yet there was a common complaint as

made by all, and that the joinder was proper. In that holding I was sustained by the 31 Michigan, 290, Robinson v. Ball, and other cases cited.

The second ground, considered in its logical order, is the fourth named in the demurrer: Because the court has no jurisdiction of the subject-matter of the proceeding. As I understand the proposition of counsel for defendants, it is that, if a writ of mandamus be asked either of this or the circuit court, neither court would have jurisdiction of the subject-matter viz; the direction of the defendants in the canvassing of returns, declaring the results and issuing the corresponding certificates of election, and that therefore no jurisdiction attaches to a court of equity in aid of such writ of mandamus, and counsel for defendants rely upon Peck v. Weddell, 17 O. S., 271, and Ingerson v. Berry, 14 O. S., 315. The proposition here presented has not, in my opinion, been determined in this state, as an examination of the facts of each case will, I maintain, so establish. In the case of Peck v. Weddell, *supra*, a suit to enjoin the clerk from recording the abstract of the vote and the declaration of the result of an election, the court simply hold "that allegations of fraud and illegality in conducting the election, constitute no sufficient ground for such injunction. Wrongs of such a nature can be inquired into and redressed only by means of a contest of the election, pursuant to the provisions of the statute."

The questions of law were all raised by a demurrer to the petition, and a careful examination of the record and statement, of facts will show that every averment of fact upon which the plaintiff relied was as to some fraud or irregularity in the conduct of the election, and not a single averment of fact, as to frauds, errors or mistakes by the board of canvassers in their ministerial work upon the returns.

So that no fact was before that court which could properly raise an issue in law or logic to draw forth a rule to serve as a guide in determining the issues in the case at bar. Besides in that case as the clerk and justices had already abstracted the votes and declared the result, they were *functi officio*; and the petition only sought to prevent the clerk from recording their declaration. The election was for the removal of a county seat, and it was claimed, the law provided no way to contest such an election, and that the court of equity must intervene; hence the Supreme Court was called upon to determine, whether the contest law provided an adequate remedy for the correction of errors, frauds, etc., occurring in the conduct of such an election.

In the 14 O. S., 315, the State *ex rel.* Ingerson v. Berry, the controversy was upon proceedings in mandamus on the application of the relator against Berry the clerk, seeking to re-open a canvass of the returns of an election for sheriff, and an order that the certificate be given to him.

The facts are all set out in the petition and answer, and it appears that the clerk and two justices had once before canvassed the returns, declared the result, and transmitted to the Sec. of State a certificate of election in favor of the relator opponent. That the relator then gave notice of contest to his opponent, and appealed from the declaration of the result of the board of canvassers, and that the proceeding in mandamus was begun after the statutory time of contest had expired.

Two grounds for the refusal of the writ, then are manifest, and are specially pointed out by the Supreme Court. First, that the board of canvassers had canvassed and abstracted the votes, declared the result, and issued the certificate of election to relators opponent. The relator

appealed and gave notice of contest, making such declaration the basis of his action; and, therefore, the board of canvassers were *functi officio* and could not be re-convened.

Second, that the writ of mandamus was applied for after the expiration of the time for contest, and if the relator was too late in giving his notice of appeal and contest, this writ could not avail him to now obtain jurisdiction; it would be a vain thing to issue it; and if in due time, then the court of common pleas had jurisdiction on his own appeal, wherein the contestee had become a party, and the writ could not issue consistent with the substantial rights of such party. * * *

It is true the court also announce that "a contest on appeal to the court of common pleas is the specific remedy provided by statute for the correction of all errors, frauds and mistakes, which may occur in the process of ascertaining and declaring the public will, as expressed through the ballot boxes."

But it is to be remembered this general language was applicable to the facts of that case, wherein the relator had already sought the statutory remedy to recover the office, which his opponent then had possession of upon the certificate, theretofore issued. Clearly then he had an adequate and specific remedy for all issues left of his case.

It is not to be conceded, however, that this position as taken by this court in the case at bar as to the force and effect of the foregoing decisions is without all controversy; it is a serious question as to the full scope of the authority intended by these cases. But, I am of opinion, that the Supreme Court itself maintains the same interpretation of these authorities as here claimed. For in 35 O. S., 64, the State ex rel. Goss v. Randall, as to a certain election of a superintendent of public schools, in the military district of lands, an office which the laws of the State provided for a contest of---and I have not specifically examined to see whether that contest would fall within the statute, or whether by writ of quo warranto, for it is clear that where a statute does not provide for a contest, the writ of quo warranto does apply, and can give a remedy; therefore, whichever it was, would have been ample to determine the right to the office---the Supreme Court discussed it upon the merits of the controversy, and not upon the 14th or 17th O. S., it appearing that the board whose duty it was to canvass the returns had preformed their ministerial duty, and refused to compel them to count returns which had not been returned and delivered as provided by law.

Again, in 38 O. S., 599, the State ex rel. James E. Campbell v. Governor Foster and others, the State Canvassing Board, which was an application to require the respondents to issue a certificate to Campbell as Congressman, instead of his opponent, Henry L. Morey, on the ground of misnomer in certain ballots, and the court investigating the case upon its merits, proceeds to determine it upon the ground of misnomer.

If the 14th and the 17th O. S., had been authoritative statements upon the proposition as claimed by counsel for defendants, they would have been specific ground upon which the court could stand; I do not believe, therefore, that they regarded them as authority, but as *dicta* upon a different state of facts not requiring the court to pass upon the question of the right to direct the clerk to canvass, while yet in the performance of the duty, in the event he evaded a plain duty as ministerial officer; the court seems to have assumed jurisdiction without question, and where there was remedy by way of contest between the two gentlemen in the House of Representatives. Such being the authority, then, in this State

upon the subject, we look elsewhere for specific rulings upon the subject-matter of facts as presented in this court.

In 68 Mass. Rep., 375, C. J. Shaw held, with reference to an election of county treasurer, wherein the County Commissioners were a Board of Canvassers, "the questions are whether upon the return of the commissioners of their report as amended the prosecutor, of this writ, was entitled to a certificate and adjudication that he had the highest number of votes for county treasurer, and whether this question can be inquired into under this process. We are not now to consider whether the county commissioners can be required to place the prosecutor in the office, it may be; that even if he should succeed and show, that he ought to have been declared duly elected, he may be obliged to resort to his *quo warranto* in order to remove the present incumbent from the office before he can be restored; and we understand that an application for such a proceeding is now pending. But we are satisfied that it is competent for this court, on this writ, at the instance of the prosecutor to inquire into the facts and to require the county commissioners to do what is still in their power to do, to declare and certify if such was the fact that the prosecutor had the highest number of votes for the office, as one step, and one important step, toward obtaining his right, without which he could not obtain it."

In 65th Mo. Rep., 48c, the State ex rel. Metcalfe v. Garesche, the court held: "In a proceeding by mandamus, to compel a board of canvassers to count a vote as returned by the officers of election, when it appears that an alteration has been made in the return of the vote, but the canvassers do not know whether it was before or after the return was delivered to them by the officers of election, the circuit court will inquire into and determine what the return, as delivered, actually was, and will compel them to make the count accordingly. Before issuing a writ of mandamus to a ministerial officer the court must ascertain what is his specific legal duty in the premises."

And 29th Ill. Rep., 413, the People ex rel. Fuller v. Hilliard et al., it was held: "The House of Representatives in a State Legislature have no such jurisdiction over the counting of the votes for members as will oust the jurisdiction of the common law courts in proceedings by mandamus against canvassers. The member elected has the right to receive a certificate of election, and if it is refused him and given to another, he may call upon the courts for redress by mandamus. Its sole purpose is to procure the requisite evidence to present to the House, and a *prima facie* right to a seat in it, independent wholly of the question of qualification; and the only means by which this can be obtained is by a compulsory writ of mandamus."

In 10 Oregon, 52, Simon v. Durham, the court held: "when a party injured has been refused a certificate of election by the canvassing board, and they counted unauthorized returns (votes stated on loose sheets, not identified or attested), the writ of mandamus will lie to compel the board of canvassers to make a legitimate canvass of the proper returns."

In 52 Cal., 3, Pacheco v. Beck, the court held that the writ of mandamus will lie to compel the secretary of state to certify the election of a congressman, from returns on file, and to disregard extraneous statements made by the county clerks, whose duty it was to send the election returns to the secretary of state.

19 N. W. Rep., 685 (Neb. Sup. Court Rep., 1884), State ex rel. Whittmore v. Peacock:

"A board of canvassers of election returns have no authority to cast out and refuse to count returns upon their face sufficiently authenticated to show that they were genuine; if they could throw out some they could throw out all, or enough to change the result of the election, and disfranchise a portion of the people, and defeat the will of the majority; but such is not the law.

The board of canvassers have no discretion in the premises. Their duties are purely ministerial, and they may be compelled by mandamus to properly count such returns and complete the canvass.

Mere right of action as by contest is not adequate. It is not speedy and efficient."

In 7 Bush., 523 (Ky. Ct. of appeals), it is held: "The duties of a board of canvassers are merely mechanical or mathematical; they may possibly judge as to whether or not the returns of election are in proper form and legally attested; but after that they must compute the votes cast for the several candidates, and issue certificates of election in accordance with the result. Such duties are purely ministerial, and the officers composing the board may be compelled by mandamus to perform them. The person receiving the highest number of votes is entitled to the certificate of election. The certificate is the evidence of election of the person holding it to the office claimed. As the certificate can not be rightfully withheld from the person receiving the highest number of votes, and as the law provides no other remedy by which it can be obtained, the circuit court in all cases must have power, in which it is improperly refused, to reach the officers composing the delinquent board by writ of mandamus."

And in 36 Wis. Rep., 498, the State ex rel. McDill v. The Board of State Canvassers, etc., "In a proper case this court will require the board of State Canvassers to determine in accordance with law which one of the candidates at an election in this State for the office of representative in congress of the United States is entitled to their certificate of election. In such a case the power of determining the right to the office is vested by the constitution of the United States exclusively in the House of Representatives itself, and this court can not, therefore, go behind the returns and investigate frauds and mistakes and adjudge which candidate was elected, but it can determine whether the returns made to the State Board of the votes cast in any county for such office should be included by the State Board in their canvass and statement of votes cast for said office." Where any such return is void upon its face, it should be rejected by the state canvasses; but if it be upon its face such as the law requires, it must be included by them in such canvass and statement, however false and fraudulent it may be in fact."

"High on Extraordinary Legal Remedies," Sec. 60. "The duty of canvassing election returns and ascertaining the person elected, being, as we have thus seen, a ministerial duty, involving the exercise of no discretion, and properly subject to the coercive action of the writ of mandamus, it follows necessarily that the same rule may be applied to the duty of issuing a certificate of election to the person who has received the greatest number of votes."

Sectoin 61. "The rule as thus stated, in no manner conflicts with the principle heretofore discussed, that mandamus does not lie to compel admission to an office, since the courts have recognized a clear distinction between the two classes of cases. And while the granting of the writ to admit an applicant to an office would necessarily have the effect

of determining the title thereto, no such effect can possibly attach to the writ when applied to compel the issuing of a certificate of election.

"The certificate of election is by no means conclusive as to the right of the office, but is merely evidence of a *prima facie* title thereto, upon which, it is true, the holder may afterwards be enabled to prosecute his right in an other form of proceeding, but which does not of itself carry title or determine the right. In all such cases the courts proceed by mandamus upon the presumption that the counting of the votes and ascertaining the majorities, and then giving certificates of the result, are merely ministerial acts, and that the canvassers from the nature of the case, can have no discretion in determining who is elected, this being a matter of mathematical calculation, or a conclusion to be drawn from the facts, and in no manner subject to the control of the officer upon those facts.

"The granting of the writ under such circumstances neither has the effect of turning out the actual incumbent of the office, nor affecting his rights in any manner, since he is not before the court. It merely places the relator in a position to be enabled to assert his right, which he might otherwise not be enabled to do."

It is manifest that a contest is not an adequate remedy, and the authorities which so hold are, I think, well grounded in reason. The contest, howsoever successful, does not restore the certificate of election which gives *prima facie* title to the office to which the party was entitled, and so has value. It has value, first, in the organization of the Senate. It entitles the holder to participate in the organization of the body in which afterward by contest he may be declared to be the rightful member. Again, it gives him an advantage, if a contest must be made, by casting the burden of proof upon his opponent. And it must be remembered that under the law of this State it is impossible for a legislative officer to contest his office until the body to which he is elected is in session. In other words, he can have no hearing in the contest, until the member who may wrongfully have a certificate has become member of the body. For a county office it is possible that the contest may be determined by the courts, and the rightful occupant have his title determined before the term of office may begin; but such is not the case with the legislative office.

Now, I am clear that the law makes no distinction as to the jurisdiction of the court, whether it be directing the Canvassing Board with reference to their duty concerning the returns as to either a Congressman, a State Senator, a Representative, the Judge of a court or any county officer. It is no encroachment upon their jurisdiction; it directs the ministerial officers who have charge, that they make the count, and how to make it it is to be presumed that one anxious in the performance of his duties, will, if doubtful questions arise, prefer the direction of the court.

By Sec. 6742. R. S., and by all the authorities on the subject, the mere ministerial duties of an officer as provided by law may be enforced by the writ of mandamus. I have found no court holding that any statute, like that of Ohio, gave the Canvassing Board any judicial or quasi-judicial power, or imposed any other ministerial duty upon them; as said by the court in 38 O. S.:

"The statute required the defendants 'to ascertain the number of votes given for the different persons for the office,' and the certificate was to be given to the person so elected.

"We fully concede that the duties of the defendants, in the respect in question were ministerial in their nature. But the performance of min-

It is to be remembered also that this pleading avers that the defendants were not proceeding to count the true and lawful returns, but, proceeding to count illegal and unlawful returns, made wholly without any authority. A liberal construction of the pleadings, as it is my duty to give them under the Code, would hold it was an averment that the board of canvassers were not proceeding to count the true returns, or the returns in fact made by the judges of the election to the clerk's office, but were counting other returns not made by the judges of election to this office I therefore hold that the petition is sufficient on general demurrer, but it is so defective and bad as a pleading, that if any other proceeding is had in the case, it must be amended, either on motion of the defendants or upon the suggestion of the court.

It is to be remembered that this, being a general demurrer, of course, is an appeal to the court to state the law upon the facts as stated in the petition. I have nothing to do as to any specific averments made by counsel as to facts during the argument; they are not before me, simply the petition as amended. It is also proper to remember that there are allegations in the petition, which do not tend to state a cause of action as that there were returns of illegal votes. This court cannot direct them to do a thing which the law does not empower and direct them to do, and, therefore, cannot consider whether the votes are legal or illegal. The demurrer and the motion will be overruled; further time, if desired, will be given. An order will be made restraining the defendants until the circuit court determines the cases of mandamus.

Wulsin & Perkins, Thomas McDougall, E. F. Noyes and W. M. Bateman, attorneys for plaintiff.

Isaac M. Jordan, John F. Follett, for defendants.

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ACT AUTHORIZING TOWN HALL.

[Hamilton Common Pleas, 1885.]

JOHN D. LANGDON ET AL. V. COLUMBIA TOWNSHIP. (TRUSTEES)

1. The Act of April 6, 1885 (82 O. L., 283), authorizing the erection of a town hall in the western precinct of Columbia township, Hamilton county, Ohio, is a special act.
2. This special act, not being expressly inhibited, was entirely within the grant of legislative power to the General Assembly; and that Assembly having already passed a general law investing township trustees with certain functions, some of which are of a *quasi* corporate character, it had the power to pass special and local laws on the same subject.
3. The purpose for which the tax was levied being a public one, the township trustees had power under the constitution to levy it.

MOTION to dissolve injunction.

The suit is by plaintiffs, as electors and tax-payers of Columbia township, Hamilton county, Ohio, for themselves and other tax-payers of said township, to restrain the defendants, the trustees of said township, from levying a tax upon the western precinct of said township, and the county auditor from placing the same on the tax duplicate, for the purpose of erecting a town hall in the village of Pleasant Ridge, in said west precinct, for the sole use and benefit of said precinct, at cost of \$8,000; and also to restrain said trustees from issuing bonds of said township in anticipa-

tion of said tax: on the ground that the levying of said tax and issuing of said bonds are illegal and without authority.

The trustees answer that they are proceeding in pursuance of authority vested in them by law, and also of a special act passed February 6, 1885, by the General Assembly of Ohio (82 O. L., 283), and they set up the provisions of that act, and their proceedings. They allege that the question of taxation, for raising \$8,000 to purchase a site and build a town hall, was submitted to the voters of said west precinct at the spring election, 1885, after 15 days notice, and a majority of the votes cast was in favor of said tax, etc.

It is claimed by the plaintiffs that the acts of the trustees complained of are unlawful and without authority of law; that the act of the legislature, under which they proceeded, is a special act and confers corporate powers, and is, therefore, in violation of sec. 1, Art. 13, of the Constitution of Ohio.

The discussion of the counsel was mainly directed to two propositions or questions:

1. Is the act referred to a special act?
2. Does it confer corporate powers?

HUSTON, J.

1. The act in question is undoubtedly a special act. Such is the nature of terms. It has only a local application—to Columbia township in this county, and especially to the western precinct thereof.

It has frequently been held by our Supreme Court that "the constitution does not inhibit appropriate local or special legislation. Its inhibition is against granting corporate power by such legislation." *State v. Mitchell*, 31 O. S., 592, 608; *State v. Covington*, 29 O. S., 102, 111; *State v. The Judges*, 21 O. S., 1; *Cricket v. State*, 18 O. S., 9.

In 29 O. S., 111, the court, referring to sec. 25 of Act 2, of the constitution, which provides: "All laws of a general nature shall have a uniform operation throughout the State,"—say, that this section "does not forbid local legislation;" * * * "The power of the general assembly to pass local and special laws is embraced in the general grant of legislative power; subject, of course, to such inhibitions and limitations as are found elsewhere in the constitution. But section 26, article 2, was not intended as a limitation on the power."

2. The important question in this case is: Does this special act confer corporate powers? Or rather, the question more properly put, is: Does this special act confer corporate powers within the inhibition of sec. 1 Art. 13, of the constitution? This section provides: "The general assembly shall pass no special act conferring corporate powers."

In order to arrive at a correct answer to the question propounded, it is proper to consider the special act referred to, its subject-matter, its relation to the general laws as to townships and their trustees, and what additional powers it confers upon the trustees of Columbia township.

For special act, see 82 O. L., 283. For general laws pertinent to this inquiry, see secs. 1376, 1388, 1443, 1479, 1480, 8540, Revised Statutes.

What are townships, within purview of the constitution and the laws applicable to same?

They are defined by our Supreme Court, "as mere sub-divisions of the State for political purposes as mere agencies of the State in the administration of public laws." *State v. Powers*, 38 O. S., 54, 62; refers

to *State v. Cincinnati*, 54 O. S., 18 (37); *Hunter v. Mercer County*, 10 O. S., 515, 520; *Hamilton Co. v. Mighels*, 7 O. S., 109.

"Civil townships have always existed in this State for the purpose of local administration." *Bd. of Ed. v. Ladd*, 26 O. S., 213.

Counties and townships are provided for in the tenth article of the constitution, not as corporations, but as political organizations. (*Trevitt v. Converse*, 31 O. S., 62). "They are denominated in the books, and known to the law, as *quasi* corporations, rather than as corporations proper." *Beach v. Leahy, Treasurer*, 11 Kan., 29.

"Such organization is invested with certain powers delegated to it by the State for the purposes of civil administration; and for the same purpose it is clothed with many characteristics of a body corporate." *Hunter v. Mercer Co. supra*; *Hamilton Co. v. Mighels, supra*.

Article 13 of the constitution is headed with the title "corporations." It relates wholly to corporations proper. In the second section provision is made for the creation of corporations "under general law."

Section 6 provides "for the organization of cities and incorporated villages, by general laws."

The whole article, it is held, was intended to apply to all kinds of corporations proper--private or municipal."

The court, in *State v. Cincinnati*, 23 O. S., 445, 466, referring to sec. 1 of said article, say: "That no distinction can be made, under this section of the constitution, between private and municipal, has already been determined by this court in the case of *State ex rel., etc., v. Cincinnati*, 20 O. S., 18."

And in case last cited, the court adopts the language of Judge Ranney in 15 O. S., 21, *Atkinson v. Marietta R. R. Co.*, in reference to the 1st and 2nd sections of said article 13, to-wit: "These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the General Assembly from either creating corporations, or conferring upon them, corporate powers, by special acts of legislation." And the court then announced the following propositions as impregnable:

"1. The General Assembly cannot, by special act, create a corporation.

"2. It cannot, by special act, confer additional powers upon corporations already existing.

"3. In the purview of these propositions and of the constitutional provisions on which they are based, there is no distinction between private and municipal corporations."

Judge Brinkerhoff, in the concluding paragraph of his opinion, deemed it proper to intimate, although the question was not involved in that case, that township and county organizations were not included in the category with municipal and other corporations proper, and cites the case of *Hamilton Co. v. Mighels, supra*, where it was held, "that a county is not properly a corporation, but that 'it is at most but a local organization, which for purposes of civil administration, is vested with a few functions characteristic of a corporate existence.'"

This intimation of Brinkerhoff finds explicit affirmation by the Supreme Court in the recent case of *The State v. Powers*, 38 O. S., 54, 61, 62. This is the latest expression of that court on the question we are considering, and is decisive.

The case was a proceeding in *quo warranto*, by the state against the defendants, who assumed to act as board of education of a certain school

district in Huron county, Ohio, under a special act of the General Assembly creating such district, by consolidating into one, the New London township school district, and the New London village school district.

By a general law, boards of education of school districts were declared to be, "bodies politic and corporate." (Sec. 3971 R. S.)

By like general law; "Every civil township * * * a body politic and corporate" for certain purposes (Sec. 1376 R. S.)

It was claimed in that case, that the act creating said school district, being a special act, assuming to confer corporate powers, was in violation of sec. 1, art. 13, of the constitution. (Here read as directly in point from the text of the decision, all of the paragraph commencing on page 61, and the first and second paragraphs on page 62. Also read fully from decision in 11 Kansas 26, *et seq.* therein quoted.) *Beach v. Leahy*, Treas., etc., 11 Kansas, 23 (1873.)

Injunction by certain tax-payers of school district No. 2, Noosho county, to restrain the county treasurer from collecting certain taxes to pay bonds issued by the board of that district for purpose of erecting a school house. The bonds were issued under a special act. *Held*: That said act did not conflict with sec. 17, art. 2, nor sec. 1 of art. 12, of the State constitution. The former provides that, "In all cases where a general law can be made applicable, no special law shall be enacted;" and the latter forbids the legislature to pass "any special act conferring corporate powers."

It will be observed, that the court attach no weight to the fact that these organizations, these political subdivisions of the State---such as townships, and school districts,---are declared in the statute to be bodies corporate.

We take it, therefore, from these authorities, that townships are not within the reason or meaning of the inhibition of sec. 1, art. 13, of the constitution.

The cases relied on by the plaintiffs involve special acts conferring corporate powers on private or municipal corporations, which we have seen, are clearly within the inhibition of said sec. 1, art. 13, and are not, therefore, applicable to the question at issue in this case.

We conclude, that the special act involved in this controversy does not conflict with the constitution.

It follows, that this special act, not being expressly inhibited, was entirely within the grant of legislative power to the General Assembly. And that assembly having already passed a general law investing township trustees with certain functions, some of which are of a *quasi* corporate character, it had the power to pass special and local laws on the same subject.

The general and special acts may even conflict, and yet both stand.

In 39 O. S., 628, 632, *Com'rs v. Board of Pub. Works*, the court say: "The decided weight of authority supports the proposition that when there is a general act and also one local and special on the same subject, in conflicting terms, neither necessarily abrogates the other, but both are permitted to stand together, and it is immaterial which is of the later date."

633. "If the legislative intent that the general law shall supersede the local and special act, is clear, it will, of course, prevail."

I do not find any material conflict between the special act in this case and the general law. It is claimed that the general law requires thirty days' notice, and the special act only fifteen days notice. Where the town

hall is to cost more than \$2,000, the general provision (Sec. 1479) for submitting the question of taxation, etc., to the voters, requires only ten days notice. This special act, for similar purpose, provides for fifteen days notice. No doubt the Trustees of Columbia township could have proceeded under the general law,---but the special act fixes certain details as to the tax and bonds, the site of hall, etc.

A further question is raised in the argument, as to the constitutional power of the trustees to levy a tax for the purpose set forth in the special act. I see no difficulty here.

By constitutional implication, sec. 5, art. 8, a township may contract debts. The General Assembly has provided by general law for what purposes it may incur debts, and express power of local taxation, "for police purposes" is vested in the trustees of townships by sec. 7 of art. 10 of the constitution.

In the case of *Cass v. Dillon*, 2 O. S., 607, 622, the Supreme Court, in speaking of this power of taxation in municipalities of the state, and especially referring to the county, says: "There is no express provision that a county may make road, or contract a debt, yet no one will doubt for a moment that it may do both. Indeed, its power to contract debt is recognized, beyond even the authority by law." (Sec. 5 of Art. 8.) * * "If it can thus incur debts it may, of course, levy taxes to pay them; notwithstanding its only express grant of the taxing power is, by art. 10, section 7, for 'police purposes.' The same thing may be said of townships, cities, towns, and villages."

Of course, the taxation must be for public purposes, 23 O. S., 22, *Taylor v. Ross Co.*

The purpose for which the tax is levied by these trustees, is unquestionably a public purpose.

The motion to dissolve the injunction will be granted.

[Clark Common Pleas, November 12, 1885.]

WESTERN UNION TELEGRAPH CO. v. CHAMPION ELECTRIC LIGHT CO.

An electric light company will not be enjoined from putting wires within three or four feet of plaintiff's wires, if the bulk of evidence is against sensible diminution of current by induction, and the linemen will not be in danger, if careful, except certain work, when defendant's current must, on notice, be stopped. The danger from breaks, etc., during storms, is too uncertain to consider. But the injunction must be with these limitations, and with leave to move to modify if actual experiment shows injury.

APPLICATION for temporary injunction.

WHITE, J.

The petition charges as grounds of complaint. 1. That the erection and maintenance of carrying poles for stringing its electric wires thereon by said defendant along the south side of Main and other streets in Springfield, Ohio, where plaintiff has its telegraph poles and lines, and parallel thereto, will cause great and irreparable damage to the plaintiff and its property in this, to-wit:

That it will destroy the property and imperil the lives of the operators of the plaintiff in its various offices, by communicating to the wires of the plaintiff very powerful electric currents, sufficient to instantly ignite the inflammable materials necessarily used in the offices of the plaintiff, melting the machinery and destroying the same---also will imperil the lives of its linemen in prosecuting their work, in coming in contract with the electric light wires.

Also that the construction of defendant's wires parallel with plaintiff's wires, impairs, by deduction the use of the wires of the plaintiff, and renders them wholly inoperative and useless because of their proximity thereto, and destroys the insulation of plaintiff's wires, and conducts the current of electricity to the ground.

That the defendant, in so doing, is acting without authority of law and against the protest of plaintiff.

Wherefore it prays a preliminary injunction restraining defendant from so doing, and that on the final hearing such injunction may be made perpetual.

Upon presentation of this petition I was requested to allow a temporary injunction as prayed, but in accordance with my rule when the injunction asked interferes with a public enterprise, I decline to allow an injunction on the petition, though the facts stated therein were positively verified, but set the application on last Monday and allowed an injunction pending the application. On Monday the defendant appeared and filed its answer asserting five defenses thereto:

1. Admitting that plaintiff and defendant are each properly incorporated; that plaintiff acquired a right to locate a line of its poles on Limestone street, from Washington to Main street, in said city of Springfield, and that it has erected certain poles on streets other than Limestone (but without authority from said city) which, with the wires, are necessary for its business. Defendant admits that it has erected a few poles on the south side of Main street, and on said poles, with others to be erected on said Main street, expects and desires to place electric wires to light the lamps of the defendant, and that to a greater or less extent said poles and wires would be located on the south side of Main street and run parallel with the said wires of plaintiff. Further it denies each and every other allegation of the petition.

2. Further answering, the defendant alleges in substance that it has a contract (limited) with the city counsel of the city of Springfield, for lighting the streets of the city in the night season, and for the purpose of executing such contract and of lighting said streets, it is authorized by the city counsel, by resolution, to erect its poles and stretch its wires at such points as might be necessary and desirable upon Main street and other streets and alleys of said city, to operate its system for the purposes stated and the convenience, comfort and safety of the citizens of said city, and that the defendant, so far as the work has been done and is yet to be done, will erect such poles and stretch such wires in a reasonable and proper manner, causing the least inconvenience possible to the plaintiff, and keeping as far distant from its property as would be possible and practicable.

3. That the plan adopted by the defendant is to provide for a double line of wires on each pole, both an outgoing and return wire and which wires, at the nearest point for a short distance only, will be about 3 or 4 feet distant from plaintiff's wires, while much the greater distance, six feet or more of space will separate said wires; that such wires of the

defendant will be thoroughly insulated by the best processes, and will cause no appreciable induction on plaintiff's wires, and be of sufficient strength to prevent breakage, while at no point will the wires of the defendant be nearer the poles of the plaintiff than about four feet, the cross arms provided by the defendant being nine feet in length.

4. Further answering, defendant says that it would be perfectly practical for the plaintiff to protect its wires and employees by adopting proper and known safe guards, which are described, and consist of rubber casing, tubes, etc.

5. The defendant further says that it has an authorized capital of \$50,000 with \$40,000 thereof paid in; that it does not owe \$200, and is entirely solvent and responsible, and able to respond for any damage it occasions plaintiff, and that the city of Springfield is a necessary party to this proceeding.

The plaintiff also, at the same time, asks leave to file what is entitled a supplemental petition, but which is in fact a supplement and amendment to its petition, in which it charges that the city counsel attempted to grant to defendant, by a resolution adopted at its November 3, 1885, session, such powers and authority to erect its poles at such points as may be necessary or desirable upon Main street and the other streets and alleys of said city, which is an extraordinary grant and was beyond the authority of the city counsel to give, and further cites several ordinances of such city counsel granting authority to plaintiff to erect and maintain its poles and wires through and over the streets of the city of Springfield, and that the plaintiff has been maintaining its poles and wires in said city for over twenty-five years, and has always conformed to the regulations and ordinances of said city.

The answer and supplemental petition materially change the situation from what it was alleged to be in the petition. There the defendant Electric Light Co. was alleged to be proceeding to erect poles and string wires over the city, streets and alleys, without authority from the city counsel, the body having charge and control thereof. And it had no such authority in fact, except as it might be implied from its lighting contract with the city counsel.

If the defendant had no authority to establish its poles and string its wires over and on the streets of the city, a court of equity would probably restrain such unauthorized acts upon the petition of any resident tax-payer affected thereby.

The city counsel of a city of the class of Springfield, is vested by law in Ohio with the control and management of the streets and alleys thereof. As incident thereto, it grants or refuses authority and permission to street and other railways, telegraph and electric light companies, to use the same so far as necessary for laying of tracks and erecting poles and maintaining the same thereon. Such grant does not affect the private rights of any individual property owner in the street, which remains unimpaired thereby, and over which the counsel of the city have no such power or authority.

The city counsel having legislated upon this subject, its action will not be reviewed by the court here. Therefore that element disappears from the case; but the private rights of the plaintiff in its property remain unaffected by such action.

The plaintiff and the defendant severally hold and exercise the delegated power of eminent domain, as corporations, so far as necessary to accomplish the purposes of their organization respectively. Such power

enables either of them to appropriate individual property rights by proper proceedings in condemnation, upon making compensation therefor.

The Western Union Telegraph Co. appears in this case as owning and operating a valuable and extensive telegraph system, with offices established, poles erected and wires strung over, through and on the streets of the city of Springfield.

A telegraph company operating a complete and extensive telegraph system with established poles, lines, instruments and offices, will be presumed to be owners thereof, and possessed of the right to use and maintain the same uninterruptedly, in a proceeding brought by it for a preliminary injunction to restrain an interference therewith by a rival company, unless the same is directly and clearly denied.

It may therefore be assumed for the purposes of this hearing, although partially denied by the answer, that the plaintiff has heretofore lawfully established and now so maintains its poles, wires, offices, etc., on and over the streets of the city of Springfield. Any unauthorized threatened invasion of such rights of the plaintiff in so operating its system of telegraphy would be unlawful, and if it materially injuriously affected the same, destroyed or impaired its property, a court of equity would be justified in preventing the same by the extraordinary remedy of injunction, upon the principle that private property cannot be taken except in accordance with law and after compensation is made therefor.

If the rights and property sought to be protected were tangible and real, as a railroad and its operations, there would be comparatively little difficulty in applying the principle stated; but when, as here, the actual visible property consist only of the poles and wires, and are comparatively of slight importance, but the operation of electricity thereon, which lends the real value to the enterprise, is intangible, and in a measure unknown, it becomes vastly more difficult and unsatisfactory, because of the uncertainty of the extent to which protection should be afforded.

The plaintiff does not assert its claim to an injunction herein as a protection to any alleged right to string additional wires upon poles already established; but only for the protection of its system of telegraphy as already in operation.

It says that it is necessary that no other line of wires should be run on the same side of the street with its telegraph wires, for the reasons already stated.

Its petition herein is verified positively, and indicates that its claim is well-founded; but the defendant's answer denies all such indication, and is also verified positively.

The plaintiff produces the affidavits of seventeen witnesses in support of its claim, and the defendant produces the affidavits of forty-two persons, each of which substantially denies that any danger will result to the plaintiff's rights or property, if said electric light wires are properly insulated, and are strung at a distance of three feet or more from the plaintiff's wires.

The affidavits are made by two classes of persons. One class consists of scientific men, skilled in the science of electricity, who give opinions therein as to the effect of the electric currents passing over electric wires in proximity to the telegraph wires. All agree that there is a point in distance between said wires at which both said wires may be strung without serious, or any inconvenience or danger. The affidavits produced by the defendant fix such point at three feet or less, and one affidavit,

that of Wm. J. Warrance, produced by plaintiff, fixes such point at the same distance. Others of plaintiff's affidavits fix the point at greater distances, and some even go to the extent of saying the lines of wire ought not to be strung on the same side of the street.

The other class of affidavits tend to show that in New York City, Brooklyn, Detroit, Cleveland, Dayton, Cincinnati, and many other places, the wires of the electric light companies, telegraph companies, telephone and fire alarm companies are strung on the same poles, and within close proximity, even nearer than two feet, without inconvenience or danger.

I am unfamiliar with the effects of electricity when run upon wires in telegraphy and electric lights respectively, and am, therefore, obliged to rely upon these affidavits in determining to what extent the defendant shall be restrained in stringing its said wires.

2. That the stringing of such wires in that manner on the ends of cross bars nine feet long, on poles at that distance below the plaintiff's wires will not endanger the linemen of plaintiff in repairing plaintiff's lines, if proper care is used in ascending the plaintiff's poles, except at times when it may become necessary to substitute new wires for old wires or to repair breaks, when the operation of the electric light wires on notice should be stopped.

3. The danger from breaks and falling wires during storms is so uncertain and indefinite that a court cannot take that into consideration.

A temporary injunction will be awarded with these limitations, if plaintiff desires, though the defendant asserts that it does not propose to violate such restrictions.

I do not intimate what would be done in the final hearing, but only intend to give effect to the present decision. On final hearing if the plaintiff finds itself to be injured by such proximity of the wires of the defendant within proper rules, the court can make such order as will be proper and right.

And, indeed, this decision does not prevent plaintiff from making a motion to modify the order, if on actual experiment it is shown to work injuriously.

Oscar T. Martin, for the Western Union Telegraph Co.

S. A. Bowman, for the Champion Electric Light Co.

[Hamilton Common Pleas, November 3, 1885.]

† THOMAS A. HARDMAN V. CINCINNATI & EASTERN RY. CO. ET AL.

1. A denial of knowledge, in an action to enforce stockholder's liability, is too indefinite, for the defendant is presumed to know whether he is a stockholder.
2. A denial that he is a stockholder now, or when the notes were made, is demurrable, for it does not deny as to the time when the debt was incurred.
3. A denial of ever having subscribed to stock, or had any in his possession, is demurrable, for he may have been a stockholder in other ways, as by transfer.

† See also *post*, 15 B, 164. *Contra*, *Bronson v. Schneider*, 49 O. S., 433.

MAXWELL, J.

In this case three questions are submitted for consideration. The action is one to assess stockholders of the Cincinnati & Eastern Railway Company upon their individual or statutory liability. Ferris, who is a judgment creditor, has filed an answer and cross-petition in which he sets out the names of stockholders and the number of shares each owns. To that cross-petition several answers have been filed, upon which the present questions arise:

1. Benedict Frankel, one of these alleged stockholders, files an answer, in which he says: "He has no knowledge of the facts in said supplemental cross-petition stated, except as he is informed of the same, and therefore, for want of knowledge denies each and every allegation in said supplemental cross-petition contained."

To this Ferris has filed a motion to compel Frankel to make his answer more definite and certain by stating whether or not he ever was a stockholder of the defendant corporation.

It is clear, that under our code a defendant is permitted to plead that he has no knowledge of facts alleged by plaintiff; but it is plain this rule extends and ought to be extended only as far as the facts to be answered are not known to the defendant, or cannot be presumed to be within his knowledge. When facts are within a defendant's knowledge, or ought to be within his knowledge, he ought to plead positively. Whether the defendant be a stockholder or not, is presumed to be within his own knowledge, and he should admit or deny it positively. The motion will be granted.

2. To the same answer and cross-petition the defendants Mauss Bros. & Co., have filed an answer, pleading: "They deny that they are stockholders of the said defendant. * * * They further say that they were not stockholders in said company at the time the said notes set up in said answer and cross-petition were executed and delivered, nor were they stockholders at the time of the recovery of said judgment set up in the petition of plaintiff."

There is a demurrer to this answer. The answer is not sufficient; it implies that the defendants were stockholders at some time. It is not a sufficient defense that they ceased to be stockholders when the notes were given or the judgment rendered because the execution of the notes or rendition of judgment presupposes a liability, upon which stockholders can be assessed in the event of the insolvency of the corporation and its failure to pay such liability. The answer only goes to the time the notes were given or the judgment rendered, and therefore is not sufficient. The demurrer to the answer will therefore be sustained.

3. There is also a demurrer to the answer of James Mack filed to the same cross-petition of Ferris. This defendant pleads: "James Mack, one of the defendants in the above entitled cause, says that he never had any stock of the said corporation in his possession, and that he never subscribed for any of said stock."

This answer is evasive. The defendant may be a stockholder without ever having had any stock in his possession. He may never have subscribed for stock and yet be a stockholder. *Non constat* but that he became a stockholder by a transfer of stock from an existing stockholder. Moreover there are other methods of becoming a stockholder than by a subscription to stock. To say, therefore, that he never subscribed for

stock or that he never had any stock in his possession, will not constitute a good defense. The demurrer is sustained.

Simrall & Mack, for Ferris — cited upon the motion, 2 Bates Pl. and Pr., p. 804; 11 Ohio State, 183; 2 Divey, 223; 4 Sandford, 708; 12 How. Pr., 153; 15 Ibid, 186; 8 Ibid, 28; R. S. Ohio, sec. 4973. Upon answer of Mauss Bros. Co: Brown v. Hitchcock, 36 Ohio St., 667; Bullock v. Kilgour, 39 Ibid, 543; Wheeler v. Faurot, 37 Ibid, 26; 9 Am. Law Rec., 28; Youmans v. Caldwell, 72; 4 Ohio State, 78. Upon answer of Mack: L. R., 4 ch. Div., 140; 102 U. S., 314; Thompson's Stockholders, sec. 106; 160 to 175, Taylor's Private Corporations, sec. 740; 44 Ga., 597; 18 Ill., 190; 10 Ind., 499; 24 Me., 256; 83 Ind., 173.

J. B. Frankel, for Benedict Frankel.

Wm. E. Jones, for Mauss Bros. & Co.

James R. Mack, for J. Mack.

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MARRIED WOMEN.

[Montgomery Common Pleas, November 23, 1885.]

CITY NATIONAL BANK V. ANNA C. HOLDEN ET AL.

Since the amendment of 1884, a married woman can bind herself, by contract, in the same manner and to the same extent if unmarried. A petition need not, therefore, aver coverture, a separate estate, or that contract was with reference thereto, but may be declared on as against a *feme sole*, and personal judgment may be rendered and enforced.

The following is the substance of Judge Elliott's decision as to the present status of the married woman question. The action was on two promissory notes, dated respectively April 27 and May 29, 1885, executed by Anna C. Holden, George W. Holden, Margaret E. Newcomer, and Joseph Newcomer, and owned and held by the bank. The petition sets out the notes and the amount due thereon, and demands judgment against all the defendants. No defense is made by George W. Holden and Joseph Newcomer, Anna C. Holden and Margaret C. Newcomer file an answer setting up the simple fact that they are married women. Plaintiff demurred to this answer as not setting forth any valid defense. The petition does not aver, as is the usual practice, that Anna C. Holden and Margaret E. Newcomer are married women, or have a separate estate, or made the contracts—that is, executed the notes—for the improvement or repair or benefit of their separate estates, or for their own benefit, or with the intent to bind their separate estates. In short, the notes are declared on precisely as if the two women were unmarried.

The point sought to be made by the answer is as to whether an action can be maintained and a personal judgment rendered against a *feme covert*, unless it is averred and shown that the claim sued on is one against her arising upon contract concerning her separate estate or property, as provided in sec. 3108 and following sections, Revised Statutes; and the further point that if it is not such a contract, but is her mere general engagement, whether she must not be sued in equity and the necessary averments and proof made to show her coverture, that she has a separate estate, and that she intended in making the contract to bind her estate.

In an elaborate opinion, reviewing the authorities somewhat at length in Ohio and elsewhere, the court sustained the demurrer and entered a personal judgment against each of the defendants—holding:

1. As the law now stands, a married woman may, in her own name, make contracts and bind herself to the same extent, and in the same manner as if she were unmarried.

2. With respect to her contract obligations, she may sue and be sued as if *sole*, and the like proceedings be had and judgment rendered and enforced as if she were unmarried.

3. In such suit it is not necessary to aver or prove that she is *feme covert*, or the owner of a separate estate, or that she contracted the debt or obligation with reference to her separate estate, or for its benefit.

Sections 4996 and 5319 of the Revised Statutes, prior to the recent amendments, are substantially the same as sec. 28 of the old code, and provided in substance that where the action concerns a married woman's separate property, or is upon her written obligation, concerns business in which she is a partner and the like, she might sue and be sued alone, in which case "the like proceedings shall be had and judgment may be rendered and enforced as if she were unmarried, and her separate property and estate shall be liable for the judgment against her."

In *Allison v. Porter*, 29 O. S., 136, 137, it was held that the suit in that case was not brought on a contract, which the defendant, a married woman, was authorized to make by the statute with respect to her separate estate, and therefore an action at law was improper.

In *Levi v. Earl*, 30 O. S., 147, it was decided that upon a contract made by a married woman as authorized by secs. 3108, etc., of the Revised Statutes, she is liable to an action at law, and to a judgment and execution as a *feme sole*, but all her other debts and engagements are void at law, etc.

In *Patrick v. Little*, 36 O. S., 79, it was held that under the provisions of the last named statutes and in the light of sec. 28 of the code as amended in 1874, when the contract obligation is to pay for services rendered or money advanced for the benefit of her separate estate, it is not error to render a personal judgment against a married woman.

These decisions settled the law in Ohio to be that wherever a married woman might be sued alone, the like proceedings might be had and judgment rendered and enforced as if she were unmarried.

The instances in which she might contract so as to render her liable to an action at law, were provided for in sec. 3108 to 3111, Revised Statutes, inclusive, and refer to contracts for the renting, repairing, improving and cultivating her separate property, and the making of contracts, in cases where her husband deserts her, for her own labor and that of her children. She might in case of desertion of her husband, etc., be decreed the rights of a *feme sole* as to acquiring, possessing and disposing of property, real and personal, and of making contracts and being sued thereon, and of suing and being sued in her own name. These various statutes and code provisions enumerate the cases in which a married woman could make contracts and assume obligations on which she might sue or be sued as if she were unmarried, previous to the recent amendments.

Sections 3996 and 5319 were amended in 1884, 81 vol. O. L., p. 65, so that a married woman now "shall sue and be sued as if she were unmarried," and in such case "the like proceedings shall be had and judg-

ment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment rendered against her, etc."

It is manifest that whatever she is authorized by statute to contract, she must sue or be sued alone, and the same judgment follows with the like consequences as if she were unmarried. When and in what instances is she authorized thus to contract? Section 3108, Revised Statutes, as amended in 1885, vol. 82, O. L., p. 131, defines what shall constitute her separate property.

Section 3109, as amended in 1884, vol. 81, p. 209, provides that "the separate property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of her husband, or be in any manner conveyed or incumbered by him, and she may in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried."

Section 3110 exempts the husband from liability for the debts of the wife existing against her at marriage, or for any contract made or tort committed by her during coverture.

Section 3111 simply authorizes the wife, in case she is deserted, etc., by the husband, to make contracts for the labor of her minor children. It would manifestly be doing violence to the plain wording of these sections, as well as to the evident intention of the legislature, to hold otherwise than that all restrictions upon the power of a married woman to contract, as if single, is removed.

It will not do to say that her authority to contract is confined to matters relating to her separate estate and property.

That is not the language of sec. 3109. "She may * * * contract to the same extent and in the same manner as if she were unmarried" is the form of phrase used. The word "and" preceding this clause does not indicate antagonism, but rather a continuation of the subject and the conjunction of additional authority.

In other States, where the language of their statute is similar to ours, the view here contended for by this court is sustained.

In vol. 19 American Law Review, p. 359, will be found an able and well considered article on this subject from the pen of David Stewart Esq., who is an author of a work on Husband and Wife. Two propositions are quoted here, both of which are abundantly sustained by authority. On page 369 "when a statute authorizes a married woman to contract 'with reference to,' her separate property, her contracts to be valid must be with reference to her separate property."

The next is on page 371, "under a statute expressly enabling a married woman to contract as if unmarried, she may take contracts generally, entirely unaffected by her coverture, but it is doubtful if she can contract with her husband." This is manifestly the law on the subject. When the statute say she may contract as if *sole*, it is presumed to mean it; 104 Ills., 278; 52 Md. R., 297.

The South Carolina Statute is similar to ours, and the courts of that State have given the same construction and held that a married woman, on her general engagements, may be sued to judgment as if *sole*. *Petzer v. Campbell*, 15 S. C. R., 581. In 124 Mass., 108, in the case of *Major v. Holmes*, under a statute authorizing a *feme covert* to contract as if she were *sole*, it is held that "this statute, in the broadest terms, enables a married woman to make contracts oral and written, sealed and unsealed, in the same manner as if she were *sole*, and does not require that her contracts should enure to her own benefit." In Iowa the statute is no

broader than the Ohio one; and in *Spafford v. Warren*, 47 Iowa 47, the same broad and liberal view of the law is taken.

Gottschall & Brown, for the City National Bank.

Haynes & Swadener, for defendants.

XV
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TRUSTS.

[Cincinnati Superior Court, General Term.]

IN RE SOUTHERN RAILROAD.

To declare a trust completed, and the title transferred to the beneficial owner, requires litigation, with proper parties and pleadings. It cannot be done in a simple proceeding to fill vacancy occasioned by death of a trustee.

FORCK, J.

A motion has been made for the appointment of a trustee to take the place of Miles Greenwood, deceased; and also a motion to leave the place vacant as the trust has expired.

The ground for the motion to refrain from appointing is, that the trust for which the trustee is to be appointed is completed. The trust being at an end, the purpose of the trust being accomplished, the trust is now a dry trust, and the title should be transferred to the beneficial owner, the city, and the management to the proper officials of the city.

Now, in order to declare the trust determined, to order a transfer of title to the city, and of management to other officials, would require litigation. There must be a suit with parties and pleadings. There must be a judgment in such form as to be a subject for review.

It would be embarrassing to express an opinion on a suit before the suit should be instituted. But counsel filing the motion are entitled to have a ruling upon the motion, and a statement of the reason for the disposition of the motion.

Now the legislature, last April, passed an act authorizing the trustees of the Southern Railroad to use part of a fund of \$300,000 in improving land already acquired, or thereafter to be acquired, by purchase or lease, for the purpose of completing the terminal facilities of the railroad. The legislature, last April, recognized the trustees as still in office, and imposed a duty yet to be done.

In the face of that statute we can not now say that this trust is fulfilled.

We refrain from expressing any further opinion upon the existence of the trust, as we have abstained from forming any further opinion either in one way or the other.

The court is called upon, therefore, to appoint a trustee to fill the vacancy. We have been largely aided by the suggestion of many names and the recommendations of many persons. Of course, where so many names are presented, there are individual preferences. We have consulted as to the various persons and their special qualifications, and after no little deliberation have finally all agreed upon the appointment of Mr. John Carlisle, as trustee, to fill the vacancy occasioned by the death of Mr. Miles Greenwood.

Harmon, J. & Peck, J., *concur*.

E. W. Kittredge, appeared for motion.

8

DYING DECLARATIONS.

[Cincinnati Superior Court, General Term.]

JOHN COSGROVE, ADMR., v. HENRY SCHAFER.

In an action under the statute for wrongfully causing death, dying declarations of the deceased are not admissible, although defendant admits killing the deceased, and the evidence tends to show facts sufficient to justify a charge of homicide.

HARMON, J.

Defendant being sued under the statute for wrongfully causing the death of plaintiff's intestate, admitted having purposely shot him, but averred that he did so in self defense. Plaintiff, having introduced testimony tending to make out a case of criminal homicide, offered in evidence the dying declarations of the deceased as to the circumstances of the killing, which the court excluded.

A reversal of judgment on a verdict for defendant is sought on this ground only.

It is conceded that the evidence offered would be competent in a criminal prosecution based upon the same facts, and if its admission therein were because of its inherent value under the principles of evidence, the argument would be unanswerable that it should also be admitted in a civil action in which the only issue is exactly the same.

But it is not. Such testimony violates two of the cardinal principles of evidence in that it consists of unsworn declarations, and no opportunity given to cross-examine the defendant. Conceding it to be an exception not justifiable on principle, its admission is justified in criminal cases only on grounds of policy. Gr. Ev., sec. 156; Mort. Cr. Ev., sec. 576; Best on Ev., sec. 505; Queen v. Rothing, 8 Cox C. C., 300; People v. Davis, 56 N. Y., 95; Wooden v. Wilkins, 39 Ga., 223.

Those grounds do not exist in civil cases of any sort, and although they might be said to exist to some extent, at least in all criminal cases, the admission of such testimony is strictly limited to prosecutions for homicide only. State v. Harper, 35 O. S., 78; Railing v. Commonwealth, 20 Pa. Rep., 667.

In actions of this class such testimony has been held inadmissible, though in none of them were the facts sufficient to justify a charge of homicide. Walden v. R. R. Co., 19 Hun., 69; Daily v. R. R., 32 Conn., 356.

The exact question here presented seems to be a new one, but, in view of the nature of this exception to the rule excluding hearsay evidence, and of the jealousy with which it is allowed even in criminal cases, we do not feel authorized to extend it to this case.

Judgment affirmed.

Force & Peck, JJ., concur.

8

[Cincinnati Superior Court, General Term.]

MERCHANTS' NATIONAL BANK v. NOTTINGHAM MANUFACTURING AND SUPPLY CO. ET AL.

For opinion in this case see 6, Dec. Re., 1237, (s. c. 14 A. L. R., 425.)

PUBLIC CONTRACTS.

50

[Cuyahoga Common Pleas, 1885.]

†FRANCIS J. WING V. CLEVELAND (CITY) ET AL.

A Board of Fire Commissioners, authorized by law to make contracts amounting to less than \$500, without advertising, but bound to advertise for bids for all contracts amounting to a larger sum, had advertised for bids for hose amounting to about \$4,000. On being enjoined by court from entering into any contract under that advertisement, the board, at the advice of the city solicitor, contracted with the same parties who, under their bids under the advertisement, would be entitled to the contract, for the hose in successive purchases of less than \$500 each, and accepted and paid for the hose. *Held*, that this action on the part of the board was an evasion and violation of the injunction, and unlawful.

BLANDIN, J.

The case of Francis J. Wing against the City of Cleveland et al. was heard and submitted to the court on an order to show cause why the defendants, William H. Bayne, James S. Hartsell, James Johnston, James D. Shannon and Conrad Wagner, who constitute the board of fire commissioners of the city of Cleveland, should not be punished for contempt of court in disobeying the injunction of the court. The petition in the case was filed on July 13, and after reciting that these defendants were members of the board of fire commissioners of this city, and that the plaintiff had made application in writing to the city solicitor requesting him to bring an action to enjoin these commissioners from the execution and performance of a certain contract, which, it is alleged they were about to enter into, and upon the city solicitor's refusal to do so, that the plaintiff, as a tax-payer of this city, says he brings this action. And he recites that the board of fire commissioners had caused a certain advertisement to be published in a newspaper in this city, soliciting proposals for 4,000 feet of 2½ inch hose for the use of the department. It recites further that this advertisement having been published, proposals were received from various parties, including among others, one from the American Fire Hose Co., and one from the Fabric Fire Hose Co., by which they proposed to furnish hose for 95 cents per foot, other companies, for other brands of hose, proposing to furnish for less prices such brands as they proposed to furnish.

But it is claimed in the petition, that the American Fire Hose Manufacturing Co., and the Fabric Fire Hose Co., had not made the lowest and best bid, and that notwithstanding that, the fire commissioners were about to, and unless restrained, would enter into contracts with these two bidders for the furnishing of the hose which they had sought in this advertisement, and that they had received proposals for. It alleges further, that the action of the board was irregular and unlawful, and that by reason of that fact these contracts, if carried out and executed by the board of fire commissioners, would result in an unlawful diversion of the funds of the city, and that as a tax-payer he would thereby suffer an injury, and thereupon asks the court to restrain the defendants from the execution and performance of the said pretended awards and contracts, and submitting the same for the approval of the council until further action of the court, and that, upon hearing, they be permanently enjoined to the same effect.

On filing this petition a temporary injunction was allowed, and a bond, as required by law, was duly given by the plaintiff. Subsequent

†For a previous decision, see *ante*, 000.

to that time a motion was filed by the defendants to dissolve that injunction, upon which a hearing was had, and on the 3d of September that motion was overruled, and it is now claimed that in violation of this injunction these defendants have gone on and purchased that same hose, and that they have therefore treated with contempt the order of the court, and this is a motion to show cause why they should not be punished for contempt.

By the proof in the case, it appears that immediately upon the receipt of these proposals, and their acceptance by the board of fire commissioners, and before the allowance of the temporary injunction, the hose which they proposed to purchase, 2,000 feet coming from one company, and 2,000 feet coming from the other, had in fact been delivered into the department, and were then in possession of the fire department of the city, and they have remained there ever since. It also appears in proof, that immediately upon the allowing of this injunction, or soon thereafter, the board of fire commissioners caused notice to be given to parties from whom they were to purchase this hose, the Fabric Hose Manufacturing Co., and the American Fire Manufacturing Co., that they had been enjoined from the performance of that contract, and would not therefore be able to preform it, and they say that thereupon they treated that contract, or the proposed contracts, as at an end.

It also appears that immediately upon the overruling of the motion to dissolve the injunction, on the third of September, the board of fire commissioners took counsel of the city solicitor in relation to the subject, and they were by him advised that they might proceed to buy hose in lots not exceeding \$500 in amount without violating the injunction. He states, however, in his own testimony in this hearing, that he advised the board of fire commissioners that they must carefully and in good faith respect the injunction; that acting under that advice, they did what they subsequently did in relation to the matter.

Section 2460, Rev. Stat., gives this board the general authority "to make all necessary repairs of houses, engines, or other apparatus belonging to the department, purchase all necessary supplies, etc." It gives them a general authority to buy this particular kind of material for the use of the department. The next section, however, limits this power in a certain way, and provides that, "At least ten days' notice shall be given in some newspaper of general circulation in the city, of the reception of proposals for the preformance of any contract exceeding five hundred dollars in amount; such contract shall be awarded to the lowest and best bidder who furnishes satisfactory security for the performance of the same; and all contracts exceeding five hundred dollars shall be subject to the approval of council." And the provision in sec. 2460 is to the effect, "that all contracts exceeding five hundred dollars in amount, shall require the approval of the council."

This was a proposed contract, or a proposed purchase which would exceed five hundred dollars in amount, and amounted to about \$3,800. The advice of the solicitor was to the effect, that by dividing this purchase up into fractions or sections so that no purchase should exceed the amount of five hundred dollars, that in that manner the purchase might lawfully be made by the board of fire commissioners. Acting under that advice, as it is said, on September 4th, and immediately following the overruling of the motion to dissolve the injunction, the board of fire commissioners passed this resolution:

By Commissioner Shannon:

Resolved, that five hundred feet of cotton hose "Unique" brand, and five hundred of cotton American Jacket or double hose, be purchased forthwith, at a price not to exceed 95 cents per foot. The resolution was adopted unanimously by the members of the board.

In that resolution it was proposed to buy a thousand feet of hose at 95 cents per foot, amounting to \$950.00, 500 feet, coming from one of these parties with whom they had proposed to make this contract, the other 500 feet coming from the other party with whom they proposed to make this contract, and being at exactly the same price at which they had proposed to make the contract which had been enjoined. And upon the same night, by Commissioner Bayne, Resolved, "That five hundred feet of hose be ordered from the American Fire Hose Co., Chelsea, Mass., and five hundred feet of hose be ordered from the Fabric Fire Hose Co. of New York." The resolution was adopted unanimously by the Board, being another proposition to purchase, and intended to be a purchase of five hundred feet more from one of these parties, and five hundred feet more from the other party.

So that upon that night, on the 4th of September, by these two resolutions, it was proposed to buy half of this hose of which the purchase had been enjoined under these contracts.

Two weeks later, and on September 19, the board passed a similar resolution, offered by Mr. Shannon, and adopted by unanimous vote of the board, to purchase 500 feet more from each one of these parties, and at the same price. On September 25, a week later, another resolution being offered by Commissioner Shannon that they purchase 500 feet more from one, and by Commissioner Johnson a resolution to purchase 500 feet more of the other; so that by these four resolutions passed upon these three nights they proposed to buy precisely the same 4,000 feet of hose that were mentioned in this petition, from precisely the same parties, at precisely the same price, and to accept in the performance of these resolutions a delivery of the very same hose which had been in their possession from before the time this petition had been filed and the injunction allowed.

It also appears in evidence, that Mr. Shannon, as president of the board of fire commissioners, had a conversation with the agent of one of these companies subsequent to the allowing of the injunction, and when the agent and Mr. Shannon both had knowledge of the fact that the injunction had been allowed, in which the agent said that if the fire commissioners would keep this hose, they would take their chances of getting their pay notwithstanding the injunction. 1,300 feet of this hose, as appears from the evidence, was in use by the Fire Department before the injunction was allowed, and that more has since been put in use by the department, so that in all there is now at the time of this hearing 2,500 of the 4,000 feet actually in use by the department.

There is no evidence that there was any newly created emergency which rendered the purchase of any hose necessary at that time; but they were purchased in the beginning, upon the request of the Chief of Fire Department, for the purpose of replacing hose that had been worn out and destroyed in the service; so that it was not any sudden emergency that had made this purchase necessary.

There cannot be any doubt that this statute which prescribes the powers of the board of fire commissioners and limits their authority to make contracts for this class of supplies, acting without the authority and ap-

proval of the council, to contracts under \$500, in amount, was enacted for the express purpose of requiring that contracts of any considerable magnitude should be first submitted for competitive bidding, in order that the city might have the benefit of obtaining lower prices that might be had by competition among bidders. In the beginning this board had determined that this was such a contract; one which, under the statute they ought to submit to competitive bidding, and in good faith they started out to do that. But by an error of the clerk in drawing the advertisement, it seems that there was an imperfection in the form and substance of the advertisement itself, as well as in the length of time it was published, whereby the informality arose which gave rise to the injunction; but that it was a purchase coming fairly within the provisions of the statute, requiring that the board should submit the matter for proposals and bids, and that they should let it as a contract under this statute requiring these proposals, and that they should act with the approval of the council, this board itself had determined in the beginning.

The question then which arises here, is whether what was subsequently done by the board in the way of purchasing these 4,000 feet of hose was a violation of the injunction. It is claimed that it is not a violation of the injunction, for the reason that having been parceled up into sections or quantities of less than \$500 each, that the board had authority to make these purchases of that amount in that way, and therefore they are not violating the injunction or the statute. But it seems to me that that is a very narrow view to take of the provisions of this statute. Now here is a board proposing to buy 4,000 feet of hose at a cost of little less than \$4,000, and that they can buy 500 feet at a time and put them all into a single transaction—because whether they put it into one evening or three evenings is immaterial—to say that they can put it into one evening's transaction, and buying 500 feet from A and 500 feet from B, then another \$500 from A and \$500 from B; that is a very narrow view of the statute to say that such a performance is, in good faith, a compliance with its terms.

We find that the commissioners did upon the evening of the 4th of September buy from one of these parties \$950.00 worth of hose of the same kind exactly that they proposed to buy in these contracts that were enjoined, and of the other party \$950.00 of the same kind of hose, making \$1,900 worth purchased on that evening under these two resolutions. It is very difficult for me to understand how anybody could have supposed that was a fair compliance with the provisions of this statute. It would be a very brief way of repealing this statute and setting it entirely at defiance. These commissioners, in their capacity as public officers, are exercising a public trust, and not parting with their own money when they buy this hose, or any other property of the fire department; but they are performing a trust, and the powers which they are invested with, are distinctly set down in the statute which creates their authority, which creates the board; and have no authority whatever except what is given in the statute, and all their transactions and dealings are at all times subject to be reviewed and controlled by a court of chancery, which has power to control the administration of all trusts; and there can be no doubt whatever, that if it had been brought to the attention of the court that the fire commissioners were proposing to buy on the 4th of September 2,000 feet of hose for the use of the department, at a cost exceeding \$500, and amounting to \$1,900, simply by parcelling that purchase up into resolutions of less than \$500 each, and that they were doing this without submitting

it to competitive bidding, they would upon the proper application without any question have been enjoined by the court, it being a direct violation of this statute.

Now, then, how it was to be expected that the city solicitor should have given this board that advice it is somewhat difficult to understand. But the commissioners did what they did under that advice.

Now, we have several decisions in the different courts of the different States that are somewhat analagous to this case in their facts, and yet not exactly in point; but they may enable us to form some conclusion as to what other courts have held in somewhat similar cases. I find in the case of the Mayor et al. v. Ferry Company, 64 N. Y. R., 623, a case in which an action was brought to restrain the defendants, the New York and Staten Island Ferry Company, from running a ferry without license, and also to restrain it from using certain wharf property belonging to plaintiff and leased by it to defendant. A preliminary injunction was granted. Upon the granting of that injunction, one William H. Pendleton, who was the president of both these companies, proceeded to transfer the title and property in one of the ferry boats from the defendant corporation to himself as an individual, he not as an individual having been enjoined by the order of the court from running the ferry boat, and he proceeded to run the ferry boat in such a way that had it been running by he defendant who was enjoined, it would have been a violation of the injunction.

"Upon affidavits proving these facts, and stating circumstances tending to show that the transfers were merely colorable for the purpose of evading the injunction, orders were obtained requiring the defendants and Pendleton to show cause why they should not be punished for contempt in violating said injunction.

"That the proof tending to show a willful violation of the injunction of the defendants and Pendleton, was sufficient to call for the exercise of the judgment and discretion of the court below, and this court could not interfere with the judgment thereon, the court stating the rule to be that injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; that they might be violated by aiding, countenancing and abetting others in violation thereof, as well as doing it directly; and that courts would not look with indulgence upon schemes, however skillfully devised, designed to thwart its orders."

The same doctrine is announced in High on Injunctions, sec. 1446, in which he says:

"In deciding whether there has been an actual breach of an injunction, it is important to observe the business for which the relief was granted, as well as the circumstances attending it. And it is to be observed that the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. Thus, where an injunction has been granted restraining a defendant and his servants and agents from obstructing and impeding the passage of canal boats, the bringing of fifteen actions of trespass against the canal company on account of the passage of that number of barges along that part of the canal flowing over the land in controversy, is a violation of the spirit of the injunction and will be restrained. Upon the other hand, the conduct complained of, although literally a breach of the injunction, is not so in spirit, and when defendants have acted in good faith, and there is no evidence of any intention on their part to violate the writ, they will not be held guilty of a contempt of court."

In 10 Green's Reports, (N. J. Eq.), page 166, is a case which furnishes some light upon the subject. It was an order to show cause why defendant should not be committed for contempt for violating the injunction.

"On filing a bill in this cause, an injunction was issued by the injunction master, which, after reciting that the bill complained that the defendant had removed and intended to remove certain belts communicating power to the machinery of the complainants, and had obstructed or disconnected a pipe supplying a blast to the forges of the complainants, enjoined the defendant to desist and refrain from removing any belt or gearing connecting the power of the defendant's engine with the machinery in and on the premises leased by him to the complainants, and from obstructing the blasts to the complainants' forges in and on the leased premises, and from any act interfering with the furnishing of the necessary power to complainants' machinery, as furnished at the time of executing the lease, and from doing or causing to be done any act interfering with the full and free enjoyment by the complainants of the covenants in the lease, until the possession of the complainants under the lease should be terminated by lapse of time, or until the further order of the court.

"The bill states, that in 1871, the complainants having held their premises (a machine shop, foundry and blacksmith shop), under lease from the defendant for five years next preceding, again leased them of him for the purposes of their business, for a further term of five years, with privilege of renewal; that the lease provided that the power requisite for their business should be provided by the defendant at his expense; that it was in fact furnished by means of shafting and belting from the engine on his premises adjoining, the blast for their forges being furnished through a pipe leading from the fan on his premises to theirs; that on the 27th of last July, he, claiming a right to put an end to the lease for non-payment of rent, entered on their premises and detached the belt, and by digging down to the pipe on his premises, and in some way obstructing it, cut off the blast, and that they with difficulty and danger replaced the belt, and so continued the power from the engine to the shafting on their premises. Thus matters stood at the filing of the bill; the power was being furnished from the engine to the shafting on complainants' premises, but the blast continued to be obstructed. The defendant says the obstruction was a "damper" which he put in. Whatever it was, it was an obstruction evidently intended to deprive the complainants of the blast. After the injunction was served, the defendant took up and removed a considerable portion of the pipe by which the blast had been conducted from his premises to those of the complainants, and closed up the remaining portion at the ends which had been made by the removal of the piece.

"On motion, based on affidavit, an order was made that for this act he be committed for contempt, as for a violation of the injunction, unless he should show cause to the contrary. He now, for cause, urges that when the bill was filed, the blast was effectually cut off by the damper, and that therefore, his act in taking up the pipe and closing the ends made by the removal of a part of it, in no wise injuriously affected the complainants; and further, that the injunction did not in terms restrain him from the act complained of, and that the writ was not mandatory in form, and will not be construed as if it were intended to be so.

"It is clear that the defendant has violated the mandate of this court. The obvious intention of the interdict was to prohibit him from continu-

ing to obstruct the blast to the forges of the complainants. Notwithstanding that prohibition, he completely severed the connection between the fan and the complainants' premises, and forbade the complainants to enter upon his premises to restore it. The damper was a temporary obstruction merely; the removal of the pipe was a complete destruction of the connection, and it was intended to be so. He must be adjudged to be in contempt."

It is urged in this case that the purchase of this hose has not inflicted any injury upon the plaintiffs, and that unless such an injury is inflicted, operating as a direct injury upon the rights of the plaintiff, that a rule of this kind would be discharged. That precise point was made in this case, and it was held that that act, being a direct violation of the spirit of the injunction, being designed to effect what the injunction had intended should not be effected, that it was a contempt of court to perform that act.

The case of *Wimpy v. Phinzy*, 68 Georgia, 188, is a case from which I will read sections of the syllabus:

"Where an injunction was granted against a defendant, his servants, agents and employes, restraining them from interfering with the possession, use and enjoyment by complainant of a certain house, an attorney who represented the defendant on the hearing, and who had notice of the injunction, was bound thereby; and he could not by virtue of subsequent employment by other parties claiming the house, take possession of the same, or put others in it." "Having done so, an order requiring him to remove the tenants put in the house by him, and return the same to the complainant, or his agents, by a specified time, or, in default, that he be imprisoned until he should do so, was right."

This throws some light upon the proposition urged here, that the act was done in good faith, and under the advice of counsel and that the court should take no notice of it. This case is rather an authority to the effect that counsel who is not party to the case, but who has knowledge of the injunction, should be amenable himself to the court for advising means and ways by which somebody else has violated the injunction, if it is done by him for that purpose.

The case of *Craig et al. v. Fisher*, reported in the 2d of Sawyer, page 345, in the circuit court of the United States, for the district of California, the syllabus of the case is as follows: "Defendant was enjoined from making or selling a patented 'hose pipe provided with internal radial plates,' designed to straighten the stream of water employed in hydraulic mining so as to throw a solid stream. After the injunction, defendant took the radial plates out of old worn out machines sold by the patentee, inserted them in new pipes, and sold the machines thus constructed: Held, that this constitutes a new machine, and not merely the repair of an old one, and is a violation of the injunction.

"Parties cautioned against experimenting to see how near they can come to the violation of an injunction, and escape the consequences."

The substance of the opinion is merely an elaboration of what is very succinctly stated in the syllabus. The injunction should be obeyed, and there should be no speculation to see how near they could come to a violation without actually being guilty of a violation.

In the 42 Illinois, is a case which comes perhaps nearer to the facts of the case before us than any I have been able to find, the case of *John J. Berry et al. v. George Kinnear et al.*, and the same against *Robert B. Hanna et al.* I read from the opinion of Mr. Chief Justice Walker:

"These cases are substantially the same, and will therefore be considered together. The bill, which was first filed, alleges that the Board of Supervisors had, by resolution of their body, ordered the county clerk to issue a county order on the treasurer in favor of the judge of the 23rd judicial circuit for the sum of \$300.00. That Woodford county is embraced in that circuit, and the appropriation was made as a gratuity and addition to the salary allowed to him by law for discharging the duties of his office of judge, and not for any indebtedness or other consideration. That the appropriation is unlawful, and was made without the knowledge or consent of complainants, who are property owners and tax-payers. The prayer of the bill is, that the county clerk be restrained from issuing, and the treasurer from paying such an order. A temporary injunction was issued according to the prayer of the bill. At the December Term, 1865, of the Woodford circuit court, the judge of the sixteenth judicial circuit being present, by consent of parties he acted as judge in the case. A motion was entered to dissolve the injunction; and complainants also filed another bill, in which they referred to and made the first bill an exhibit, and adopted its allegations. It is alleged in addition thereto, that the board of supervisors of Woodford county were in session, and had just rescinded the order upon the clerk to issue the county order on the treasurer for the sum as stated in the original bill, but had at the same time passed another order directing the county clerk to issue a similar order for the same sum, and for the same purposes as was required by their first order. That these proceedings were intended as an evasion of the injunction previously granted to restrain the county order from issuing or being paid. The bill prayed an injunction to restrain the clerk from proceeding to execute the order, in accordance with the prayer of bill." So that it seems they did substantially what this board of fire commissioners did; upon being enjoined from obeying one order, they rescinded that order directing the clerk to issue. Then they proceeded to pass a resolution providing for some other order, which they supposed would be entirely out of the order, because it was not the identical thing which they were restrained from doing; that therefore, after having rescinded the first order, they passed a resolution for the clerk to draw another order for precisely the same amount.

The court say further that "The last bill filed is in the nature of a supplement to the former; and in the view we take of the case, the supplemental bill was unnecessary. All of the facts which the latter bill contained were set forth in the former, except the effort to evade the injunction. It is a maxim of the law that a person cannot do indirectly what the law prohibits being done directly. If the board of supervisors had passed an order rescinding the first, and ordered the clerk to issue a similar county order, they would have been in contempt. If the clerk and treasurer had acted under such a second order they would have been also in contempt in disobeying the injunction. It is obvious that such a course would have been a mere shallow pretext by which to evade the injunction. They were all as much prohibited from adopting such a course as they were from acting under the first order of the board of supervisors. And had the order been issued, it would have been a clear and unwarranted contempt of the authority of the circuit court."

"The order of the board of supervisors, enjoined, was for the issuing of a county order for a particular sum, to a particular person and purpose. It is not even pretended that the board were not attempting to do the very thing which the injunction prohibited them from doing."

That is not the case here, however, because it is here claimed that they were seeking to obey this injunction in good faith, while they were in fact buying the same hose, from the same parties, for the same price.

"Had these officers acted, they would have manifestly been in contempt. This second injunction was therefore wholly unnecessary, and the bill under which it was granted was unimportant, and we shall therefore only consider the questions arising under the first bill as though the second had not been filed."

They proceed then to investigate the question as to whether they could gratuitously give the money to the judge in addition to his salary under the law, deciding it could not be done. From these, and any number of similar authorities, it is perfectly manifest that an injunction cannot be evaded, but must be obeyed; that if the injunction is wrong, there is a proper way to set it aside, and upon proper showing that can be done. But while it is in force, no matter how erroneous it may be, it must be respected and obeyed.

Now, it seems to me that it is impossible to reach any other conclusion in this case, than that these acts are wholly unlawful; they were unlawful without this injunction; they were a violation of this statute without this injunction, and the city of Cleveland is not bound and has not been bound by any contract which this board of fire commissioners has attempted to make, and would not be bound without this injunction, and that these parties who manufactured this hose, and sold it under these resolutions, and sold it to the city, knew they were dealing with the city of Cleveland, and that these commissioners were but the agents of the city of Cleveland; and knowing that fact, they are bound to know the extent of the authority of the board of commissioners. That authority is set down in these statutes, and that authority does not warrant these commissioners in making a purchase to exceed \$500 in amount, as these were made on the 4th of September, or on the 25th of September. But without this injunction, no rights would have been acquired by these parties in this transaction as against the city of Cleveland. They have gone on to deliver this hose, and allowed it to be put into service upon their proposition that they would take their chances for getting their pay. It strikes me there would be very little liability of the city to them under the circumstances of the case. And I am clearly also of the opinion, that what was done by the commissioners, while it was done under the advice of the solicitor, they had in fact no right in law whatever to do. They have each one, however, for themselves declared in open court upon this hearing, that they had no intention whatever of violating this injunction, or the order of the court; that they acted in good faith, under the advice of the city solicitor that they might thus act. I am inclined to the opinion, that in the face of this testimony, the court ought not to find that they have willfully violated this injunction, although they have violated it in fact. That has to do merely with the question of the punishment which should be imposed upon them for the violation. The authorities are abundant, and perfectly clear to the effect that an injunction cannot be violated under advice of counsel; that the rights of other parties are concerned; that the rights of other parties that are sought to be protected by the injunction cannot be sacrificed because the other parties acted in good faith, or by the advice of counsel.

Upon hearing, the whole subject was discussed, in case there was violation of the injunction, as to what punishment should be imposed, and that matter is all before the court for a disposition. It is said that this

plaintiff, Francis J. Wing, is not injured because of the fact that the hose that had been purchased were good hose, and purchased at a fair price. That may be true that the hose were good quality of hose, and that they were purchased at a fair price. I do not desire to intimate that there has been any bad faith on the part of these commissioners in making this purchase; but clearly the spirit of these statutes which prescribe their authority and control their action is to the effect that competitive bidding should be had where these contracts are let for sums exceeding \$500 in amount, and that *prima facie* the presumption is that an advantage would accrue to the city by that competitive bidding. That is a presumption from the mere enactment of the statute requiring that this should be done.

And whatever may have been the injury inflicted upon the person of this plaintiff as a tax-payer, certainly that would not be the measure of injury which might be inflicted by a violation of the statute, or a violation of the injunction.

It is my opinion, however, that what should be done would be to put both this plaintiff and the city of Cleveland in precisely the same situation which they would have been in had this injunction been obeyed; and that can only be done by restoring to the city treasury the amount of money which has been taken out under this unlawful resolution.

It will, therefore, be the order of the court in this matter, that these defendants be required to pay into court, to be returned to the city treasury, the amount of money thus paid out to them, as shown by the proof in this case, under these resolutions, amounting to \$1,900, on or before 10 o'clock Tuesday morning, the 27th instant, and upon that being done, the contempt will be deemed to have been purged. Such other order will then be made in the premises as may be necessary. The costs, of course, will be adjudged against the defendants.

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CONTRACT OF SALE.

[Cincinnati Superior Court, Special Term.]

†VICTOR WALDHEIM v. SOLOMON I. SHANE ET AL.

Where, in a contract of sale, the price to be paid is agreed to be an amount arrived at by computing certain items of credit and expense, the accidental omission of a certain item of expense in the computation, discovered after the execution of the contract, is a mere error in the performance of the contract, for which the purchaser may recover from the sellers.

HARMON, J.

The facts in this case, as I find them, are briefly these:

Waldheim and the two brothers Shane, were partners, and a controversy arising as to a proposed extension of business, they resolved to separate, one or the other to buy and continue the business. There never was any idea of winding up the business. With the view to accomplish

†The following entry was made in this case in the Supreme Court, November 28, 1890: "It appearing from the record that there is a disagreement between the parties as to the facts, this court declines to weigh the evidence, and the judgment of the superior court, at general term, remanding the cause for a new trial, is therefore affirmed."

their object the three agreed to take stock. Provision was made for agreement in case of difference as to the value, and instruction was given to the bookkeeper to proceed and balance the books of the firm so that the proposed dissolution might take place. Thereupon the stock was taken, and the value of everything agreed upon, or fixed. The result was handed to the bookkeeper to incorporate in his statement; and he, having finished up the books, called in the partners and laid before them the result, which was, that one of the Shanes was entitled to \$8,949.31, the other \$9,105.62, and Waldheim to \$9,357.41, upon a complete closing of the business and balancing of accounts, and thereupon the question was mooted as to who should buy and who sell. One of the partners inquired as to what sum the sellers, whoever they might be, should throw off from the item included among the assets of the firm of outstanding accounts, to cover the risk and expense of collection. Various sums were mentioned by one and another,—Waldheim appearing to have a lower idea in that regard than the others,—until he finally suggested that six hundred dollars be taken from that item of assets, which would be two hundred dollars from each one's account. Thereupon one of defendants, with the acquiescence of the other, declared, "We will sell out at those figures;" to which the plaintiff assented. Then the parties further agreeing upon the time and mode of payment, a writing was prepared and executed which professed to embody that agreement, and in which it was stated that the Shanes sold out to the plaintiff all their interest in the firm for a sum, given in figures and letters, found by adding together the amounts so standing to their credit, and deducting four hundred dollars.

After the sale had been consummated by payment of the cash part, which was \$11,000, and a note for the remainder still outstanding, the plaintiff, in continuing the business, discovered that in so making up the accounts of the firm an item of expense,—advertising,—which seems to have been very heavy in that line of business, and which was kept in a separate account, had been omitted, amounting to nearly \$1,709. The consequence was that the statement of the bookkeeper as to the interest of each one in the business upon which they had traded, was too much as to each of them by one third of that amount. Defendants declining to correct the error, this action was brought for the amount so overpaid by mistake. The petition was amended by asking also for the correction of the writing which had been so executed. Defendants denying that there was a mistake, the case has been tried and the testimony of all the parties taken.

In so stating the facts, I have taken the version which is given by the plaintiff, because in weighing the testimony I find that he, rather than the defendants, has stated more accurately what took place. In the first place the defendants have shaken somewhat the confidence of the court in their recollection, or accuracy of narration, by statements of some things, which the court is not able to find took place. For instance they declare positively that on the occasion of the sale they said to plaintiff: "Now hadn't we better look over the books and see that the bookkeeper has got them all right; may be he has made a mistake;" to which the plaintiff replied, "No, I am willing to take the chances if you are," which would be, if true, an absolute waiver of any such claim as plaintiff now seeks to assert. The bookkeeper, although at the time under contract to go into business with the defendants, which contract he has since carried out, and is now in business with them, when called failed to give any such

account of what took place, and although it was sought to recall him, the court refused to permit it. And again the accounts given on behalf of defendants of what took place at the interview between the parties after the discovery of this mistake, I find to be against the weight of the evidence. They contend that then and there they reminded the plaintiff that they had spoken of possible mistakes, and that he had declined to investigate; that, as they expressed it, he had bought a cat in a bag: but the testimony of other witnesses, which, in my opinion, outweighs theirs, is that they made no such statement, although it would have been extremely natural that they should have made it if such had been the fact.

The case therefore stands as it stood at the close of plaintiff's evidence. Is he entitled, on his own statement, to recover here?

The question is not of a right to rescind. Two days after the sale rescission would have been impossible, because neither party could have been placed in *statu quo*. Nor is rescission sought.

If the mistake complained of were a fundamental error in the inception of the contract, preventing true consent, it may be conceded that relief without rescission would be impossible, because it would require the court not only to unmake the apparent bargain, but to make a new one.

The rescission cases cited were all cases where the mistake was of this sort. *Corpmeal v. Powis*, 10 Beav., 26, related to an error as to the annuity the government would grant for a given sum. It was fundamental, because while the agent of defendant agreed for an annuity to be based upon the government rule, not then known to either party, he expressly stipulated for her approval, which was never given to the contract in that form, she merely agreeing to the figures shown her, based upon erroneous information as to the government rule. Had defendant approved the contract as made by the agent, there would have been a valid contract, and the mistake in figures merely one in course of execution, and rescission would not have been necessary.

Pritt v. Clay, 6 Beav., 503, is also subject to the same distinction.

So, the first question here is, what was the real contract, and was the mistake which is admitted and agreed to have been mutual, fundamental, preventing true consent, or only one arising in course of performance? And plaintiff must recover, if at all, upon the theory that the real contract was not to sell for so many dollars and cents, but for a sum to be computed in a certain way.

Defendants contend that while the books and accounts were closed with a view of giving information to the parties by which they might afterwards contract, the true contract began at the time when the parties agreed upon the amounts to be paid and received.

If we are to consider merely what took place at the particular moment when, with the figures furnished by the bookkeeper before them, the parties began to determine who should become the buyer, then defendants' view of the contract would be the true one. That is the way we should look at it if a stranger had walked in and without any previous negotiations said to defendants: I will give you so many dollars and cents for your interest in the firm; and they had said, we will take it. Then certainly the sum named would be the result of mental calculation between the parties as to what one would give and the other take. But this is too narrow a view to take of what took place between plaintiff and defendants. The meaning of figures depends in negotiations as well as in mathematics upon position and surroundings. They may be above a line or below it, to the left of a point or to the right of it. So

they must be taken in connection with all the dealings and conversations of the parties using them.

In *Stewart v. Welch*, 41 O. S., 483, 502, we are enjoined to look through words, not merely at them, in seeking the real intention of the parties using them. And in *R. R. Co. v. Steinfeld*, 42 O. S., 449, we are told it is proper to use the light reflected by the subsequent conduct of parties to ascertain their real meaning when fraud or mistake is charged, even against a written agreement.

Applying these principles, it is very plain to my mind, although this case is so peculiar that I have several times laid it down and taken it up again to test by repeated vision the correctness of my view, that the figures \$9,105.62, \$8,949.32, \$9,357.41, which these parties had before them, were not used by them as figures reached by the mental process which buyers and sellers use. Underlying them was the determination previously formed and expressed by all, that they were to have a true statement of the affairs of the firm, and, although they had not decided who should buy or sell, yet that the buying and selling should be in accordance with such true statement. That this was so, is shown by the fact that the only bargaining was about an article to be subtracted because of the cost and risk of collecting outstanding accounts reckoned in the assets at their face. That settled, the contract was complete, and the intent was plainly that the sale was for the amounts shown by the ledger to the credit of defendants, less this deduction.

If the language used had been as defendants testify, "we will take \$17,654.93," I should still think that these figures in that connection were merely equivalent to "the amount to our credit in the books less \$400;" but according to the plaintiff, whose version I accept, the figures furnished by the bookkeeper were not named in the proposal or acceptance, and so cut no more figure than the books themselves which also were before them.

Looking at it thus, what took place afterwards was mere execution—the work of the pencil, not of the mind. It is not contended that this is one of the cases where the writing created the contract. It is merely a memorandum made at defendants' request of the agreement already made. In writing down the figures as representing the agreement, the mistake occurred. It is just the same as though the agreement had been executed by payment then and there, and like over-payment made. The agreement acquired no more sacred character by postponement of performance.

In order to accurately express the meaning of the parties, that memorandum should have read that plaintiff was to pay defendants for their interests the amount shown by the books to their credit, less \$400.

The subsequent conduct of all parties shows that they so understood it, for they were extremely vigilant in demanding and receiving the benefit of items omitted from the calculation before them at the time of sale, for instance the deposit for the electric light and the surrender value of insurance policies, two-thirds of which plaintiff allowed defendants on their demand.

Now, when it appears that a still greater omission was made without the knowledge of either party—an extraordinary one, I may say, in view of some facts disclosed here, it would be a reflection on the law to hold that it afforded no remedy, but must leave in the hands of the defendants money which justice and good conscience requires them to repay.

The facts in *Payne v. Upton*, 87 N. Y., 327, were much like those before us. The parties had negotiated for a sale of land by the acre.

but the sale was finally made at a gross sum, when it was discovered that by mutual mistake they had overestimated the number of acres. The court decreed a reduction of a mortgage note for a deferred payment. While it might have been done on the ground that the seller was bound by his statement of the area, though innocently wrong, and probably the sellers here cannot properly be put in that position with regard to the accounts, yet the reasoning of the court in answer to the same argument made here, that it was asked to make a new contract for the parties, applies to this case and confirms the view I have taken. See also *Townsend v. Crowley*, 8 C. B. (N. S.) 476; *Kelly v. Solari*, 9 M. & W., 54.

Judgment for plaintiff.

A. W. Goldsmith & Edward Colston, for plaintiff.

Judge Wm. L. Avery, for defendants.

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DIVORCE—EXTREME CRUELTY.

[Miami Common Pleas, 1885.]

GREEN V. GREEN.

To make a case of extreme cruelty under our divorce statute, it is not necessary that the facts shall show "*personal violence*," or "*bodily harm*," or "*reasonable ground to apprehend it if cohabitation should continue*." Mental suffering, if impaired health result therefrom, either mentally or physically, as the result of profane and abusive language, or from charges of a want of chastity, made in the presence of, or coming to the hearing of the party complaining, that were made to others, is sufficient.

WRIGHT, J.

The evidence in this case shows that the defendant, the husband of the plaintiff, had used toward her profane and abusive language, had charged her in her presence, with illicit intercourse with a farm hand of the defendant, and had also so accused her in the presence of others, neighbors and friends of the parties, both in her presence and absence; in the later instance the accusations were made known to her afterward. The result of all these was such that plaintiff's health both physically and mentally, especially the later, became very much impaired, so that insanity was threatened, and her life became a burden to her.

There was no personal violence used, nor bodily harm resulting from defendant's conduct further than great mental distress and weakness, and such physical weakness as would necessarily follow. By the common law, which is cited by Judge Nash with approval, in his treatise on Pleading and Practice, page 761, it was necessary to show that either personal violence, or bodily harm had been inflicted, or that continued cohabitation would result in it. Some later decisions hold, that physical danger may be either to life or limb, or merely to the health.

The present status of the rule in this class of cases, seems to be this: That if the conduct of husband or wife, toward the other, is such, as results in grievously wounding the feelings of the other, so that the mind or physical health becomes impaired, or such effect will necessarily result if continued, or if it utterly destroys the legitimate ends and objects of matrimony, it comes within purview of the statute. The following authorities are cited in support of this, viz:

Beebe v. Beebe, 10 Ia., 133; May v. May, 62 Penn. St., 206; Beyer v. Beyer, 50 Wis., 254; Cook v. Cook, 3 Stock. (N. J.), 195; Black v. Black, 30 N. J. Eq., 215, 221; Latham v. Latham, 30 Gratt. (Va.), 307; Kennedy v. Kennedy, 73 N. Y., 369; Smith v. Smith, 8 Oregon, 100; Powelson v. Powelson, 22 Cal., 358; Wheeler v. Wheeler, 53 Ia., 266; Gibbs v. Gibbs, 18 Kan., 419; Whitmore v. Whitmore, 49 Mich., 417.

In *Palmer v. Palmer*, 45 Mich., 150, Judge Cooley affirms the court below, in granting a decree, wherein the evidence disclosed the facts to be, that the plaintiff went to her father's house to be, and was there, confined. The husband failed to come, although he knew where she was, and that she was about to be confined, and could have come without any trouble.

After her child was born plaintiff wrote a reproachful letter to her husband. He came afterward, and refused to have anything to do with the child, accusing his wife of unchaste conduct, and claiming the child was not his own, but that of her father.

There was no direct testimony in this latter case, showing actual injury to her physical or mental health, but as the court well put it: "If she was a decent and self-respecting woman—and there is no evidence to the contrary—she could not with comfort co-habit as wife with defendant afterwards."

This is as far as any court has extended the rule, but it seems to be founded in reason. I think the true rule to be: "That if the conduct of the husband, or wife, by acts of commission, as distinguished from mere omissions, is such toward the other as to seriously impair the bodily or mental health, or endanger life, or such as substantially destroys the legitimate ends and objects of the marriage relation, it constitutes "extreme cruelty" under our statute.

Williams & Gantz, for plaintiff.

A. R. Byrket, for defendant.

PARTIES—JUSTICE OF THE PEACE.

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[Cincinnati Superior Court, General Term.]

†SADIE WEHLEN ET AL. V. F. H. MACKE ET AL.

1. The owners of separate mortgages upon the same chattels cannot be properly joined as plaintiffs in an action of replevin based upon the mortgages, but when so joined the court may render judgment against all.
2. A justice of the peace may set aside a judgment void for want of service of summons on defendants, may issue a new summons in the same action, and upon due service thereof may proceed again to judgment.

ERROR to Special Term.

On January 12, 1885, a firm, Wehlen & Scherer, were the owners of certain chattels described in the petition herein. On that day Lammerding & Harkness commenced an action against Wehlen & Scherer before a justice of the peace, and caused an attachment to be issued and levied on said chattels.

†This judgment was affirmed by the Supreme Court, without report, October 29, 1889.

The constable who levied upon the property, failed to serve the defendants in that action, or either of them, with a copy of the summons or the order of attachment, but the justice nevertheless rendered judgment for the plaintiffs therein on the 16th day of January, 1885. Afterwards, it being made to appear that there had been no service upon defendants, on January 27th he set aside the judgment, and issued a new summons in the same case against Wehlen & Scherer, which was duly served upon them, and afterwards on the 11th day of February, 1885, a judgment was rendered by the justice of the peace against the defendants, and he issued an order of sale of the chattels levied upon by virtue of the order of attachment.

The plaintiffs, being the holders of chattel mortgages, made to them individually on January 13, 1885, by Wehlen & Scherer, brought this action of replevin before any sale was had, claiming that they were the owners of the chattels by virtue of said mortgages, the conditions of which had been broken, and by means of the writ of replevin the chattels which had been in possession of the constable since they were first attached, were taken from him into the custody of the sheriff, and delivered to plaintiffs.

At the trial below the court found that the lien of the attachment, set up in a cross-petition by F. H. Macke, who held it by assignment from Lammerding & Harkness, was valid and prior to that of the chattel mortgages; also that there was a misjoinder of parties plaintiff in the action, and rendered a judgment in favor of Macke upon his cross-petition, against the plaintiffs, for the value of the goods.

Plaintiffs seek a reversal of that judgment.

PACK, J.

There is little room to doubt that the plaintiffs were misjoined. Each of the several mortgages owned by the respective plaintiffs was cause for a separate action. The argument that plaintiffs were all interested in the same goods, and therefore properly joined, proceeds upon the assumption, that there could be no defense by the mortgagors. For if they had a valid defense to any of the mortgages, the holder of that one would have no interest in the goods. The claims were separate, the parties different, and the defenses might be as distinct as the claims. They could not properly join in one action.

It is urged that if there was a misjoinder, the court erred in rendering judgment against all the plaintiffs, but that some of them should have been dismissed and the action permitted to proceed in behalf of the others.

As it does not appear that any of them proposed to withdraw, how could the court say who should go, and who remain, when all were interested in the same way and all equally at fault? But there was another objection to such a course of procedure. This is an action of replevin, and to dismiss a plaintiff after he had replevied the goods, would be equivalent to rendering a judgment in his favor. The only course open to the court was apparently that which was taken, *i. e.*, to render a judgment against all.

The claim most seriously pressed upon us, however, is that the attachment, issued January 12th, never became a lien because of the failure of the constable to serve the defendants to the action with copy of summons or writ of attachment prior to the rendition of the invalid judgment of Jan. 16th, and that the justice then became *functus officio*, and had no power to set aside the judgment, and that if any lien was acquired by virtue of

the judgment finally rendered by him, it can only date from the service of the second summons issued. The judgment rendered Jan. 16th, was either valid or invalid. If valid, there can be no question as to the priority of the lien by virtue of the attachment. If invalid, it was so because the defendants were not served, the justice was without jurisdiction, and the judgment utterly void, and this latter alternative appears to be the true one.

The fact that there was no service, was found by the court below, and was the reason why the justice set aside the judgment. When it was made to appear to him that there had been no service, the case stood before him in the same position as it would if no step had been taken except the issuing of the attachment, and he rightfully took it up again at that point and proceeded to judgment, which was duly rendered after service of summons and a trial by jury. The judgment perfected the proceedings necessary to enable plaintiffs in that action to enforce their lien, dating from the date of the levy on the goods, which was prior to the date of plaintiff's mortgages. The judgment of the court at special term is affirmed.

FORCE and HARMON, J. J. concur.

Harding & Moore, for plaintiffs.

Van Seggern, Phares & Dewald, for defendant Macke.

Hagans & Broadwell, for other defendants.

SHERIFF'S FEES

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[Mahoning Common Pleas, 1885.]

†COMMISSIONERS V. GEORGE W. LODWICK.

1. A sheriff is not entitled to receive in addition to the compensation provided by sec. 719, R. S., railroad fare, carriage hire, or other incidental expenses incurred in conveying insane persons to and from lunatic asylums of the state.
2. When there is an infirmary in a county, but no room for insane persons either in the asylum of the state or the county infirmary, the sheriff cannot be allowed more than seventy-five cents per day for keeping and boarding such insane persons; and the probate court in such case cannot contract for the keeping and boarding of insane persons with the sheriff as if he were not a public officer.
3. In cases of felony where the state fails to convict; in cases of misdemeanor where the state fails to convict, or where in case of conviction the defendant proves insolvent, the sheriff cannot be paid by the county his fees for receiving, or discharging a prisoner from the jail, or taking a prisoner before a court or judge, his fees therefor, except to be applied on the allowance of \$300 per year, provided by sec. 1231, R. S.

This cause was submitted to the court without action upon an agreed statement of facts. George W. Lodwick, as sheriff of said county, charged and was paid by the county certain fees which the committee that examined the annual report of the county commissioners reported in their opinion as illegal. The questions in controversy sufficiently appear in the opinion of the court.

†*Contra*, see *State v. Serviss*, *ante*, 460.

THAYER, J.

In the above entitled case, three questions are propounded to the court, which hereinafter follow, with the answers thereto:

1. "Is a sheriff entitled to receive from the county, in addition to the compensation and mileage provided by sec. 719 Rev. Stat., railroad fare, carriage hire, or other incidental expenses in conveying insane persons to and from the Lunatic Asylums of the State?"

Answer. The fees are clearly illegal. Section 719 provides for the following taxable costs: "To the sheriff or other person than an assistant, for taking an insane person to the asylum, or removing one therefrom upon the warrant of the probate judge, mileage at the rate of ten cents per mile, going and returning, and seventy-five cents per day for the support of each patient, on his journey to or from the asylum, and to each assistant five cents per mile, and nothing more."

The bare reading of this provision would seem to determine the question. It is the duty of the sheriff to take insane persons "to the asylum," and to remove them "therefrom," not to a depot near to it, nor to the city where the asylum is, but "to the asylum." How he shall "take" such insane persons is for him to determine. He may travel by private conveyance, or by a public railroad, or otherwise as he select, but however he travels, his fees are limited to "ten cents per mile going and returning,—and to each assistant five cents per mile, and nothing more." It is claimed that the words—"and nothing more"—apply only to assistants." Why it should be so limited is not suggested; clearly it comprehends both. In the view of the court, the entire fee which can be paid to sheriffs in such cases is ten cents per mile for the entire distance; and the journey begins at the point where the sheriff receives, or has in charge, the insane person, and ends "at the asylum," and *vice versa*.

2. "Can the sheriff be allowed by the county commissioners more than seventy-five cents per day, for keeping and boarding insane persons, when there is an infirmary in the county, but where there is no room for them either in the state or county infirmary? And can the probate court contract with or provide for such prisoners, with the sheriff individually, as if he were not a public officer?"

Answer. This question must also be decided in the negative. Section 1235, Rev. Stat., provides: "The sheriff shall be allowed such compensation as the county commissioners shall, from time to time, order and allow, not exceeding fifty cents per day, for keeping and providing for prisoners in jail; and the commissioners, annually, at their June session, shall review and fix the price of keeping and providing for said prisoners; but in any county in which there is no infirmary, they may, if they think the same just and necessary, allow any sum not exceeding seventy-five cents per day, for keeping any lunatic or idiot."

Standing alone, little or no difficulty is apparent, in construing this section. The usual, common and ordinary meaning of the term, "keeping and providing" includes "board and sustenance." But this section, it is claimed, must be construed with sec. 7379, which provides: "The sheriff shall provide for all prisoners, fuel, bed and clothing, washing, and nursing when required, and, except for those confined in jail for debt only, board, and such other necessities as the court in its rules shall designate; and he shall be allowed and paid by the county, for services required by the provisions of this chapter, such compensation as the commissioners shall prescribe."

Clearly these sections must be construed together; and, just as clearly, in my judgment, the latter, instead of enlarging the former, is limited by it.

By sec. 1235 the maximum is fixed. "Fifty cents per day for keeping and providing for prisoners in jail," and "seventy-five cents per day for keeping any lunatic or idiot."

By sec. 7379, the sheriff "shall be allowed such compensation as the commissioners shall prescribe."

True, but it must be within the limits prescribed by sec. 1235, that is, construing them together—the sheriff shall be allowed such compensation as the commissioners shall prescribe, but not to exceed fifty cents per day for each prisoner, and seventy-five cents per day for each lunatic or idiot.

In opposition to this view, it is urged that the phrase, "keeping and providing," found in sec. 1235, means safe keeping, imprisoning, preventing escape, etc., and does not include board and sustenance; and in support of this view, an authority is cited: 14 Law Bulletin, No. 1, page 6."

I cannot so hold. The phrase "providing for" in my judgment, cannot be cramped into "restraining" or "imprisoning." The ordinary meaning of the term includes board of sustenance, and I see no reason to give it any other meaning here.

If this view be correct, the fees charged in this item are illegal.

3. "In cases of felony where the State fails to convict; in cases of misdemeanor where the State fails to convict, or in case of conviction where the defendant proves insolvent; can the sheriff be allowed and paid by the county, his fees for receiving, or discharging a prisoner from the jail, or taking a prisoner before a court or judge, exclusive of the compensation of \$300.00 per year, provided by sec. 1231, Rev. Stat.?"

Answer. This question also must be answered in the negative. Section 1231 provides: "The court of common pleas in each county shall make an allowance of not more than three hundred dollars per annum for the sheriff, for services in criminal cases, where the state fails to convict, or the defendants prove insolvent, and for other services not particularly provided, to be paid out of the county treasury."

That the \$300.00 here specified is exclusive of all other fee, is tolerably plain, if the English language can make it so. This fee is "for services in criminal cases, where the State fails to convict, etc," not for part of the services, but "for services." The evident meaning is—for all services.

If the sheriff may charge this fee, —why not any other of his taxable fees in such cases? The result would be that, in the end, he would receive, not only all his ordinary fees, but the \$300.00 besides.

I see no reason why the question should be decided otherwise than above suggested.

Judgment for plaintiff.

Disney Rogers, for Commissioners.

W. S. Anderson and C. R. Truesdyle, for George W. Lodwick.

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SALE OF INTOXICATING LIQUORS.

[Cincinnati Superior Court, General Term.]

ELIZA BLAKENY V. CHRISTIAN GREEN.

1. The provision of R. S., 4364, authorizing proceedings against owners to subject property used for the sale of intoxicating liquors with their assent to the payment of judgments against their tenants so using it, is not invalid. The result of such proceedings is not to deprive owners of their property without due process of law.
2. In such proceedings the judgment against the tenant, to which the owners were not parties, is at least *prima facie* evidence against them.

HARMON, J.

The demurrer of Daniel and Isaac Wolf, to the petition reserved here, questions the construction and validity of sec., 4394, Rev. Stat., which provides that premises rented or permitted to be used or occupied for the sale of intoxicating liquors, "shall be held liable for and may be sold to pay all fines, costs and damages, assessed against any person occupying the same; proceedings may be had to subject the same to the payment of any such fines and costs assessed or judgment recovered, or any part thereof, which remain unpaid, either before or after execution issued against whom such fine and costs or judgment have been adjudged or assessed."

The remedy here provided is entirely independent of that given in sec. 4357, which gives to every wife or other person injured in means of support, etc., in consequence of the intoxication habitual or otherwise of any person, a right of action, after notice not to sell liquors to such person, and makes the owner, etc., of premises, "having knowledge that intoxicating liquors are to be sold therein in violation of law, or, having leased the same for other purposes, knowingly permits intoxicating liquors to be sold therein that have caused the intoxication," etc., "liable severally or jointly with the person selling, etc., for all damages sustained as well as exemplary damages."

This gives a general right of action against the owner of property used by his consent for the unlawful sale of intoxicating liquors, the same as against the seller, judgment upon which may be enforced against any of his property. Section 4264 merely subjects the property so used with the owner's consent to judgments against the occupier for damages caused by wrongful sales of liquor. The proceedings under this section are in the nature of proceedings *in rem*. If the value of the property is less than the amount of the judgment, or if it be incumbered to its full value, there is no remedy against the owner.

The petition sets out the ownership by defendants D. and I. Wolf, of the premises described therein, their renting the same to defendant Green, from month to month to be used and occupied for the sale of intoxicating liquors, and their knowledge that he was using the same for the unlawful sales of such liquors, the making of such sales by said Green to plaintiff's husband while in such use and occupation of the premises, with such knowledge on the part of defendants Wolf, and her recovery of damages against Green therefor, and prays for a sale of said premises to satisfy this judgment.

We think the petition conforms to the statute, and is, therefore, good if the law is valid. But the contention is that it is not valid because its

effect is to deprive owners of their property without due process of law, contrary to the guaranty of the 5th amendment of the constitution of the United States.

Without discussing the various attempts which have been made to define the phrase "due process of law," as here used, for some of which see Cooley on Const. Lim., p. 432, *et seq*, it is sufficient here to say, as their result, that one is deprived of his property by due process of law, when it is put in jeopardy only by reason of some act or omission of his own with respect to a matter which the legislature has authority to regulate or control, and when he is given fair opportunity to be heard as to the happening of such act or omission before his property is taken.

Now what is, by this section, made the basis of the liability of the owner's property? Not the act or omission of another which may be done without his authority, and which he is powerless to prevent, nor his own with respect to any of the inalienable rights which lawmakers may neither abridge nor control, but his own assent to the use of his property for carrying on a business which has always been subject to the police power of the legislature and which is notoriously liable to work such injuries as recovery is permitted for by this law. He need not rent his property for such use, or if he does he may require indemnity, and the mere fact of such use by his tenant at once terminates his tenure if the owner so desires, and we think failure to assert this right with knowledge in a case like this is knowingly permitting such use, although this court seemed in doubt upon this question in *Granger v. Knipper*, 2 S. C. R., 480, a case in which the original renting was for other purposes.

When defendants Wolf rented their premises to defendant Green to be used for the sale of intoxicating liquors, and knowing of unlawful sales by him, permitted such use, this law being then in force, they assented to such property becoming a security to any person injured by such sales for all damages suffered thereby.

It has been held that a law is valid which permits the seizure of property rented for a distillery for breach of the revenue laws by the tenant; *Dobbins' Distillery v. U. S.*, 96 U. S., 395; and while the question now before us has never been presented for decision in our Supreme Court, it has spoken of the owners' assent to such use of his property as the basis of his liability. *Bowers v. Pomeroy*, 21 O. S., 184; *Baker v. Beckwith*, 29 O. S., 314, 318. The owners general liability stands upon the same basis as that of the specific property. Both depend upon the right of the legislature to regulate the liquor traffic, which is not denied.

Nor can it be taken without regular judicial proceedings to which the owners must be made parties, and which they may defeat by successfully controverting the averment of their assent to such use, and the case differs from cases like *Lowry v. Rainwater*, 70 Mo., 153. True, these owners were not made parties to the action against Green, the judgment which plaintiff is now seeking to enforce against their property; nor is it averred that they had notice or knowledge of the pendency of such action. And the Supreme Court has expressed no opinion as to the effect upon the owner of such judgment against the seller, though they mention the question, *Bellinger v. Griffith*, 23 O. S., 619. But no decision of it was called for in that case, and the same court has repeatedly decided that a judgment against a principal is at least *prima facie* evidence as against the sureties, both of the principal's liability and its amount. *State v. Colerick*, 8 O., 487; *Westerhaven v. Clive*, 5 Ohio, 186; *State*

v. Jennings, 14 O. S., 73. And as we have said the owners stand, to the extent of this property, in the relation of sureties toward Green.

Whether, in case they had notice or knowledge of the pendency of the action against Green, the judgment therein is conclusive against them, as in Robbins v. Chicago, 4 Black, 657, and the cases just cited; or whether, in case they had not, they may in this action contest it, we are not now required to decide.

We are aware that it has been held in Iowa that the owner is a necessary party to the action against the seller. See France v. Krayner, 42 Ia., 143; Town v. Hiney, 53 Ia., 89; and by a divided court that the property is not liable to be taken, unless it is showed that the owner had knowledge of the specific sales which caused the damage sued for; Meyers v. Kirt, 64 Ia., 27.

As to the latter point we are not able to put such a construction upon our statute, even if it be a reasonable one of theirs. And as to the former the Iowa statute differs from ours in that no general right of action is given there against the owner, and no proceedings are provided for except the original action against the seller, so that unless the owner be made a party thereto, he has no opportunity to be heard in his defense, and a well known rule requires that construction to be adopted which will sustain the law if there be such construction possible.

Demurrer overruled.

Force and Peck, J. J., concur.

A. J. Cunningham, for plaintiff.

W. L. Avery, for defendant.

POLICE REGULATIONS.

[Richland Common Pleas.]

MANSFIELD (CITY) v. B. & O. R. R. Co.

An ordinance requiring a railroad to erect gates at street crossings is invalid. The state alone can enact police laws.

This case comes up on appeal from the mayor's court. July 20, 1885, the plaintiff filed its bill of particulars against the defendant by city solicitor John A. Connolly for \$50 as a penalty for failure to erect suitable gates at the crossing on Spring Mill and Main streets, Mansfield. A judgment was rendered by default in the sum of \$50, and costs of \$1.90.

DICKEY, J.

The petition in the action of the city of Mansfield against the B. & O. R. R. Co., is based upon an ordinance of the city council requiring railroad companies to erect and maintain gates at certain crossings of streets within the city, and prescribing certain penalties upon neglect and refusal to comply with the requirements of the ordinance, and it prays for the penalty in the sum of \$50. To this petition a general demurrer is interposed by the defendant. The plaintiff and the defendant are each a corporation, the creatures of the legislature, and to each of them are delegated certain powers and privileges. The plaintiff being a municipal corporation and the creature of statute, has no powers but

such as are specially delegated. It has control over its streets and alleys, and may remove from them all obstructions and nuisances; but the defendant has also acquired a right across the same, or some of the same streets, and each party may exercise its respective rights, but without the power to abridge or control the other in the exercise of its rights, and when such power is assumed to be exercised, such action is *ultra vires* and void.

The power to require a railroad company to erect and maintain gates at crossings of a street or public highway, would be a power to legislate as to the conduct of, and prescribe rules for the company relating to the security of the lives and persons of citizens, and would fall within the police laws, the right to enact and regulate which has never been delegated, but is reserved to the state. This has been distinctly settled by the Supreme Court of Ohio.

"The state has reserved to itself the right to enact police laws, necessary to secure the lives and property of its citizens. Among the powers thus reserved, and which must inhere in the state, is that of prescribing reasonable regulations for the government of railroad corporations in regard to the manner in which they shall exercise their corporate franchise in running their trains, so as to avoid danger to the lives and property of its citizens." *Railway v. Railway*, 30 Ohio St., 604.

The reasons of the court might be extended and other authorities cited to the same effect, but as this is a holding of our own Supreme Court, standing as the law of Ohio, I deem it conclusive of the question.

John A. Connolly, for plaintiff.

J. H. Collins and C. E. McBride, for defendant.

PARTNERSHIPS.

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[Stark Common Pleas, 1885.]

THORNTON KELL V. BENJ. F. VANKIRK ET AL.

Record of names by individual and partnership traders, required by the act of 1884, does not apply to an individual carrying on business in his individual name.

The plaintiff brings this action to recover a judgment for the value of labor and materials and to enforce a mechanic's lien. The averments of his petition are in substance, that in September, 1884, he made a verbal contract with the defendant Benjamin F. Vankirk, to furnish the materials and construct for him, on his premises in the city of Canton, a stone foundation and cellar walls for a dwelling house; that he fully performed his contract, beginning the work October 17, and completing it December 15, 1884; and that within the time fixed by statute, the requisite steps were taken to perfect a lien on the premises, under the mechanic's lien act. Other lien-holders are made defendants. The plaintiff asks for judgment and an order to sell the premises.

Vankirk sets up two defenses, the first of which is: That the plaintiff, during the year 1884, and for a long time prior thereto, and ever since, has been operating a large stone quarry, and owned and conducted a stone yard in Stark county; that during all of such time he has been taking contracts, for the building of dwelling houses, school houses,

bridges, cellar-walls, pavements and other mechanical work, and is engaged in buying and selling stone; and in the prosecution of all of such business had in his employ a large number of mechanics and laborers; that while so engaged and as a part of the mechanical business so carried on by him, in the year 1884, he furnished the materials and performed the work set out in the petition, and to recover the value of which this action is prosecuted; that the plaintiff was thus carrying on a mechanical business in Stark county during the year 1884, and has neglected to make out and file with the recorder of said county a statement of the name under which he conducts such business as required by an act entitled "An act requiring individual and partnership traders to record their names." Passed April 10, 1884, 81 O. L., 131.

To this defense, the plaintiff demurs. The act pleaded in bar of the plaintiff's right to recover provides:

Section 1. "That from and after the first day of July, 1884, all individuals and co-partnerships now doing a mercantile, mechanical or manufacturing business * * * shall make out and file with the recorder of each county in which such business or any branch thereof is carried on, a true and correct statement, containing the name or names under which the same is or will be carried on; if the business is owned by one individual, the full and entire name and place of residence of said owner, or if a co-partnership, the full and entire individual name of each member of the co-partnership, with the respective place of residence of the same."

Section 3 provides, that if any individual or co-partnership referred to in the act, fails to file such statement, this failure constitutes a legal defense to any action brought by such individual or co-partnership, to collect any claim or debt arising out of such mercantile, mechanical or manufacturing business. It is admitted that the plaintiff owned the business described in the answer, and conducted it in his own name.

The question presented on this demurrer is, whether the plaintiff is affected by this act--has the failure to record his name, worked a forfeiture of the claim made in the petition.

PEASE, J.

The act passed April 10, 1884, 81 O. L., 131, entitled "An act requiring individual and partnership traders to record their names" does not apply to an individual, who, owning a mercantile, mechanical or manufacturing business, carries on such business in his individual name; and when one, engaged in the business of contracting for and doing stone work, makes a contract in his own name, to construct permanent improvements on real estate, his failure to register under the provisions of this act is not a defense to an action on such contract to recover the value of the improvements.

Demurrer sustained.

John C. Given for plaintiff.

Mong & McCarty for defendant.

CONVEYANCES—COURT OF EQUITY.

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[Superior Court of Cincinnati, General Term.]

† JAMES W. O'CONNOR V. MARY L. RYAN ET AL.

Where O'C., then insolvent, conveyed property to N., in consideration of notes which he received from N., with a verbal agreement that they were to be discounted by O'C., and afterwards paid by him, and when paid and returned to N. the latter should reconvey the property, and the notes were paid and returned by O'C., but the title to the property was suffered to remain in N., who afterwards, without the knowledge of O'C., conveyed it to R., for the purpose of placing it beyond the reach of the creditors of O'C., and then informed the latter of the conveyance, who thereupon ratified and confirmed it, and permitted the title to remain a long time in R.: *Held*, that a court of equity would not assist O'C. to recover the title to the property from the heirs of R.

ERROR to Special Term.

In this case the court below, at the request of plaintiff, separately stated its findings of fact and conclusions of law.

From these it appears that in the year 1858, O'Connor being then the owner of the premises described in the petition, and insolvent, conveyed them to Nourse for a consideration, recited in the deed, of fifteen hundred dollars, but that the only consideration in fact consisted of two notes of \$500 each, secured by a mortgage on the premises, made and delivered by Nourse to O'Connor on the same day that the deed was executed. At the same time the parties verbally agreed that the notes should be paid by O'Connor, and upon their payment and return to Nourse he was to reconvey the premises to O'Connor. O'Connor paid the notes, but the property was not reconveyed, and the title was suffered to remain in Nourse until July 30, 1861, when he also becoming insolvent, and being about to make an assignment for the benefit of creditors, he conveyed the property to John B. Ryan by a deed of general warranty, without consideration, although a consideration of fifteen hundred dollars was recited in the deed.

The conveyance was so made for the purpose of keeping the property out of the reach of O'Connor's creditors, as he still remained insolvent. That purpose was avowed by Nourse in his testimony herein, and was known to Ryan when he took the deed, for he knew of the circumstances of the conveyance to Nourse, and was the confidential friend and agent of O'Connor, although the precise character and the scope of his agency do not appear.

O'Connor was not aware of the conveyance to Ryan when it was made, but was immediately informed about it and affirmed and ratified it.

Ryan afterwards told a friend that the property belonged to O'Connor, but the title was suffered to remain in Ryan until his death in 1871. In the year 1874, O'Connor having settled with all his creditors, not, however, by payment in full, commenced this action, praying that Ryan's heirs be declared to be the holders of the property as his trustees, and for a reconveyance, or an order of court which shall operate as such. The defendants resist the demand of plaintiff on the ground that the property was conveyed to Ryan to defraud creditors, and that O'Connor cannot now have the assistance of a court of equity to reclaim it.

† This judgment was reversed by the Supreme Court, October 5 1886, and again on rehearing January 18, 1887. See also 6 Dec. Re., 1096, and 41 O. S., 368.

The court below rendered judgment for the defendants, and this proceeding is prosecuted to secure a reversal of that judgment.

PECK, J.

Whatever other questions may have been involved in this action at the outset, there now remains but one—was the conveyance from Nourse to Ryan made for the purpose of defrauding creditors and under such circumstances that plaintiff is not entitled to relief in equity? The protracted litigation in this case has at least served the purpose of eliminating other questions than the one propounded. That Nourse and Ryan looked upon and intended the conveyance as a method of keeping the property out of the reach of O'Connor's creditors is plain. Nourse says it was, and Ryan's intimate knowledge of the transaction and of O'Connor's affairs leave no doubt that he had the same intention.

The court below found that such was the fact, and we perceive no reason to doubt the correctness of that finding. But it is claimed that all this does not affect O'Connor—for several reasons: 1. Because it was not his deed but that of Nourse which is claimed to be fraudulent, and that Nourse was a *bona fide* holder. Admitting the latter proposition to be true—Nourse held in trust for O'Connor, and if he made a fraudulent conveyance at the instance of the latter, it would hardly be an excuse for O'Connor to say that he did it, not with his own land, but with that of Nourse—so that the mere fact that a third party made the deed avails plaintiff nothing, and the real question is, whether the fact that O'Connor did not know of the conveyance until after it was made, takes the case out of the operation of the well known rule, that equity will not assist one who has conveyed away his property to defraud his creditors, in an effort to recover it back. It appears that O'Connor was forthwith informed of the transaction and assented to it. His position then became that of one in whose behalf a conveyance in fraud of creditors had been made, aware of all the facts preceding and surrounding the transaction, and necessarily aware of its effect—affirming it as soon as made known to him, and permitting the title to remain in that state for some thirteen years while he settled with his creditors, or they lost the right to enforce their claims by lapse of time and the statute of limitations.

It is claimed that, although Nourse and Ryan may have had or expressed a fraudulent intention, there is no proof that they told O'Connor that the conveyance was made for such purpose. It is difficult to believe that O'Connor, the person most interested and necessarily best informed as to his relations to the property and all the parties including his creditors, did not as fully understand the purpose and effect of the transaction as either of the others. No reason is to be discovered, nor has any been suggested, why O'Connor's property should be conveyed to Ryan, other than that given by Nourse, which in substance is that the purpose was to place it beyond the reach of O'Connor's creditors. It would have been just as easy to convey it to O'Connor as to Ryan. Both were residents of the city, and there is nothing to show that O'Connor was absent from home at that time.

The object of the transaction was too plain to escape the notice of any one endowed with reason, and knowing the facts. We must presume that Mr. O'Connor understood the purpose of the deed, and that his ratification of it was made with such knowledge. As he ratified and took advantage of the conveyance to settle with his creditors without

applying any part of this property to the payment of their claims, we do not think he is in any better position than if he had directed the conveyance to be made or had made it himself.

2. It is urged that as the original conveyance to Nourse was upon a good and valuable consideration, and the title was lawfully in Nourse, the conveyance to Ryan was only a transfer from one trustee to another, and that the creditors were in no worse position after the conveyance to Ryan than while the title remained in Nourse. But is that correct? Nourse held the title to the property for a long time after the notes he gave O'Connor had been paid and returned to him, before he conveyed to Ryan. During that period the creditors might have subjected it to the payment of their claims, if they had known the facts. How then can it be said that a new conveyance to another person, conveying apparently a fee-simple title for a valuable consideration, placed the property no further from the creditors? In the one case they had but to show that Nourse held as trustee for O'Connor. In the other they had not only to show that, but also that the conveyance to Ryan was not what it purported to be, and that he too held in trust. By the same argument it may be shown that no conveyance in trust to conceal property from creditors is inimical to the latter, for they have only to prove its true nature to set the conveyance aside.

3. It is further urged with a great deal of earnestness that Ryan was the agent of O'Connor, and that the case therefore falls within that class wherein an agent of a party receiving the fruits of an illegal transaction is not permitted to set up the illegality of the transaction as a defense to an action by his principal to compel him to pay over or deliver what was so received. *Norton v. Blinn*, 39 O. S., 145.

We cannot see how the rule in that class of cases applies to this, which concerns a transaction in real estate, and no case of this sort has been cited to us wherein it has been applied. In a certain sense, every trustee is an agent, and if the argument is intended to apply only to cases of general agency, we cannot see how, if there were such agency, it could operate as a license to assist in defrauding creditors. The fact that the conveyance was from Nourse, a third party, makes no difference, because, as stated above, we find that very conveyance to be the illegal act which bars the plaintiff's way to a remedy, and as to this transaction, Ryan was neither more nor less an agent than any other grantee of a fraudulent grant.

The plaintiff attacks the findings of fact made by the court below in various particulars, and especially as to a document called a deed in blank which it is claimed was executed by Ryan and delivered to O'Connor. When a copy of the paper was offered in evidence below, it was excluded, and the court could therefore make no finding of fact about it. Nor can we perceive how its exclusion injured the plaintiff. It is not contended that it could have any effect as a conveyance, and as an acknowledgement by Ryan that the property was that of O'Connor, it was unnecessary—for we have assumed that throughout the case, and it appears to be abundantly proved. The question here is not one of ownership, but of remedy. We find that the plaintiff cannot recover his property, because he has closed the doors of a court of equity upon himself. If the said paper had been admitted in evidence, it would perhaps militate against plaintiff's claim, for the fact that a paper in the form of a deed, but containing the name of no grantee, had been executed

and delivered by Ryan to O'Connor, would tend to show that they were still engaged in concealing the property from creditors.

The findings of fact appear to be sustained by the testimony, and we find no error prejudicial to the plaintiff in the rulings of the court below. As to the claim that the point upon which we have decided the case, is covered by the decision of the Supreme Court commission herein, *Ryan v. O'Connor*, 41 O. S., 368, we have carefully examined and considered that decision, as in duty bound, and we nowhere find the questions concerning the conveyance from Nourse to Ryan discussed or alluded to. The testimony now before us differs materially from that which was before the Supreme Court, and upon it we believe the decision of the court at special term was correct, and it is affirmed.

FORCE and HARMON, J. J., concur.

Glidden for plaintiff.

Kittredge & Wilby, for defendant.

[Hamilton Common Pleas, February 6, 1886.]

†THOMAS A. HARDMAN V. CINCINNATI & EASTERN RAILWAY CO. ET AL.

1. In actions upon stockholder's liability the statute of limitations commences to run as against any claim, when the company is insolvent, and the claim is determined and enforceable against stockholders. Both elements must concur for six years before the claim is barred.
2. Each creditor's claim is distinct, and a bar to one is no bar to the action.
3. A general denial will sustain evidence that the defendant was not a stockholder, because his payment was a donation and not a purchase.
4. A defendant holder can not set off his claims against the corporation against his liability as stockholder.
5. A defense that there are stockholders who have not been made parties or paid their subscriptions, should disclose the names of such. Where the record shows the names of such persons to have been omitted, the objection can be taken before the referee when an assessment is made.
6. In such actions against stockholders, a defense that a creditor compromised his claim "before he obtained judgment," is demurrable. So a defense that the creditor filed his claim and asserted a lien in another case, without averring its payment or allowance, is demurrable.
7. A sale of stock with an indemnity to the vendor against assessment on his liability, is no defense.
8. A regular sale and transfer on the books to a solvent person would avail the vendor however.
9. An infant purchasing stock, and holding the same after his majority, and after the insolvency of the company, is liable, *semble*.

MAXWELL, J.

This is an action by T. A. Hardman against the Cincinnati & Eastern Railway Company, and the stockholders of the company, upon what is commonly known as their additional liability.

A great number of the defendants reside along the line of railroad, out in the county, and answers have been filed by almost all of them; some of them alike, some in different forms entirely, and some in slightly

† See also *ante* 14 B. 346.

different forms. To these answers demurrers and motions have been interposed by counsel for the creditors, which have been submitted to the court for its decision.

A number of the defendants plead the statute of limitations; all in some such way as makes it necessary for the court to decide how, and under what circumstances, the statute of limitations may be pleaded by those who may have been proceeded against on account of their additional liability as stockholders. One part of the question has already been decided by our Supreme Court in the case of *Hawkins v. Furnace Co.*, 40 O. S., 507. The syllabus of that case, as applicable to the question now under consideration, is as follows:

"An action by a creditor of a manufacturing company, organized under the act of May 1, 1852, to enforce the individual liability of the stockholders, is an action upon a liability created by statute named in 4987 Rev. Stat., and must be brought within six years after the cause of action accrues."

This syllabus simply states the general principle, or in other words fixes the length of time which the statute will have to run before the action is barred, leaving the conditions of fact under which the statute begins to run, still to be determined. One of these conditions or factors, we find set out in the *Hawkins* case, and applicable to the case now under consideration. In its opinion on page 514 the court says: "His cause of action arose when the company became insolvent." It will be observed that this statement by the court comprises simply the fact of insolvency; nothing is said, either way, about the knowledge of the creditors of the insolvency of the corporation. It must be obvious, however, I think, that the insolvency must be open and notorious, and continued, not secret or hidden, known perhaps only to the officers of the corporation. There may be many ways evidencing this open and continued, notorious, insolvency. It is sufficient for this case, to say that the defendant company became openly and notoriously insolvent, when it passed into the control of the court and into the hands of the receiver. That action was notice to all the world that it could no longer carry on business in the usual way, and that it had become necessary to withdraw its assets from the usual operation of law, so that no one creditor might gain any advantage over another, but that all might share alike. Under these conditions, the statute undoubtedly began to run against all claims that could be at once proceeded upon against the stockholders. That brings us to the consideration of the second question. At what point in the life of a claim can it be proceeded upon against the stockholders?

The *Hawkins* case throws no light on this second question, nor do I find any case in our state deciding it, although it may be claimed that the case of *Baldwin v. Coal Co.*, 8 Dec. Re., 533, indirectly decides it. That was a case decided by the common pleas of Cuyahoga county, and although not binding upon this court, is an authority for this court to consider. It is clear, however, that one cannot maintain an action on his claim until it be due, and therefore, that the statute of limitations cannot begin to run against a claim until it be due; so that notwithstanding the statute begins to run in favor of all stockholders, immediately upon the open, notorious and continued insolvency of the company, as to all claims that are due, its operation must be considered as suspended as to all debts that are not due, until they become due; any other conclusion seems to me to be untenable.

But how is it as to claims alleged to be due by their owners, but disputed, perhaps contested, by the company? Does the statute begin to run as to them, as soon as the company becomes openly, notoriously and continuously insolvent? It is so claimed by some of the stockholders. During the time the creditor may be litigating with the company about his claim, the payment of it is certainly suspended. The company and the stockholders stand toward each other somewhat in the relation of principal and surety; at least it may be said that the additional liability of the stockholder is in the nature of suretyship. If it be so, it certainly could not be claimed that any one could proceed against the surety while the claim was being contested by the principal, especially as in this action the principal, the company, and the surety, the stockholders, cannot be joined in one action. It follows then that one cannot prosecute his claim against the stockholders upon their additional liability, until the company be openly, notoriously and continuously insolvent, and, in addition, his claim be either admitted by the company, or reduced to judgment against it. When these conditions all unite, the statute begins to run.

The demurrer must be sustained to the fourth defense in the answers of J. L. Kennedy; the fifth defense in the answers of F. J. Druhot, Mrs. N. S. Dunn, Charles Pettithory, H. B. Gray, W. J. Overstake, Frederick Druhot and A. H. Glenn; the fourth defense in the answers of A. M. Waters, J. S. Galtiet, Huston Bare and Mrs. Huston Bare; upon the same principle the demurrer is sustained to the answers of Henry Wardlow and C. H. Reinhardt. Also the demurrers to the second defense of Andrew McIntire; the third defense of James Wright; the fourth defense of W. S. Bottleman and Rees Hiatt. The same principle must apply to the first defense in the answers of T. C. Kennedy and N. W. Curry and the second defense of Mrs. I. M. Beck, E. M. Hays and Thompson & Bro. The defective point in the above answers is that they aver "that the action ought not to be maintained," for the reason that the company has been insolvent for more than six years, and that Ferris' cause of action did not accrue to him within six years before the commencement thereof. To make these averments good, they must refer to and cover all the claims against the company.

There are a number of defenses that allege that the answering defendants had made donations, etc. Such are the second defenses in the answers of D. B. Frost, Wm. Cowdry, J. W. Butler, W. L. Henning, Fred Bauer, Henry Kelch, Andrew Leonard, Jonathan Strouf, J. M. Day, Elmer Dean and Ed. Bratton. Counsel for creditors have demurred to the several defenses. If it be found, upon the hearing, that these several defendants instead of being or having been stockholders, made donations of the several amounts credited to them as having been paid for stock, they will be dismissed. But I do not think it is proper to put in as pleading, this, which is clearly a matter of evidence. At the same time, I doubt, whether a demurrer is the proper way to correct the pleading, but would suggest to counsel for the creditors to file a motion to strike out this evidence, which motion will be granted. The same kind of evidence in the answer of Ida Purday must also be stricken out. The same ruling will be made as to the answer of Henry Wardlow, both as to his first and second defenses. The same ruling will be made as to the second defense of James Knight.

Another question, arising upon the answer of Robert Collins, is whether a stockholder can plead a debt due to him from the corporation

as a set-off against his additional liability. He cannot, because the parties to the transaction are not the same. The action against him is by the creditors of the corporation. His claim is against the corporation itself.

The motion to strike out matter in the answer of Robert Collins, relating to a set-off, must therefore be granted.

Another question, arises upon the answer of James Allison and a number of others. The allegation in substance is that there are subscribers to the capital stock who have not been sued nor made parties, and that there are many subscribers to the capital stock who have not received certificates and not fully paid up their subscriptions. I have some doubt about whether the matter set up in these answers is proper matter to be incorporated in a pleading. It seems to me to be more in the nature of a question that might properly be raised upon the hearing before the referee when he comes to the point of making his assessment. Suppose a number of parties to be jointly, not jointly and severally, bound; a suit is brought against them; might not one of them object when the court came to enter judgment, to having judgment entered against him alone, when the record showed that there were other parties equally liable?

But, however that may be, I can see no harm in this defense if the defendants making it will make their answers definite and certain by setting out the names and residences of all the stockholders, who, as they claim, have been neglected. If this be done, the defense may be useful. They may have ten days to amend in that respect. The same rule will apply to unpaid subscriptions. If these are made known to the referee, he can proceed to collect them, if collectible, and to that extent diminish the burden falling upon the one who furnishes the information. The same rule will apply to the third defense of J. L. Kennedy; fifth defense of A. M. Waters, J. S. Gallit, Huston Bare and Mrs. Bare; the sixth defense of F. J. Druhot, Mrs. N. S. Dunn, Charles Pettihory, H. B. Gray, Frederick Druhot, E. L. Druhot, A. A. Glenn, W. J. Overstake; the second defense of Mary Kline, Jacob J. Kline, John Taylor, Louisa Kline now O'Neil.

The fourth defense of F. J. Druhot, Mrs. N. S. Dunn, Charles Pettihory, H. B. Gray, W. J. Overstake, Frederick Druhot, W. L. Druhot and H. Glenn; the third defense of A. M. Waters, J. S. Gillict, Huston Bare and Mrs. Bare, alleging, that they have been informed and believe that Ferris, before he obtained this judgment, compromised and settled his claim against the company, are bad. They do not allege that he was paid in accordance with that alleged settlement; on the contrary, for aught the answers aver, the settlement may have been the foundation of the judgment, which by silence, the answers admit to be in full force. The demurrers to these must be sustained.

The fifth defense of J. L. Kennedy; the seventh of F. J. Druhot, Mrs. N. S. Dunn, Charles Pettihory, H. B. Gray, W. J. Overstake, Frederick Druhot, E. L. Druhot, A. H. Glenn; the sixth of A. M. Waters, J. S. Gallit, Huston Bare and Mrs. Bare, allege that Ferris filed his claim with the receiver or set up his judgment in the case in which the receiver was appointed. This he had a right to do. He may pursue all the remedies he has at one and the same time; the only limitation being that if he gets his money out of one that ends his claim. If, upon the sale of the road, Ferris' judgment be paid, he will have no

claim against the stockholders. The demurrers to these defenses must be sustained.

The demurrer to the fourth defense of Henry Wardlow must be sustained because the former ability of the company can cut no figure in this case. It might be best, however, to have a part of this defense, that relating to his ignorance of any claim that he was a stockholder, stricken out on motion, and the part referring to the past ability of the company go out on demurrer.

Demurrers have been filed to the eighth defense in the answers of F. J. Druhot, Mrs. N. S. Dunn, Charles Pettihory, H. B. Gray, Frederick Druhot, E. L. Drulot and A. H. Glenn. These defenses allege that the defendants have sold and transferred their stock, and taken an indemnity against loss. If they had made a regular assignment and transfer on the books of the company, their assignees would have been sued here, and not they; as it is, they can only bring in their indemnitors on cross-petition and have the question settled between them. The demurrers must be sustained.

The last question, and perhaps one of the most important questions in the case, is the question raised by the answer of S. B. Hite, whose answer sets up that at the time of making the subscription and at the time of issuing the certificates of stock to him, said defendant was an infant within the age of twenty-one years, to-wit, of the age of seventeen years, and that he has at no time ratified said subscription. I have not been able as yet to come to such a conclusion upon this answer as is entirely satisfactory to myself, partly for want of some of the facts which ought to be made known to the court in the case. As far as I have examined the authorities, I am of opinion that the principle applicable is, that if he be of majority and hold stock at the time of the insolvency of the company, he then became liable thereon; but his age is not sufficiently averred in the pleadings to enable me to determine. At the time of making said contract of subscription, it is stated that he was seventeen years old, but it does not say when he made his contract of subscription. A motion addressed to this, requiring the defendant to state when he made his subscription and whether or not, at the time of the insolvency of the company, he was of the age of twenty-one years, would enable me to decide that question also.

Simrall & Mack, for creditors.

T. C. Downey, C. W. Waters, Britton & Britton, Phillip Kumler, Harding & Moore, Phillip Henderson, J.R. Mack, Collinge & O'Neil, Waters & Waters, Asa Waters, for various defendants.

LIFE INSURANCE.

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[Superior Court of Cincinnati, General Term.]

† ROSEHANNAH SMITH V. MANHATTAN LIFE INS. CO.

1. Where a policy of life insurance was taken out by a husband in behalf of his wife, and the contract of the company was with the latter, the former continuing to act as her agent, receiving notices and paying premiums up to a certain time, when he ceased to act for or in her behalf, and so notified the company, the latter could not thereafter deal with the husband as agent of the wife, nor make any agreement with him with respect to the policy, which would bind the wife. In such case notice of the approaching maturity of a premium given to the husband would not be notice to the wife.
2. Where the right to participate in the profits of the company is secured to the beneficiary of a policy of life insurance, with the right to apply dividends to the reduction of premiums, the company is bound to notify the beneficiary of the amount of the annual dividend to be applied in reduction of the premium before it can forfeit the policy for non-payment of such premium.

This was an action to recover \$3,000 claimed to be due on a policy of life insurance issued by defendant in the year 1863, upon the life of John W. H. Smith for the benefit of the plaintiff, who was his wife.

The application for insurance was made by Mr. Smith in the name of his wife, and is signed Rosehannah Smith, by Jno. W. H. Smith. The policy recites that for and in consideration of seventy-five dollars to them paid by Rosehannah Smith, the company assure the life of John W. H. Smith for her sole use, in the sum of three thousand dollars for the term of his natural life, and in case the wife's death should occur before that of her husband, the sum was to be paid to her children. It was further provided, that in case Rosehannah Smith did not pay the premiums on or before the day fixed for the payment thereof, the company should not be liable for the sum insured, nor any part thereof. By the terms of the application which is made part of the contract, premium was made payable annually "with participation in the profits of the company." John W. H. Smith received the policy and placed it among his papers, where the plaintiff testified she saw it during his life-time, and that he told her about it. Before the premium came due in each year, the company sent Mr. Smith a written notice of the time when it would be due, and of the amount of the annual dividend to be applied in reduction thereof. The premiums were regularly paid by the husband, part in cash, and part by taking credit for the dividends in reduction of the same—up to and including the year 1879.

In April, 1880, he received the usual notice that the premium would be due June 4th, of that year, and that the amount of the dividend for the year was twenty-four dollars, which deducted from the total premium would leave due the company on that day the sum of fifty-one dollars. To that, on April 27, 1880, he replied, acknowledging receipt of notice and saying: "Is there any way in which I can have this policy transferred? My wife is otherwise provided for and I would like to transfer the policy. If this cannot be done, please advise me if I can get a paid up policy, as I do not desire to continue it in its present form."

To that the company replied on the 29th of the same month: "The only change that can be made in No. 10,476, is a paid-up policy for \$810, without profits. If accepted let us have the policy and renewals prior to June 4th."

On May 3, 1880, Mr. Smith wrote to the company as follows: "Replying to your favor of April 29th, in regard to paid-up policy would say I desire to have it changed and enclose the policy and renewals, as requested. I will say that my wife has separated from me and sued for alimony on the charge of not having provided for her. This is notoriously false, but of course does not particularly interest you. I greatly desire that the policy should be made payable to my estate if it can be done, as I am obliged to provide for her with alimony, or otherwise support her; and as she is no longer a wife to me I desire my children to have the benefit if any. Some of the renewals have been mislaid, but I return the last."

To that the company replied May 8, 1880:

"No change can be made in this until the 4th day of June next at which time we will give it our attention. We notice that you only return the renewal receipts for

† This decision was affirmed by the Supreme Court. See opinion 44 O. S. 156.

1865, 1876, 1878. Please make a careful search for the others and forward same to us and oblige." On May 19, 1880, he wrote the company. "Replying to yours of the 6th instant, I herewith enclose you all of the certificates that I have been able to find." The company responded May 25.

"We notice that the renewal receipts for 1865, 1869, 1870, 1871, 1872, 1873, 1874 and 1877 are missing and would respectfully request that you make a careful search for them, and failing to find them, that you send us an affidavit stating the circumstances of their loss and that search has been made. The beneficiary under policy No. 10,476, cannot be changed."

With this letter the correspondence ended, and there is no proof that any further step was taken either by the insured or the company; nor does it appear that any paid up-policy was issued. Mr. Smith died in the month of January, 1881.

To the plaintiff's petition based on the policy, defendant answered admitting that the policy was issued, but alleging that the premium due June 4, 1880, was not paid and that the contract of insurance thereby ceased and determined, and further that the insured during his life-time had agreed with the company to surrender the original policy, and accept in lieu thereof a paid-up policy for \$810. The allegations of the answer are denied in the reply.

On the trial of the case at special term, counsel for defendant moved the court at the conclusion of plaintiff's testimony disclosing the facts above set forth, to withdraw the case from the jury and enter a judgment for defendant, which motion was overruled. Defendant's counsel also requested that sundry instructions based upon their views of the law as to notice, and the alleged agreement for a paid-up policy, be given the jury; but they were refused, and the jury instructed to the effect that if they should find that plaintiff had no notice from the company or any other source, of the maturity of the premium and the amount of the dividend applicable to its reduction, she would be entitled to recover on the policy. Defendant's counsel then requested that the jury be instructed to return a verdict for \$810, the amount of a paid-up policy, but the request was refused.

A verdict was rendered for the plaintiff for the \$3,000 and interest, less the amount of the unpaid premium of 1880. A motion for a new trial having been made, the hearing and determination thereof were reserved to the general term upon the pleadings and a certified bill of evidence setting forth all the evidence and proceedings at special term.

PECK, J.

The questions before us arise mainly upon the matters alleged in the answer—the non-payment of the premium due in June, 1880, and the claim that there was an agreement for a paid-up policy between the insured and the company.

It is claimed on behalf of plaintiff, in reply to the matters urged in defense, that the company could not forfeit the policy for non-payment of the premium of 1880 because they had given the plaintiff no notice that the same was due, or of the amount of the dividend applicable to its reduction. That the correspondence between the parties, relied upon as showing an agreement for a paid-up policy, does not, when properly construed, contain any such agreement, and if it does, that it was not in the power of the insured to make an agreement, injurious to the rights of the beneficiary. In response to this, defendant urges: 1. That the law does not require such notice. 2. That a notice was given to Smith in April, 1880, and that that was sufficient if any notice were required, as the company could not be held bound to notify the beneficiary; and 3d, that there was an agreement made between Smith and the company for a paid-up policy for the benefit of his wife, which agreement is valid, and binding upon her.

As to the so-called agreement, we do not think it necessary in any view of the case to inquire whether there was or was not an agreement. Jno. W. H. Smith had power to cease paying premiums—and we find from the correspondence that he unequivocally expressed his intention not to pay any further premiums for his wife's benefit, and after that he did not pay. This action on his part worked a forfeiture of the policy, unless the circumstances were such that the rights of Mrs. Smith could not be affected by it. And if her rights could not be affected by his non-payment, they could hardly be affected by his agreement not to pay, made for a consideration of much less value to her than the policy thereby surrendered. The question then resolves itself into this: Had the husband, under the circumstances, the power to extinguish the rights of the wife in the policy, other than her right to a paid-up policy? The answer to that depends upon the relations of the parties at the time. In form, the policy was plainly a contract between plaintiff and the company. The name of J. W. H. Smith only appears as that of the person

whose life is insured, or as the agent of his wife. But it is urged that he took the policy without her knowledge, never consulted with her about it, kept it in his own possession and paid all the premiums on it. In answer to that, it is in evidence that plaintiff saw the policy and was informed by her husband about it, and if knowledge and acquiescence on her part were necessary, they have been shown. The relation of plaintiff and her husband to this contract was originally that of principal and agent. This was held to be the relation of a husband and wife under a similar policy in *Klein v. Insurance Co.*, 104 U. S., 88. The insured acted as the agent of the beneficiary at the inception of the business, and the company had the right to deal with him as such. Under those circumstances, notice to him was notice to her, and the company might perhaps regard his refusal to pay, or his agreement to accept a paid-up policy, as authorized by her.

At this point, however, the plaintiff asserts that the agency had terminated, and that the company's officers knew it some thirty days before the premium became due in June, 1880. This claim is based upon the letters of April 27 and May 3, given above. In them Mr. Smith told the company that his wife had separated from him; that she had sued him for alimony; that she was no longer a wife to him, and that he was unwilling to further provide for her in that manner. It seems to us that these letters plainly indicated to the company that he had voluntarily ceased to be her agent. Such being the case, the rights of the plaintiff could not thereafter be affected by his action or his failure to act, and if he made any such agreement as that alleged, she would not be bound by it.

"But," defendant says, "if all that be true, Mrs. Smith failed to pay the premium due June, 1880, and the policy is therefore forfeited." To this she responds with the claim that she had no notice of the approaching maturity of the premium, or of the amount to be paid after deduction of dividend. This brings us to the principal point of the case. Was the company bound to give plaintiff such notice before they could avoid the policy for non-payment of premium? As a general rule, no such notice is requisite. *Thompson v. Insurance Co.*, 104 U. S., 252; but in a case where there was the right to participate in the profits of the company, and apply dividends to reduce premiums, the same court, *Phoenix Ins. Co. v. Doster*, 106 U. S., 80, held that a notice was requisite, for the reason that the party bound to pay could not know the amount he must pay until informed of the amount of the dividend to be deducted. The case at bar falls within the latter class, as shown by the facts stated. A notice was necessary. It could no longer be given to the agent, for the company knew he had ceased to be such, and knowing that, they could no more expect to deal with him and bind the principal than if he had never been an agent. The notices previously sent Mr. Smith had been sent him on the assumption that in notifying him they were notifying his principal; but when the agency ceased, the object could no longer be accomplished in that way. No other agent being substituted, there was nothing left for the company to do but give notice to the principal. Some other objections to this conclusion are urged, as, that the notice to Smith in April, 1880, was given before the officers of the company knew anything of the altered relations of the parties. It is a sufficient answer to this to say that the company were informed of the change in ample time before the premium became due to have notified Mrs. Smith.

It is also urged that plaintiff was bound to tender the amount of the unpaid premium before commencing this action—and we are pointed to the fact that in *Phoenix Ins. Co. v. Doster*, a tender was made by the beneficiaries, and that it seems to have been regarded by the court as an important element of the case. But in that case the required notice reached the beneficiaries on the day of the death of the insured, whereupon they promptly tendered the amount due. In the case at bar no notice was ever given the beneficiary—and if a notice were necessary to inform her of the amount due and put her in default for non-payment, in the absence of such notice and its consequent obligation to pay, there could hardly be any necessity for a tender. It is also claimed that it is not shown that the officers of the company knew of the plaintiff's address, and could therefore send her no notice. In the application her address is given as at Cincinnati—and the company were not notified of any change—unless they were at liberty to presume that she had left the city because of her separation from her husband. That she had left his house might be fairly presumed under such circumstances, but not that she had left the city. It does not appear that notice to her was sent to Cincinnati or elsewhere. We are of the opinion that the failure of the company to give notice to plaintiff prevents them from forfeiting the policy because of the non-payment of the last premium, and that, in the absence of such notice, neither the husband's failure to pay the premium, nor his agreement to accept a paid-up policy in place of the policy sued upon, could affect the rights of the wife under the latter.

The motion for a new trial is overruled and judgment may be entered upon the verdict.

Force & Harmon, JJ. concur.

Herron for plaintiff.

J. O. Hoyt and McGuffey & Morrill, for defendant.

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HUSBAND AND WIFE.

[Muskingum Common Pleas, 1886.]

†C. S. HINA V. J. M. RATH.

1. Section 3110, Rev. Stat., limits the liability of the husband for antenuptial debts of the wife, to the amount and value of her separate property acquired by him before or during coverture.
2. A devise of property from wife to husband does not render him liable, after her death, for her antenuptial debts.

PHILLIPS, J.

This action is brought under favor of sec. 3110, Rev. Stat., as amended in 1884 and seeks to compel defendant to pay an antenuptial debt of his deceased wife.

The petition states a cause of action against defendant's wife at the time of her intermarriage with him, her subsequent death, and his acquisition, by devise, of all her separate property. The defendant demurs.

The statute referred to reads as follows: "The husband shall not be liable upon any cause of action existing against the wife at their marriage, * * * except to the extent of any separate property of the wife acquired by him under an antenuptial contract or otherwise." 81 O. L., 209.

At common law the husband was liable, during coverture, for the antenuptial debts of his wife. His liability terminated at her decease, and his estate was not liable after his death. He was liable, not as debtor, but as husband. 1 Bl. Com., 443; 2 Kent Com., 143.

This common law liability of the husband, and the reason upon which it rested, have been recognized in Ohio. *Alexander v. Morgan*, 31 O. S., 546.

The statute in question does not purport to create a liability; it deals with an existing liability. It does not enlarge or extend such liability, but modifies and limits it. And its provisions relate to a "husband," not to a devisee. To make the husband liable under this statute, the property must be acquired, and the corresponding liability enforced, by action, prior to the death of the wife.

This distinction resting partly upon the common law and partly upon the statute, is not without reason. If the husband acquire the wife's property before or during coverture, he diverts it from her estate; but if he acquire it by devise, he takes it subject to the rights of his creditors, who are not prejudiced by such acquisition.

In this case, both the acquisition of the property and the bringing of the suit were after coverture, and the defendant is not liable.

Demurrer sustained.

C. A. Beard, for plaintiff.

F. H. Southard, for defendant.

†This decision was affirmed by the circuit court.

PUBLIC CONTRACTS.

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[Superior Court of Cincinnati, General Term.]

ANN E. MOORE ET AL. V. CITY OF CINCINNATI.

- i. **Persons** whose property is to be assessed for a street improvement, may, without first applying to the solicitor, sue to enjoin the proceedings at any stage where illegality appears.
2. The board of public works has no authority to require from bidders, in addition to the guaranty required by sec. 2303, Rev. Stat., that they will enter into the contract and properly secure its performance, a written statement by resident freeholders that they are qualified to and will become such sureties, and to reject a bid for failure to comply with such requirement.

HARMON, J.

The demurrer to the answer reserved here raises two questions; first, the right of plaintiffs as owners of property abutting a street about to be improved by the city at the expense of such property, to sue to enjoin the unlawful letting of a contract therefor without first applying to the solicitor as required by sec. 1778, Rev. Stat.; second, the right of the board of public works to reject a lower bid than the one accepted, because the bidder failed to comply with a rule of the board relating to the manner of bidding.

As to the first question, while the action is one which the solicitor might no doubt bring, and therefore one which a mere tax-payer could not bring except upon the solicitor's refusal, these plaintiffs do not sue as tax-payers under sec. 1778. See *Stone v. Viele*, 38 O. S., 314. They are persons whose property is about to be subjected to an unlawful assessment, and are expressly entitled to sue for such injunction by secs. 5848-51, the original act which related to taxes only having now been made to include assessments. And while, reading those sections literally, plaintiff could sue only to enjoin the levy of the assessment, we think that being remedial they are entitled to a liberal construction. We have seen too much of the practice of waiting until the improvement has been made and then searching the proceedings for defenses against the assessment. Public policy requires us to adopt the not unreasonable construction of the law that it was intended to permit the parties interested to stop the proceedings which are to result in an assessment at any point where illegality appears, as plaintiffs seek to do here.

As to the second question: While it may be conceded that the board may adopt reasonable rules concerning form and manner of bidding, the right of persons to be affected to have the contract awarded to the lowest bidder is one which must not be invaded. And a case might be supposed in which good faith on the part of the board would require it at least to readvertise, where strict insistence upon some rule of its own adoption would exclude bids by responsible parties in manifest good faith and very much lower than those open to no formal objection. Whether this be classed as such a case, the bids rejected for such reasons being less by \$5,000 and \$7,500 respectively than that accepted, the entire estimated cost being only \$30,000, we need not decide, because we think plaintiffs entitled to the relief prayed for for other reasons.

The statute has expressly declared the will of the legislature as to the form and contents of bids in certain respects, and the authority of the board to deal with the same subject by its rules and regulations is necessarily limited by this law. The board certainly cannot dispense with

any of the requirements of the law, nor can it, in our opinion, add to them others relating to the same particulars dealt with by the law. It can only deal by its rules with matters of execution and detail, over which the law, by silence, has given it control; and with them only in such a way as not to impair rights secured by the law, or impede its just operation.

By item 4 sec. 2303, every bid is required to "be accompanied by a sufficient guaranty of some disinterested person, that if the bid be accepted a contract will be entered into and the performance of it properly secured." It is admitted by the answer, that a much lower bid than the one accepted was accompanied by such guaranty and was in all respects in conformity to the statute and the rules of the board, except that it was not accompanied, as required by one of such rules, by a written statement signed by two resident freeholders that they were qualified to, and would, if the bid should be accepted, become sureties for the faithful performance of the contract.

We think the board had no authority to require anything more than the statute in this respect. It is not contended that the rule was intended merely to indicate what the board would regard as a sufficient guaranty under the statute, and if it were so contended it is plain that it is not in form a guaranty. Persons signing such a statement could not be held for the cost of readvertising, or increased cost of the work, which it was the manifest object of the statute to secure.

The professed object of the rule is to enable the board to be advised in advance whether the sureties which are to be given after the contract is awarded, are satisfactory. But it is not concerned with this in receiving bids, and it seems to us an unreasonable restriction upon bidders. A bidder may be better able to secure sureties after the contract is awarded to him, and having given the guaranty required by the statute that he will at the proper time furnish proper security for the performance of the contract, he is entitled to such further time to procure it.

Plaintiffs being entitled to an injunction against the proposed contract with Kirchner because the far lower bid of John Hoyes was rejected for no reason except that just stated, we do not pass upon questions involved in the rejection of other lower bids.

Demurrer to answer sustained

FORCE & PECK, JJ. concur

BURNET & BURNET, for plaintiffs.

Coppock, Cox & Gallagher, for the city.

J. M. Dawson, for Kirchner.

DEPOSITIONS.

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[Cuyahoga Common Pleas, January Term, 1886.]

M. BURNSIDE V. C. C. DEWSTOR, SHERIFF.

1. A notary public has the power and authority to commit a witness for contempt in refusing to answer questions pertinent to the issues in a case where he is properly taking depositions.
2. There is no contempt until an order has been lawfully made by the notary, and a refusal on the part of the witness to obey that order; the mere putting a question to the witness by the attorney for the party taking the deposition and a failure to answer the question at the request of the attorney, the notary making no command, request, or order to witness, constitutes no contempt, and a commitment therefor is illegal.
3. Where a deposition is being taken by a notary, and a witness is committed for refusing to answer a question, the return of the officer and the record must clearly show that every preliminary step has been taken, by way of notice, or otherwise, to authorize the notary to take the deposition. There is no implication in favor of the return or record; everything requisite or necessary for the exercise of the authority by the notary, must appear upon the face of the record.
4. The record of a commitment for contempt by a notary public is only *prima facie* evidence of the legality of such commitment, and in a hearing on a writ of *habeas corpus*, parol evidence is admissible to dispute such record.

MCKINNEY, J.

*J. A. Osborne and Boynton & Hale, for petitioner.**Thomas J. Carran, for respondent.*

LIFE INSURANCE.

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[Cuyahoga Common Pleas, January Term, 1886.]

ODELL, ADM'R, V. MANHATTAN LIFE INS. CO.

The policy is the sole contract of insurance, and statements by the agent to the assured, before it is issued, as to the share he will receive of the reserve fund, or prospectuses of the company not made a part of the policy, are not admissible in evidence, no reformation of the contract being asked.

Heard on demurrer to the petition. (February, 1886.)

The petition avers that plaintiff is administrator of the estate of Eliza Chidgy, who was the wife of one John Chidgy. Defendant is a corporation organized under the laws of New York, and doing business in Ohio. That in January, 1868, Eliza entered into a contract of life insurance upon the life of John for \$3,000, paying therefor an annual premium of \$223.80. That certain representations were made by defendant's agents to Eliza, to induce her to enter into such contract, which were not embodied in the policy by her accepted. In January, 1876, Eliza stopped the payment of premiums, and accepted a paid-up policy on John's life for \$154. That the statements made by defendant's agents were false and fraudulent, and instead of being entitled to a paid-up policy for \$154, she was entitled to an equitable interest in the profits and reserve fund of defendants, or to a paid-up for \$2,138. John died in September, 1882, and thereafter defendant paid Eliza the amount of the paid-up

policy, to-wit, \$154. No reformation of the contract is asked because of the false or fraudulent statements made by defendant's agents in inducing said Eliza to enter into the same, but she prays judgment for \$2,138. To this petition the defendant filed a demurrer; which is sustained.

McKINNEY, J.

1. The relations between a policy-holder in a mutual life insurance company, and the company, are those of contracting parties; the policy being the contract which defines the rights, and determines the liabilities of the parties, and an action by a policy-holder against the company for equitable relief cannot be maintained in the absence of fraud or mistake, and if it is sought to reform the contract by reason of fraud or mistake, the same should be averred in the petition.

2. By the law of New York, and the one under which the defendant was organized, the "reserve fund," is the sum of money to be kept and invested by the company, sufficient in amount to re-insure and pay all its liabilities and risks, for the security of the policy-holders and for no other purpose. The defendant is not a trustee for its policy-holders, the premiums paid belong exclusively to the company, and unless retained by some statute, can do with them what it pleases, without accounting to its policy-holders therefor.

3. In an action like this, the real contract is the written policy, and in absence of fraud, mistake or ambiguity, the statements made by the agents of the company, prior to the making of the policy, as to the character and meaning thereof, or as to the usages of the company, and the statements contained in any circular or prospectus issued by the company, and not made a part of the policy, or referred to therein, are not admissible in evidence; it will be conclusively presumed that the whole engagement is embodied in the writing, and no extrinsic matters or usages to vary its express terms can be given in evidence.

Prentiss & Vorce for plaintiff.

Ranney & Ranney for defendant.

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WITNESSES.

[Ross Common Pleas, January Term, March, 1886.]

STATE OF OHIO V. JAMES ROSS.

If witnesses for the state, ordered to remain out of hearing, listen at the door, and are subsequently called to testify, a new trial will be granted to the accused, unless the court can affirmatively find that they heard nothing; and the prosecuting attorney will be directed to file informations against them.

HUGGINS, J.

This cause has been heard upon a motion for a new trial, a verdict of guilty having been rendered. Several grounds are assigned and urged in support of the motion. Among these is the ground that there was misconduct on the part of the witnesses for the State affecting the defendant's substantial rights.

Section 7350, Rev. Stat., provides:

"A new trial, after a verdict of conviction, may be granted on application of the defendant, for any of the following reasons affecting materially his substantial rights: * * *

"Misconduct of the jury, or of the prosecuting attorney, or of the witnesses for the State."

The misconduct alleged is that the principal witnesses for the State, in violation of an order of the court, directing them to remain out of hearing of the witnesses while testifying, and after having been conducted to the witness room in pursuance of such order, left such witness room and proceeded to the jury room by a way which leads from the one room to the other, and that while in such jury room, they listened at the door which leads from the jury room into the court room, and there heard the testimony in the cause. The door of the jury room is just behind the place occupied by the jury, and the witness chair is not more than six to eight feet from the door. The evidence submitted to prove this alleged misconduct, is the affidavits of the witnesses themselves. All concerned, make oath to about the same facts, so far as this question is involved. A quotation from one will give the tenor of the whole evidence, upon this point. Hiram Davis deposes, among other things as follows:

"That this affiant, Mrs. Lou Davis, McLellan Kline, John Hastings, and others, were witnesses on behalf of the State in said cause; that said witnesses were, together with all the other witnesses for the State, ordered by the court to be conducted into the witness room, so as to be out of hearing of the witnesses who were testifying; that this affiant, while the prosecuting witness, Emma D. Langdon, was testifying on behalf of the State, went into the jury room and stationed himself at the door leading into the main court room, and within a few feet of the witness stand, and there listened to the testimony of the said Emma D. Langdon, that this witness again stationed himself at said door and there listened to the testimony of McLellan Kline and John Hastings, witnesses for the State; that subsequently said affiant was called to testify in said cause, on behalf of the State."

The affidavit of the defendant and each of his counsel are to the effect that they knew nothing of the alleged misconduct until after the trial.

Two questions are to be here determined. In the first place, was there misconduct of witnesses for the State, and in the next place, if there was, did such misconduct affect the defendant's substantial rights? These affidavits are, to say the least, remarkable. The witnesses do not claim that they did not hear or did not understand the order. They simply say that knowing what it was, they proceeded to violate, or to attempt to violate it. There can be no question but what this was misconduct. The matter of making the order that the witnesses be examined separately from each other, was not a matter of right in the defendant, but one within the discretion of the court. But if the court in the exercise of its discretion, saw fit to make such order, it did then become a right of the defendant to have such order obeyed. And I think this was a substantial right, for the court would not make such an order if it was to be a vain thing. If the order was of no consequence it should not have been made. If the order was violated in such a way that such violation could have been known and commented on by the counsel for the defendant to the jury, the case would be different, for in such case the jury would be presumed to consider such misconduct in weighing the testimony of the witnesses.

As the Supreme Court have said:

"If a witness remains in violation of the order, it furnishes strong ground of suspicion that the witness is not fairly disposed in the cause, and that he wishes to avail himself of the testimony of the other witnesses, in order to make his testimony as potent as possible by making them correspond with theirs. *Laughlin v. State*, 18 O. R., 99, 102.

In the same case, quoting an opinion of Henderson, J., in *State v. Sparrow*, 3 *Murphy's Rep.*, N. C., 487, it is said:

"A refusal by either party to comply with an order of separation would make an unfavorable impression, would be fairly open to observation, and go to the credit of the witnesses." *Id.*, 103.

And again in the same case it is said:

"It is certainly good practice, where a party requests it, to have the witnesses examined separately. And we think (as in the case before us), where the witness is called to testify, as to the previous statements of a witness, in order to corroborate the statement of such witnesses on the trial, it is especially necessary. And a right minded judge will be careful, particularly in a criminal case, where the defendant is generally in custody, in seeing that the order of the court is strictly complied with." *Id.*, 103, 104.

If the jury could have known of the misconduct, and if counsel for defendant could have commented upon it to the jury, the verdict might stand. The trouble is, such was not the case. Most of the witnesses do come in, however, and make counter affidavits, in which they depose, while admitting they tried to listen at the door, that they could not hear the witness who was testifying. If this was certain, the verdict might not be disturbed. But when the nearness of the witnesses listening to the witness testifying, is considered, and when some of the witnesses fail to make such statement of exculpation, if it can be so considered, it can hardly be certain that testimony was not heard in violation of the order, and unless a court can so find, the substantial rights of the defendant have been affected.

For the misconduct of the witnesses for the State, a new trial will have to be granted. Such misconduct is of such a character, that it should not pass unnoticed. The prosecuting attorney, as an officer of this court, is directed to file informations against each of the witnesses in the cause that there is good reasons to believe violated the order of the court. The proper order in that behalf, will be furnished the clerk. M. G. Evans, prosecuting attorney, and J. B. McLaughlin for the State.

Roberts & Van Meter and L. T. Neal for the motion.

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TRUSTS.

[Superior Court of Cincinnati, General Term, February 10, 1886.]

†HENRY C. URNER, GUARDIAN, v. WILLIAM E. YAGER ET AL.

A. being solvent and childless, had a wife who was hopelessly insane. He transferred securities of the value of \$100,000 to himself and Y. in trust, to pay the income to himself during his life, and upon his dying in the life-time of his

†This judgment was affirmed by the Supreme Court, Minshall, J., dissenting, no report, March 2, 1892.

wife, the surviving trustee to hold for certain designated kindred; but in case of the death of his wife during A.'s life, the trust thereupon to determine and cease, and the property to be retransferred to him. At the same time he executed a will giving \$20,000 to the plaintiff in trust to maintain liberally A.'s wife from the income thereof and from the income of securities which he had previously taken in the name of his wife, and to reinvest the surplus income to the same trust. By the same will he gave \$6,000 in legacies, and disposed of a residuum to residuary legatees. A. dying, the plaintiff elected on behalf of his ward against the will.

Held, the trust deed is a valid disposition, and the property disposed of by it forms no part of his estate for the purposes of distribution, and the widow has no claim to it.

FORCE, J.

This is an action between the guardian of a lunatic and the trustees of a trust. There is a fund of a hundred thousand dollars in the hands of the trustee.

It is claimed that the fund belonged to the lunatic, his ward. And it is claimed by the defendants to belong to the beneficiaries of the trust. The whole of it belongs to one or the other. The question is, who is the proper owner.

The case grows out of the following state of facts: Mr. Adams, in his life-time solvent, without children, having a wife who was hopelessly insane, and who was then in an asylum, made a deed, which was to be, a settlement, and executed a will. By the deed he transferred into the hands of two trustees, one of whom was the defendant in this action, Yager, and the other himself, stocks and bonds, and so forth, to the value of one hundred thousand dollars, to be held by the trustees, to pay the income to him during his life, and, in case of the death of his wife in his life-time, the trust then to cease and the property to be retransferred to him. In case he should die in the life-time of his wife, the beneficial interest thereupon should pass to his kindred in the manner named, the trust to survive, and the trustees to continue until a certain designated person should arrive at the age of twenty-five years.

At the same time he made a will. By this will he gave \$20,000 to a trustee, the plaintiff, for the benefit of his wife, reciting that she was helpless, and insane, unable to take care of herself; providing that this trustee should use the income of this \$20,000, as well as of the securities, which had already been taken in the name of his wife, for her benefit; and with phrases of regard and affection, providing that the trustees should take care of her wants liberally, and the surplus, after providing for her, should be reinvested for her benefit. It provided, also, that, in case she should, happily, have recovered her sanity by the time of the testator's death, all his household furniture should be hers also. It made other provisions, giving over \$6,000 to persons named, and providing that the residue should be distributed in a way that indicated that he regarded this residue to be of value.

This recital of the facts indicates clearly that it was not a case of actual fraud. It is clear that Mr. Adams supposed that he was making abundant provision for his wife, that she should be, as he says, liberally taken care of in her life, and that upon her death a designated portion should go to certain of her kindred.

So that the claim that the deed of settlement was a fraud against the rights of the wife, is not meant to be, as it is not, a case of actual fraud; but that it is fraudulent in law, because it is in contravention of

the law of distribution which gives a surviving wife a certain definite interest in the personal property left by her deceased husband.

The controversy, in substance, it is true, is not, perhaps, between this lady and the defendants. She, of course, is unconscious of the controversy. She, if the suit were decided in her favor, could not use, or control, or dispose of, or be aware of, the fortune. It is, in substance, a controversy between her kinsmen and kinsmen of the testator; but, in law, it is controversy between her and the beneficiaries of the trust; and the question between them is, whether the trust is voidable, as against the provisions of the law of distribution.

Mr. and Mrs. Adams had no children. If he had died intestate, all his personalty would have gone to the widow. She has a right, under the statute, to make her election, and her guardian has made it for her. This election having been made against the will, she is entitled to all the legacies and residuum that were given to others by the will, and it is claimed, in addition to that, is entitled, also, to this \$100,000 which is in the hands of the trustees, as being, in fact, a part of the estate of the decedent.

By the deed Mr. Adams transferred and assigned outright, to the trustees named, all the property named in the deed. It passed outright to them, and, after that, was no longer in his control. He was one of the trustees, but both of the trustees were to act, and therefore it passed away from his control. It is true it was a voluntary act, it was a gift, a settlement; but it was a settlement for uses named in the deed, for one use in his life-time, for other uses after his decease. Certainly since the case of *Kekewich v. Manning*, 1 D., M. & G., 176, it cannot be disputed that this was an irrevocable distribution of his property. And while the case *In Re Lady Way's Trust*, 2 D., J. & S., 365, is not a leading case, it is more clearly explicit that the disposition made by this deed of trust is an irrevocable disposition.

Hence, during the life of the trust, this property was beyond the control of Mr. Adams. He could not revoke the trust by any subsequent deed or by will. During the life of that trust the property was to be disposed of according to the terms of the deed. It is true, if his wife had died during his life, the property would go to him; but it would go to him, not because he, by any subsequent deed, could bring it back to him, but because it came to him by the terms of the trust itself.

Then the property was in the hands of the trustees; the legal title was in them; the beneficiary interest in the beneficiaries named in the deed. He dying, therefore, during the continuance of the trust, could not be said to be, at the time of his death, the possessor of that property, or the owner, and, therefore, the property could not be considered as part of the assets of his estate, and therefore, cannot be distributed as part of his estate.

The precise question has not been considered by our own supreme court directly. The court, in several cases, has discussed the question, what constitutes the estate of a deceased person, for the purpose of distribution. In *Lockwood v. Krum*, 34 Ohio St., 1, husband and wife having separated, and alimony decreed to the wife, \$60 per annum during her life, the husband secured to his wife \$60 per annum during her life, and gave all the rest of his property to his children absolutely. Upon his death the wife had an administrator appointed, and \$800 was allotted to her for her years' allowance. And the question was raised whether or not the administrator could bring into the probate court for

administration the property which had been given to the children, or enough of it, to pay the year's allowance. The court held, p. 7, "The rights that accrue to her after the decease of the husband, in virtue of the relation terminated by his death, are created by the statute. If he dies leaving an estate to be administered, she is entitled to an allowance for herself and minor children under fifteen years of age, to be paid after the funeral expenses, those of last sickness and administration are provided for. If there are no assets to be administered, the statutory right to the allowance is of no avail." And pp. 8 and 9: "In order to defeat or avoid the gift thus executed, two facts must appear: First, that the same was made to defraud the creditors of the donor. Second, that Mrs. Lockwood was a creditor in respect to the right to a year's support after his decease."—"It is difficult to see upon what principle this wife can be regarded as a creditor of her husband as respects the allowance for her year's support after his decease. Where there is a creditor there must be a debt and a debtor. But it is not pretended that any obligation or liability arises in respect to such support while the husband is living, nor is it denied that it is wholly the creation of statute with no existence or possibility of existence until after the husband dies."

The case would be stronger in case of the wife's distributive share, which share is a distribution made to her after the payment of the year's allowance, and after the payment of debts. If she was not entitled to the year's allowance, surely she is not entitled to a distributive share.

The case, *Miller et al. v. Wilson*, 15 O., 108, was a case, not of personality, but where the right in litigation was exactly the same right we are now discussing. The statute gave to the widow, as it now gives, dower in any equitable estate in land which her husband dies possessed of. A husband possessed of an equitable estate, gave it to his son, and had the legal title conveyed to his son, and afterward died. Creditors came in and had this conveyance to the son declared to be void as against creditors, being in fraud of them. The supreme court held that the husband was not possessed of this equitable estate at the time of his death, and, as the widow has no interest except that which the statute gives, and the statute gives her dower in the equitable estate held at the time of his death, she was not entitled to dower, and the gift to the son was, therefore, not in fraud of her dower. In *Needles v. Needles*, 7 O. S., 482, a father, in his life-time, gave property to a son, and the son gave back his receipt, stating this gift was in full of his share and expectancy in his father's estate, and stipulating that he would present no claim for any share in the property which his father might leave. It was held that prior to the death of the father the child cannot release to his parent any interest in the estate, because he has none to release; that the law, or the father's will, in one case or the other, disposes of the property which is left. Hence the release cannot have any effect; the property must be distributed according to the provisions of the statute, or according to the will, where there is a will.

In all these cases the supreme court held that in the life-time of the parent the child has no interest; in the life-time of the husband the wife has no interest, under the statute of distribution, in his property, and they have nothing but what the statute gives them, and the statute gives them an interest only in what is left at his decease.

Counsel cited in support of the plaintiff in this case, cases based upon the custom of London, and which certainly are in favor of the guardian in this case if the right given by the custom of London is the

same as the right given by our statute of distribution. By the custom of London the widow was entitled to one-third, and the children to one-third, of the personalty of a freeman of London, at his death, and a conveyance such as the one in this case would not be valid as against the right of the widow under the custom of London. And in several cases in the United States, following the ruling in those cases, it has been held that a conveyance of this sort would not be valid as against the widow. The value of those English decisions, and of the American decisions as well, depends upon the closeness of the analogy between the rights under the custom of London, and the rights under our statute. The custom of London was not a creation of statute. It was older than the statutes of distribution. As to these two-thirds, the custom of London always has been that they are property over which the husband had no testamentary control, and in which the wife and children were supposed to have an interest during the life of the father. In *City v. City*, 2 Levinz, 130, the father, in his life-time, owned a leasehold estate and gave it to his son. Upon his father's death it was held the widow was not barred by the assignment to the son, it being voluntary; but she was entitled to her customary share in it. And in the case of *Beckford v. Beckford*, 2d Reports in Chancery, 161, where some children had received provision from the father in his life-time, they were required to bring such advancements into hotchpot with the other children upon his death, and it was held that, "What hath been received by any one more than their share and legacies, is to be paid as the master may appoint." And in *Blundell v. Barker*, 10 Modern, 451, 459, it was held that where a daughter, in consideration of a portion given to her when she married, released to the father her share of the children's third, it was held that, "the father should be considered as a purchaser of his daughter Barker's share," and he had a right to dispose of it by will. It is clear, then, that a freeman of London could not, by gift, or voluntary settlement, in his life-time, diminish that two-thirds of his personalty to which his wife and children became, upon his death, entitled by the custom of London; that they had so far a vested interest in his personal property in his life-time; that their expectancy was in some respects, like the expectancy of an heir apparent of an entailed estate. How widely different that is from that right which the statute of Ohio gives to the widow, of a distributive share of the personalty left by her husband at his death, a right which the supreme court says does not come into existence till his death, appears from the cases which I have cited.

It does not seem to us, therefore, that English decisions based on the custom of London, or American cases which follow them as authority, can be held as authority, controlling cases which arise under the statutes of Ohio.

It is some satisfaction to find that the supreme court of Massachusetts, in *Stone v. Hacket*, 12 Gray, 227, and the court of appeals of Virginia, in *Lightfoot v. Collyer*, well considered cases, have held that under a statute, just such as we have, a disposition by the husband, just such as we have in this case, is valid and will stand as against the claim of the widow to set it aside after his death.

And we hold, in this case, that the assignment in trust was a valid settlement, for the trusts declared therein, and that as under that settlement, the hundred thousand dollars were no part of the assets possessed by Mr. Adams at his death, they constitute no part of that which is to

be distributed as a part of his estate, and judgment is given for the defendants.

HARMON and PECK, JJ., concur.

Hoadly, Johnson & Colston, and Mr. Urner, of Frederick, Md., for plaintiff.

W. H. Mackoy, Kebler & Roelker, and Jas. McSheny, of Frederick, Md., for defendants.

DEPOSITIONS.

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[Knox Common Pleas, February Term, 1886.]

†EX PARTE W. R. LANGFORD.

A resident witness, not a party to the case, who is in good health, and not intending to depart, and will be able to attend trial, cannot be compelled to give his deposition.

STATEMENT OF CASE.

In the case of M. I. L. against R. D. L. plaintiff served notice on defendant, that at the time and place mentioned therein, she would take the depositions of defendant and sundry witnesses, to be used as evidence in the trial of said cause. In obedience to subpoena, W. R. L. appeared on February 17th before the notary, and was sworn as a witness. W. R. L. was ordered by the notary to be examined as a witness in said case; the following questions asked, and said W. R. L. ordered by said notary, to answer the same: "State your name, age, place of residence and occupation?" The said W. R. L., under the advice of counsel, refused to answer said questions and filed with said notary his written affidavit and statement setting forth therein his reasons for such refusal, and substantially as follows:

1. That he is not a party in any way to the action of M. I. L. v. R. D. L.
2. In said cause he would not be called as a witness for M. I. L. but for R. D. L.
3. That plaintiff is not attempting to take his deposition in good faith with the expectation or belief of ever using the same on the trial of said cause, but was attempting to fish for evidence.
4. That said plaintiff could not use his deposition on the trial of said cause in Knox county, because he was:
 1. That he is a resident of Knox county.
 2. That he is not absent therefrom and does not expect to be.
 3. That he will be in said county on each and every day of the next term of court therein.
 4. That he is 35 years of age, in robust health, not suffering from any infirmity, does not expect to be imprisoned, and will be able to attend court as a witness.
 5. That his testimony is not required upon any motion made or to be made, but upon the merits of said case.

†*Contra*, ex parte Nushuler, 4 Dec. Re., 299; Shaw v. Installation Co., *post* 000.

For such refusal the said W. R. L. was imprisoned under an order of commitment issued by the notary.

This is an application under sec. 5255, vol. 82, p. 33, for the discharge of said W. R. L. from such imprisonment.

MCELROY, J.

The section under which the application is made, reads as follows.

"A witness so imprisoned by an officer may apply to a judge of the supreme court, circuit court, court of common pleas or probate court, who may discharge him if it appears that his imprisonment is illegal."

Under the admitted facts and statutes, was the imprisonment of said W. R. L. illegal? Had the notary authority or right under the statutes and facts, to order the commitment and imprisonment of L.?—the answer to this, is depending upon another question. Had the notary any authority or right under the statutes and facts to order said L. to answer said question—to testify? If he had—if plaintiff had the right under the statutes and circumstances, to take the testimony—the deposition of said L., then said notary had the authority and power to imprison L. in the county jail. Section 5254. Otherwise not.

The affidavit of said W. R. L. was not denied—the following facts are to be taken as true as set out in the bill of exceptions, so far as this question is concerned—that said cause was pending in court of common pleas of Knox county; that said W. R. L. is and was a resident of said county, and not absent therefrom; that he was not unable, nor was there any probability of his being unable to attend court as a witness on account of age, infirmity or imprisonment; that he was 35 years of age, in robust health, under no expectation or intention of being absent at the following term of court; that his testimony was not to be taken as required upon a motion. Affidavits filed in said application, after such imprisonment, cannot be considered as to this question.

If plaintiff had the right to take the deposition of L., it matters not, so far as this question is concerned, whether he was in good faith or not, nor whether said W. R. L. was to be called as a witness by defendant and not by plaintiff, or by either party—he is subject to the process of the court for either party who may desire his testimony. There is nothing submitted to show any probability that at the next term of the court the testimony of L. would or could be used as testimony in the form of a deposition under sec. 5265. It is not so claimed, unless under the suggestion that said L. might die; it is true that he might die—unquestionably true that he must die—so must all men. It is claimed that plaintiff had the right to take said L.'s deposition without showing any probability that the same would or could be used as evidence on the trial; that the same can be taken without any purpose or intention of using the same as testimony; that the same can be done under and by virtue of sec. 5266, "either party may commence taking testimony by deposition at any time after service upon the defendant." What is a deposition? It is the testimony of a witness. Section 5261. It may be used only in the cases provided in sec. 5265.

Section 5277. Depositions taken pursuant to this chapter shall be admitted in evidence on the trial of any civil action.

Section 5267 makes special provision that the testimony of a person "On the order of the court, before a referee, reduced to writing, subscribed by him and reported to the court, may be used as a deposition in the case."

Testimony by deposition is secondary—hence, the testimony by deposition of a witness absent from the county or infirm, may be used if such witness continues absent or infirm. Not so if his attendance can be procured, and it must appear to the satisfaction of the court, that for a cause specified in sec. 5265, the attendance of the witness can not be procured. Section 5281.

If the attendance of the witness can be procured, such deposition ceases to be testimony—ceases to be a deposition under the statute and cannot be used.

The facts existing at the time the cause is heard in court determine whether it is testimony or not. A deposition to be used must under the facts then existing, be testimony in the case. Under the statutes, it is just as conclusive, that a deposition to be taken, must under the circumstances then existing, be taken as testimony in the case, to be used as testimony, if within sec. 5265. Not to be taken as an experiment, as a mere declaration to be used as any declaration may be used—the oath adding no weight and of no force—without any greater authority or power to compel a declaration in the one instance, than in any other—that is, a person cannot be compelled to make a declaration under the form of a deposition, any more than without such form. The case cited in W. & B. Digest, if correctly reported, and reference to the Kansas decision therein, should lead to careful consideration of the statutes, but cannot be followed as authority by this court on this question.

Section 5252. "Disobedience of a subpoena, * * * a refusal to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer," etc.

A person cannot be so lawfully ordered except in pursuance of the statutes. A person, resident of the county, not absent therefrom, not intending to be absent therefrom, not unable to attend court from age, infirmity or imprisonment; no probability, from present condition of being unable to attend court, and whose testimony is not taken for or required upon motion—in short, a person situated as appears from the uncontradicted affidavit of W. R. L. filed with the notary, cannot be lawfully ordered to answer as a witness, under notice to take depositions "to be used as evidence" in said county of his residence, and cannot be legally imprisoned for refusing to so answer.

Under the facts and findings of the court, the sheriff is not a necessary party.

The court find and decide that the imprisonment of the applicant, W. R. L., is illegal, and order that he be discharged.

W. J. Gilmore argued in support of the application

J. D. Critchfield, *contra*.

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EASEMENTS.

[Superior Court of Cincinnati, General Term, April, 1886.]

ROBERT W. BURNET V. LEONARD HELKER.

Where S., the owner of two lots with buildings thereon, so constructed that there was a water-closet on the second floor of one house, from which the only door opened into the adjoining house, and which had been used only by the occupants of the latter, there being no other water-closet on the latter premises, conveyed the same by deed of general warranty, to D., who conveyed to defendant, and afterwards S. conveyed the other lot and building to plaintiff.

Held: That the right to the use of the water-closet on the premises, now owned by plaintiff, passed by virtue of the deed to D., and from D. to defendant, as an easement appurtenant to the premises so conveyed.

ERROR to Special Term.

In the year 1874 B. Simon and others were the owners of lots at the corner of George and Cutter streets in this city, so improved that there was a house on the corner fronting on George street, and another in the rear of that, fronting on Cutter street. The two houses adjoined and were separated by a single wall. Through this wall there was and still is a doorway, leading from the Cutter street house into a small water-closet just beyond the wall, and within the lines of the other property. That was the only opening into the water-closet, and the latter was then and still is used only by the occupants of the Cutter street property—the property of the defendant being so designated for convenience and to distinguish it from plaintiff's property. Such being the situation, Simon and others in the year aforesaid conveyed the Cutter street property with the privileges and appurtenances thereof to one Du Tour by a deed of general warranty. In the year 1879 the same parties in like manner, conveyed the corner lot to plaintiff, and in 1883 Du Tour conveyed the Cutter street property to defendant by a like conveyance.

The descriptions of all the deeds are such that the water-closet is within the lines of the property conveyed to plaintiff, and he brought this action to enjoin defendant from further using or occupying the closet. At the trial of the case at special term, the court found that plaintiff was not entitled to the relief sought, and dismissed the petition. The plaintiff now seeks a reversal of that judgment.

PECK, J.

No prescriptive right to the easement is claimed, and the case depends upon the effect of the deed from Simon and others to Du Tour. When that conveyance was made, the grantors were still the owners of the other property, and whatever it conveyed to the grantee could not afterwards be, by them, conveyed to the plaintiff; but as the closet in question is within the boundaries of the property conveyed to plaintiff, it clearly passed to him free of any claim on the part of defendant, unless the conveyance to Du Tour in some way operated to convey the interest in dispute. At the time that deed was made, the closet had been constructed so as to be used only by the occupants of the property conveyed. It was so used, and was the only closet of that sort on the premises. Did the right to use it pass as an easement appurtenant to the property conveyed?

In *Wheeldon v. Burrows*, L. R., 12 Ch. Div., 81, 49, the law as to implied grants is stated as follows: "All those continuous or apparent easements, or in other words, all those easements which are necessary to

the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted," will pass to grantee under the grant.

In *Meek v. Breckenridge*, 29 O. S., 648, the following statement of the rule is cited with approbation by the learned judge who delivered the opinion of the court. "A grant of a thing will include whatever the grantor has power to convey, which is reasonably necessary to the enjoyment of the thing granted." And in that case it was held that if the eaves of a house situated on a lot conveyed by deed projected over other property of the grantor not conveyed, the right to maintain the eaves in that condition would pass as appurtenant to the estate granted. In *Morgan v. Mason*, 20 O., 402, it was held that the right to flow certain lands in order to supply water to a mill, which had been acquired as an easement by the mill owner, a judgment debtor, passed as appurtenant to the mill property when the latter was levied upon and sold by the sheriff. See also *Mitchell v. Seipel*, 53 Md., 251; 8 Washburn R. P., 394; *Tiedman R. P.*, 842. Applying the principles of these cases to that at bar, the conclusion seems plain that the right to use the closet in question passed with the conveyance of the property, for the convenience of the occupants of which it was constructed, in connection with which it had been and still is used, and to which it was and is a necessary appurtenance. The grantors being the owners of both the dominant and the servient estates, must be held to have conveyed the easement in the latter, by their deed of the former, and as the defendant derives title through that conveyance, he cannot, now, be disturbed by the plaintiff.

Judgment affirmed.

FORCE and HARMON, JJ., concur.

D. T. Wright, for plaintiff.

Chas. Baker, for defendant.

EXEMPTION.

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[Superior Court of Cincinnati, General Term, April, 1886.]

DIETRICH OLDING V. MARY KEMKER ET AL.

That a foreclosure of one of the mortgages on a homestead encumbered for more than its value, is pending, no decree having been taken, does not entitle the owner to \$500, in lieu of homestead.

ERROR to Special Term.

This was an action to recover damages for the refusal of the sheriff, at the instance of defendants, to set aside and allow plaintiff certain chattel property as exempt from execution in lieu of a homestead—the plaintiff claiming that at the time of the levy and sale he was a resident of the county, the head of a family, and not the owner of a homestead. The answer alleged that he owned and occupied a homestead at the time of the levy and sale. At the trial it appeared that the plaintiff, with his family, was residing in a house on a piece of property purchased by him some years before, and the legal title to which then stood in his name, but which had been mortgaged for more than its value. The mortgages were overdue and unpaid, and suit to foreclose had been commenced some

time before the levy of the execution, but no decree had been taken. Some months afterwards a decree was taken, and the property sold for less than the amount of the mortgages.

PECK, J.

We are unable to distinguish between this case and that of *Bartram v. McCracken*, 41 O. S., 377. The only fact in this case not found in that is, that here suit to foreclose had been commenced, while in that it had not. We do not think that makes any difference. Both properties were mortgaged for more than their value, and the conditions of the mortgages had been broken in both cases. The mere commencement of a suit did not change the state of the title. It is not necessary to decide what would have been the effect of a decree of foreclosure, because none had been taken. The judgment is affirmed.

FORCK and HARMON, JJ., concur.

N. Bird, for plaintiff.

Wulsin & Perkins, for defendants.

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ASSIGNMENTS.

[Hamilton Probate Court, 1886.]

Goebel, J., and Fulton, Referee.

IN RE EDWARD PURCELL AND JOHN B. PURCELL.

1. On the hearing of exceptions properly taken to the account of an assignee of an insolvent estate, the probate court has jurisdiction to determine the effect upon title, of the deed of assignment and precedent conveyances of real estate, as far as the same is involved in the disputed items of such account.
2. An assignee of two insolvent estates filed in the case of each assignment, one and the same account, improperly mingling together the receipts and disbursements of the one estate with the receipts and disbursements of the other, and describing himself therein as the assignee of the two estates jointly, and subsequently for mal-administration was removed from his office of assignee in the case of each estate: On hearing of exceptions properly taken to said account in the case of each assignment, and on behalf of each estate, *held*, that the probate court may separate the joint account, and make a finding of the items therein that properly belong to the account of the assignee in the case of each estate.
3. An assignee of an insolvent estate who mal-administers, and thereby causes loss and expense to the beneficiaries of his trust, will not be entitled to an allowance for compensation in any form, whether as statutory commissions, counsel fees for services rendered, or extraordinary services.
4. An assignee who delays, unreasonably, to file his account, as required by law, will be charged with interest from the date his account became due; and a delay of six years to account, after the date at which the account became due, is an unreasonable delay and sufficient to charge him with such interest.

At the dates of the assignments John B. Purcell was Archbishop of the Roman Catholic Church for the diocese of Cincinnati, and his brother, Edward Purcell, was the Vicar-General and the manager of the temporal and financial affairs of the diocese. John held title in real estate of considerable value, the greater portion of which was in use for religious and charitable purposes by various organizations of the Catholic faith. Edward held a large quantity of notes, due-bills and accounts against various parties to whom he had made loans. A custom had grown up in the diocese of receiving from the adherents of the church, deposits of monies on which interest was paid. The monies so received by Edward, and the monies

received by John in his ecclesiastical office, were put into a common fund out of which loans were made, real estate properties purchased and improved, and churches, schools and charities helped and sustained. This custom had resulted in financial embarrassment involving both Edward and John. Partly by written term and obligation, and otherwise by unequivocal acts and declarations, each had become liable for the debts of the other. An indebtedness to many persons, and in an unknown aggregate amount, had accumulated, and creditors were pressing claims which neither John nor Edward, nor both of them together, had the ability to meet. On January 20, 1879, John had executed a mortgage of realty to five "Diocesan Trustees," for the purpose of obtaining a contemplated loan to pay this indebtedness. That expedient developed an insolvency amounting to millions of dollars, and was found to be wholly inadequate and impracticable. By the 1st of March following, affairs had reached such a crisis that an assignment appeared inevitable. An assignment by John was thought unbecoming to his ecclesiastical office. After consultation the plan was formed that John should convey his real estate to Edward and that Edward should make the assignment. Accordingly on the 4th day of March, 1879, John, by a deed in fee-simple, conveyed certain specific parcels of real estate to Edward; and on the same day Edward, by a deed of general assignment, conveyed all his property to John B. Mannix in trust for the benefit of creditors. On the same date the "Diocesan Trustees," who had issued no bonds and obtained no loans, executed a formal cancellation of the mortgage they held, and thereafter the trusts provided for in that instrument were abandoned. Subsequently questions arose as to the validity of this deed from John to Edward; and on further consideration it was thought that other property in the name of John than that described in said deed, might be subjected to the payment of his debts. Suits and attachments were pending on the 12th day of March, 1879, when John B. Purcell also by deed of general assignment, conveyed all his property to John B. Mannix in trust for the benefit of his creditors. In this court Mannix gave bond, on the 12th day of March, 1879, as assignee of Edward Purcell in the sum of \$250,000, with George Hoadly, John Holland, Charles Stewart and Michael Walsh as sureties; and on the 14th day of March, 1879, as assignee of John B. Purcell, in the sum of \$50,000, with H. H. Hoffman and M. Clements as sureties. The assignee caused an inventory and appraisement to be made of the assets and property that came into his hands from the two estates, which he filed in this court on May 23, 1879. In performing that duty he made but one inventory, designating upon the face of it by the initials "E. P." and "J. B. P.," the identity of certain items which he considered unquestionable, and leaving to others the task and responsibility of determining the rest.

By docket and journal entries of the same date it appeared that this inventory was filed in both cases, and no objection of record has been made to its form.

Although it is expressly provided by statute that an assignee shall file his account in the probate court at the expiration of eight months from the date of his appointment and qualification, John B. Mannix filed no account of his trust in either case until more than *six years* and eight months had elapsed after such date.

On October 30, 1885, for the first time, and then to escape citation, this assignee filed a report. It presents but one account of the receipts and expenses of both estates mingled together, without the formality of designating by initial letters or otherwise the estate to which any of the items belong. On December 10, 1885, the court, on its own motion, having ordered the assignee to show cause why he should not be removed, he appeared, and in open court admitted that he had misappropriated the funds of his trust and offered to resign. The court continued all questions relating to the acceptance of his resignation for its further order, and appointed a referee to examine him with reference to the condition and his administration of the trust. On January 4, 1886, after that examination had been completed, the court accepted his resignation and appointed two trustees selected by the creditors in his place.

The questions now before the court arise upon exceptions filed to the assignee's account.

PER CURIAM.

I. A preliminary question presented by the record is this: Should the account of John B. Mannix, as assignee of Edward Purcell, be separately stated and distinguished from his account as assignee of John B. Purcell?

We think the two accounts should be separately stated. There were two assignors, two formal assignments, and we think two estates.

Edward's assignment was for the benefit of his creditors, and passed his personal property and choses in action, and the real estate conveyed to him by John. John's assignment was for the benefit of his creditors, and passed real estate not included in his conveyance to Edward. The indebtedness of these two persons to the same creditors did not merge their estates before the assignments, and the circumstance that both made assignments to the same person, was not sufficient to merge them thereafter. Different bonds were given in these assignments, and sureties upon the one are not sureties upon the other. It was the plain duty of the assignee, therefore, to keep these two estates separate and distinct each from the other. Whether his sureties, who have undertaken for the faithful performance of his duty according to law, can ground an objection to this account on the non-performance of that duty, it is not necessary now to inquire.

It has seemed to us that a separation of the account could injure no party in interest, and should be made as a matter of simple justice and orderly procedure. The difficulty of doing it is an objection to the labor rather than to the duty of the task.

The affirmative determination of this question has led the court into an extended and laborious investigation.

The resignation of the assignee, and his precedent violation of the trust, have made it a manifest impropriety that he should be called upon to authoritatively separate and state these accounts. The account and the exceptions to it have been filed and docketed in each case. Both cases are before us upon all the questions presented by those exceptions. On such a hearing it is the province of the court to add to the account any omitted items that properly belong to it, and to take from the account any items that do not properly belong to it. This implies the power and the duty to state the accounts. If the result is not as satisfactory as could be wished, perhaps the number, character and variety of the items; neglect on the part of the assignee to properly describe and keep them distinguished; loss of public records, lapse of time, and want of clear testimony would make any result of such an inquiry now necessarily unsatisfactory.

The accounts so taken and stated dispose of all the questions before us. Some of these it will be convenient to discuss in the order in which they were considered.

II—1. In attempting to distinguish property of the two estates the first question to arise is, "What was the effect of Edward's deed of assignment?" As already intimated, we think it passed the real estate conveyed to him by John. The validity of both deeds of March 4th has been directly assailed, and judicially established, in the case of *Brannan v. Purcell*, 41 O. S., 187. The result of that contest simplifies the inquiry in this. No other facts are now presented from which a different conclusion could be reached. In that case the court in effect held, not that Edward's assignment to Mannix was an assignment by John, but that because of the relations of Edward and John to the same creditors, the assignment by Edward had the same practical operation as an assignment by John; and, hence, was in law a sufficient substitution for an assignment by John. Certainly upon the face of the instrument Edward did not make the assignment as an agent of John, or for the benefit of the creditors of John. It was the very purpose of the two conveyances to transfer the real estate to Mannix by means of an assignment by Edward rather than by an assignment by John; and a court of last re

sort has sustained the validity of what was done. John's deed transferred all the estate and interest he held in the property to Edward, and Edward's deed transferred it to Mannix. Mannix received this real estate then by virtue of the assignment made to him by Edward, and as the assignee of Edward he is to account for it.

The realty described in John's deed to Edward consisted of eight parcels, which may be briefly described as the Eighth and Central avenue property; the Third and Plum street property; the Mount St. Mary's Seminary property; the Morgan tract; the Considine farm; the Mt. Harson lot; the Cathedral School property; and the Coleman property. Some of these parcels were incumbered by liens. The net proceeds of sales are chargeable to the assignee on the account of Edward's estate.

It follows of course that the personalty held by Edward on March 4th, was transferred to Mannix in the same way. The deed includes both realty and personalty, and if he held the personalty by no better title before, the arrangement entered into between him and John gave him as good a title as that by which he acquired the realty. All the personalty received by Mannix, except some personal and official effects, and several sums of money hereafter specified, has been received by virtue of the assignment made to him by Edward, and as Edward's assignee he is to account for it. This general line of separation between the two estates is subject to several qualifications.

2. John's deed of assignment to Mannix conveyed the residue of his estate. In terms it includes all the property of which "he was seized at law or in equity, including every species of estate, real or personal which may by any proceeding at law or in equity be subjected to the payment of his debts." With the exception already stated there was no personalty upon which it could operate. But John held real estate known as Nos. 263 and 265 Third street, and St. Joseph's Cemetery, which had not been included in his preceding deed to Edward. In addition to that he held nominally, at least, a fee-simple title in over two hundred parcels of land in the Catholic Diocese of Cincinnati, improved and in use for ecclesiastical purposes. Mannix as the assignee of John B. Purcell and Edward Purcell brought suit against John B. Purcell as Archbishop of the Diocese, setting out in substance these conveyances from John to Edward, and from Edward and John to himself, and the several parcels of land conveyed by them; alleging that by reason of a claim that John's tenure of the realty had only been in trust for ecclesiastical purposes, there was a cloud upon the title preventing him from making sale. In this suit lien-holders were made parties, and by foreclosure proceedings the Eighth and Central avenue, and Third and Plum street properties were sold to satisfy mortgages and yielded a surplus.

In the district court, to which this action was taken, it was in brief held, that John's title in the realty was such as *prima facie* to subject it to the payment of his debts; that if in fact he held it in trust, it could not be subjected to the payment of his debts; that the fact of a trust could be established by parol evidence; that the evidence to establish a trust must be clear, certain and conclusive, not only as to its existence, but also as to its terms; and that if the evidence leaves it in doubt whether a trust was intended, the legal title will prevail. In the application of these principles to the case before it, the court also held that the Cathedral property, the Cathedral School property, and the Mount St. Mary's Seminary property, with other property not involved in

the present inquiry, were held by John in trust, and were not assignable for the payment of his debts; but that the assignee was entitled to an account in the case of each for advances made by John and Edward on behalf of the same; and on the other hand, that the St. Joseph's Cemetery property was not held by John in trust, and did pass to his assignee for the benefit of creditors.

We are governed by this decision. In logical effect it places in the account of Edward's estate the results of the foreclosure sales of the Eighth and Central avenue and Third and Plum street lots; eliminates from his estate the Mount St. Mary's Seminary; and charges to the account of John's estate the sale of lots in St. Joseph's Cemetery. The case has important bearings upon other questions involved in the exceptions.

3. So far as this account is now concerned, three pieces of property unsold stand much upon the same footing. Each perhaps indirectly was the source of some revenue, and the cause of some expense to the trust.

(a.) The Cathedral property originally included the Cathedral residence and the lot on Eighth and Central avenue already mentioned. The title was in John. Prior to the assignment John had obtained a perpetual policy of insurance on the improvements, which Mannix as his assignee cancelled and converted into money, and replaced with other insurance at a less outlay. Prior to the assignment John had also paid considerable sums of money in the way of taxes on the property, which Mannix as his assignee subsequently recovered back in a suit against the county commissioners. Subsequently to the assignment Mannix received a sum of money on account of taxes paid on the property, from a priest in authority at the Cathedral; and has paid out several sums of money in the way of taxes on the property. So much of the property as remains unsold was held in trust, and the rest passed to Edward. But the taxes paid were paid partly on account of a portion of what was held in trust and partly on account of what was conveyed to Edward. There has been no apportionment of these taxes, and there are no data before this court from which an apportionment could be made. Claim has been asserted by the assignee against the ecclesiastical successor of John for repayment of the same in a proportionate amount, and while the validity of the claim is admitted, the amount has not been adjusted, and as to that it is still pending.

(b.) We have seen that Mount St. Mary's Seminary was held by John in trust. It was an educational institution, but has been closed as such since the assignment. Mannix has received some small sums of money paid to him on account of tuition given in the institution, before the assignment, of course. Besides the building it was provided with furniture, paintings, and a valuable library. While the proceedings for the subjection of the property to the payment of debts were pending, expenses were incurred in the care and preservation of the property, which with some hesitation are allowed.

(c.) The Coleman property was the subject of litigation. Coleman had conveyed it to John, reserving a life estate in himself. John had executed back a declaration of trust, not of record, obligating himself to hold the property for certain charitable uses. After Coleman's death, his heirs brought suit against Mannix to set aside the conveyance. In the litigation that ensued the validity of the conveyance was sustained and the trust established. Proceedings in error were pending when a

compromise was effected and Mannix realized a small sum of money. He also paid out a small amount for insurance.

We think Mannix received and paid these sums of money as the representative of John, in whom the legal title to those properties was vested. *Prima facie*, each parcel was assignable for his debts, and until judicially decided otherwise, there was at least a doubt in the assignee's favor. If by reason of that doubt he realized monies, he should certainly account for them, and account in the capacity in which they naturally came into his hands. And so as to expenses. In case of doubt an assignee should be allowed a reasonable discretion, and while it may be questioned whether some of these payments are fairly chargeable to the trust, we cannot say that there was an abuse of such discretion in making them.

4. For reasons somewhat similar, we have charged to the account of John's estate the revenues received by Mannix from ecclesiastical sources.

From the "Diocesan Trustees" he received a safe, some office furniture and a small sum of money. We have no data to determine whence this money was derived. The trustees were appointed by John, and paid the money, it would seem, as his representatives.

From the successor of John, in his ecclesiastical office, and from the secretary of his successor, several sums of money were received by Mannix, with the statement that the parties from whom the money came did not wish to be known. On what account, and on whose account these monies were paid, we are left entirely to conjecture. In the absence of any testimony, we think it not an unnatural presumption that the account should be indicated in the incumbent of the office through whom the monies came.

5. Mannix received considerable sums of money in suits, the records of which describe the capacity in which he appeared, and determine the account to which his receipts in those cases belong. For instance, in the case of *Boyle v. Boyle et al.*, No. 35,902, superior court of Cincinnati, he recovered expressly as the assignee of John B. Purcell only, and the amounts he received in that case are accordingly charged to the account of John's estate. In other suits he recovered expressly as the assignee of Edward Purcell only, and his receipts in those cases are accordingly charged to the account of Edward's estate. In such instances we see no reason for going behind the record.

But in the case of *Mannix v. Boyle et al.*, No. 61,692, Hamilton common pleas, the record has not been accessible. It appears, however, from the testimony, that the suit was brought to set aside a conveyance. Prior to either assignment, John B. Purcell had made the conveyance to Boyle, taking a mortgage on the tract conveyed for the purchase money. John was indebted to Manning, and Edward was indebted to Westerman; the amount of the two claims being about equal to John's claim against Boyle for this purchase money. Prior to March, 1879, Boyle had transactions with Manning and Westerman, under which the property was claimed by way of offset to John's lien for the purchase money. A compromise was effected, in which Mannix received sums of money from Boyle and Manning, and real estate from Westerman. As the original indebtedness from both Boyle and Manning was to John, we think the monies received from them chargeable to the account of John's estate.

The case of *Grueter v. Mannix et al.*, No. 69,988, Hamilton common pleas, relates to a portion of the "Considine Farm," and is more

complicated. It appears that Grueter was the assignee of a lease executed in 1874 by John. The lease contained a privilege of purchase and a covenant of John to convey by warranty deed to purchasers in subdivided parcels. A subdivision and sales of lots were made, the purchasers relying upon the covenant. After the assignments a controversy arose as to whether payments of money to Edward had been made on account of rents reserved in the lease, Mannix refusing to convey until his claim for back rents was paid. In the meantime a claim was asserted against an undivided fractional part (three-tenths) of the original title of John, in what is known as the Barr suit, which is still pending.

An entry was made under which Mannix received sums of money from several parties to the action, and was directed to hold a sufficient portion of the same to protect the lot holders against claims in the Barr suit. And, that no element of complication might be wanting, John included his interest in the "Considine Farm" in his conveyance to Edward. The court in its action did not prescribe the amount to be so held, or distinguish between the two estates Mannix represented. What Mannix is to hold, we think he should hold as the representative of John, whose title was involved. The remainder belongs to Edward's estate. We are left to fix upon some arbitrary rule of division, and have divided the amounts equally between the two estates.

6. Some rents have been received. Such as have accrued since the assignments, of course, follow title. The Block & Pollak rents were for the Third and Plum street property, and go to Edward's estate. The McLaughlin and Connor rents were for Nos. 263 and 265 Third street, and go to John's estate.

The ground rents received from George F. Meyers were on both accounts. He held a lease on part of the "Considine Farm," under which rents were due at the time of the assignment and subsequently accrued. Mannix made no distinction in the amount in his inventory, his report, or his testimony. To arrive at some data the court *sua sponte* examined Mr. Meyers and obtained from him the figures from which a division of that item has been made.

Concerning the further receipts, the division of the account may be made without remark. Some are distinguished by the initials "E. P." and "J. B. P." in the inventory, and account books of Mannix, with which his account has been compared; some fall within principles already discussed; and the appropriate place of others will be apparent.

III.—There has been controversy as to whether Mannix should not be charged with certain items which do not appear in his account. It is quite clear that some of these items are chargeable. It was developed in the examination of Mannix that payments were made to him of various amounts (\$500, Nov. 18, 1879, by E. P. Bradstreet; 50 cents, Dec. 11, 1879, by Mary J. O'Neill; 32 cents, Feb. 2, 1880, by Abner Longshore; \$350, Oct. 9, 1880, by Ann Spanhorst; \$23.54, Dec. 7, 1880, by Johann Thilman; \$5, Aug. 7, 1882, by Winifred McDonnell; \$10, Aug. 22, 1882, and \$30, June 20, 1884, by Peter Burns; 50 cents, Aug. 6, 1883, by Daniel Lehan; \$111.91, May 23, 1885, by Mary E. Hadley; \$20, Oct. 1, 1879, and \$20, Jan. 1, 1880, including coupons of United States four per cent. bonds) all of which are omitted from his account. They are now charged, each in its appropriate account, in the accounts stated.

The principal item in this controversy relates to \$10,800, par value, United States four per cent. bonds. Such an item is included in the inventory and appraisement filed May 23, 1879. In his account he

credits himself with purchases of such bonds in par value as follows: April 12, 1879, \$4,550, May 5, 1879, \$1,250, and May 17, 1879, \$5,000, aggregating the same amount, \$10,800. It would appear, therefore, that on the latter date he had on hand to account for, \$21,600 of such bonds, including bonds appraised and bonds purchased. But Mr. Mannix testifies that the bonds appraised and the bonds purchased are the same bonds; that he received no bonds by the assignment; that he purchased these bonds from monies collected while the inventory was in progress; and that having them on hand when the inventory was filed, he had them included in it and appraised. Circumstances seem to corroborate this explanation. A calculation of the receipts and expenditures to May 17, 1879, leaves in Mannix's hands a sufficient sum of money to have made the purchases. And considering the long financial stress that preceded these assignments, the possession of Government bonds in any considerable amount by the assignors seems at least very improbable. We have, therefore, accepted the explanation.

As such purchases necessarily required the use of monies collected on account of John's estate, as well as Edward's, we have put an equitable proportion of the bonds so purchased into each account.

It is questionable whether other items claimed on behalf of the trust ought not to be charged against the assignee. But as an assignee should be allowed some latitude of discretion, and the testimony should clearly charge him, they are denied place in the accounts.

IV.—We come now to the other side of this account in which Mannix credits himself with sundry items of expense, investments and compensation. Here the questions relate more to the propriety of the amounts than the division of the items; the separation of the two estates on one side of the account being followed of course, by a corresponding separation on the other.

1. Mr. Mannix credits his account with payments of clerk hire from the date of the assignment to September 2, 1882, a period of about three years and six months, aggregating an amount of nearly seventeen hundred dollars. Clerical services in the office of the auditor and recorder of Hamilton county are not included, and were paid for separately. He claims to have paid nearly all this money to a law student in his office, continuously employed to write letters, investigate claims and to prepare and take the proofs of claims of creditors without charge to the latter therefor. It was no part of the assignee's duty to perform notarial work for the creditors. And if during the first year following these assignments Mr. Mannix and his law partner and his clerk were able to perform the clerical labors imposed upon him including the preparation and proof of claims, it seems to us that Mr. Mannix and his law partner, after the first year, could have performed such labors as remained without the aid of a clerk. We therefore credit the payments for clerical services for one year, following the assignment, as set out in his accounts. And as these services were rendered to both estates, and some arbitrary division must be adopted, we follow the obvious one and apportion one-half of the expense to each estate.

2. Mr. Mannix credits his account with payments of office rent from the date of the assignment to November 1, 1885. The period covered is six years and eight months, and the aggregate amount is nearly twelve hundred dollars. It appears that there were many creditors, and that for months after the assignment they crowded the office of the assignee

and his partner to such an extent that additional office room was necessary. It was the duty of the assignee to receive proofs of claims and answer reasonable inquires. We think that under the peculiar circumstances of this assignment, office rent for one year following the date of the assignment is not an unreasonable or improper charge against the trust. But it was not the duty of the assignee to provide a special office for the entertainment of creditors after the claims were filed and before any dividend was to be paid. And if he continued to retain a separate office for a period longer than we have named, it was obviously more for his personal convenience than by way of any benefit to the trust. For reasons already given, we divide this expense equally between the two estates.

3. Considerable expense in the way of attorney fees, notary fees, printing, costs, etc., was incurred in the case of *Mannix v. Purcell*, already mentioned as having been brought to subject property. So far, in the main, the suit has been unsuccessful. But no question is made as to the propriety of such a suit, or the amounts paid. The question is, "Which estate should bear the expense of this litigation?" The title of most of the property sought to be subjected was in John; but several parcels included in the petition were in the name of Edward. Mannix sets up both assignments in his petition, and brings his suit as the assignee of both Edward and John. The object of the action was to subject property to the payment of debts; but the debts to be paid were the debts of both Edward and John, and one estate was to profit by the litigation as much as the other. In the result actually realized, John's estate receives the benefit of the Cemetery lots; while Edward's estate takes the surplus of the foreclosure sales. It seems therefore unjust that either estate in assignment should bear the whole burden of this expense. As it was incurred for the equal benefit of both estates, and in a measure involved both estates, we divide it equally and charge one-half to each.

There is an apparent exception. Copies of records were procured from different counties embraced in the diocese, in which John held real estate. These records were the muniments of his title. It may have been proper to use them for other purposes than as evidence in this particular action. As the expense is so directly connected with John's estate, we have charged it to John's estate. And we have similarly charged the taxes paid in Auglaize county.

V.—In the matter of investments Mr. Mannix's account is false and fraudulent. On his examination he admits that it contains many entries of purchases that were never made. He mildly speaks of them as entries of "purchases that he should have made," which is only another way of saying that they are entries he should not have made, of purchases that he did not in fact make. The purpose of these fictitious entries is apparent. The money represented by them had been converted to his own use, and the law required him to account for it with six per cent. interest from the date of conversion. Government bonds bore a lower rate of interest, and there would be a clear profit to him by practising this deception. He admits that he used many thousands of dollars of this trust property in private speculative transactions, of which there is not the slightest intimation in his report from beginning to end. And after squandering the whole trust estate until only a little remnant of depreciated securities is left, he crowns the infamy by deliberately coming into court with a false report over his signature and oath, setting out solemn reasons why it was impracticable to make any settlement of the

assignment, and why it was proper and necessary "that the funds in his hands shall be held by him, invested as shown in his foregoing account."

It is difficult to trace these transactions. Mr. Mannix did not confide them even to his books, and the only record preserved of them is in loose memoranda. But while difficult, it is perhaps unnecessary for the purposes of this account to trace them. Profits and investments all went one road, and but little survives the general disaster.

1. At the date of the filing of this account, however, he admits that he had on hand 301 shares of Cincinnati, New Orleans and Texas Pacific Railroad stock of the par value of one hundred dollars each; and 200 shares of Mt. Adams and Eden Park railroad stock, of the par value of fifty dollars each, which he purchased with trust funds. In his account there is no entry of any purchase of such stock, or of any dividend received on account of it. From the memoranda and testimony of Mr. Mannix it appears that he purchased the former stock as follows: Oct. 6, 1881, 100 shares at par, \$10,000, in the name of Charles Stewart; same date, 150 shares at par, \$15,000, in the name of M. Walsh; Oct. 19, 1881, 44 shares at \$1.07½, \$4,730, in his own name as assignee, and March 15, 1882, seven shares at 98½ cents, \$689.50; and the latter stock, in one purchase March 16, 1882, at 90 cents, \$9,000; and that he received dividends on the same as follows: On the former stock, Jan. 20, 1882, on 294 shares at \$1.50 per share, \$441; and Feb. 5, 1883, on 301 shares at \$3.00 per share, \$903; on the latter stock, July 10, 1883, \$100; Oct. 11, 1883, \$100; Jan. 12, 1884, \$100, and April 10, 1884, \$100. If there were other dividends the fact does not appear. He had no authority to purchase these shares, and they have depreciated in value. Since filing his account he says he has acquainted his sureties with the situation of his affairs, and delivered the shares to them by way of "indemnity." It will hardly be contended that his sureties, "acquainted with the situation of his affairs," could hold these shares by way of "indemnity." We treat the shares as still on hand, credit his account with the amounts paid for them, and charge it with dividends received, and the depreciation in market value on the first day of this term.

2. The loss in market value of these stocks became so great that Mr. Mannix resorted to the tender mercies of Wall Street to retrieve it. Here his investments melted away like snow-flakes in the morning sun. When the money resources of his trust were exhausted, the box in the Safe Deposit Company was rifled of its bonds. The spell was upon him, and neither pride of manhood, nor professional reputation, nor loyalty to friends who had honored him in this trust with their confidence, checked his course until all was gone.

We have now to deal with the matter only to the extent of correcting his account.

(a). It appears from the examination of Mr. Mannix that in these stock speculations he hypothecated bonds of his trust as follows:

1882, Nov. 21, U. S. four per cents.....	\$ 500
1883, May 13, U. S. four per cents.....	6,000
1883, Aug. 18, U. S. four per cents.....	3,500
1883, Aug. 29, U. S. four per cents.....	4,500
1883, Oct. 17, U. S. four per cents.....	9,000
1884, April 2, U. S. four per cents.....	10,000
1884, April 15, U. S. four per cents.....	4,000
1884, April 23, U. S. four per cents.....	16,000
1884, April 29, U. S. four per cents.....	7,000

1884, April 29, Dayton & Michigan fives.....	\$10,000
1884, May 27, U. S. four per cents.....	2,500
1884, May 31, U. S. four per cents.....	8,500
1884, June 30, U. S. four per cents.....	2,000
	<hr/>
	\$ 83,500

These collaterals were sold by his brokers from time to time to cover losses by the depreciation of his stocks. On what dates and at what prices they were sold does not appear. These transactions were wholly without any pretense of authority or justification, and each deposit of the trust funds was a conversion of them to his own use. His account, therefore, is to be charged with the market value of the deposit on the day of deposit; and having charged himself in his account with interest on the securities after the dates of the deposits, it is proper that appropriate deductions be made, in order that his account may carry interest.

(b). The assignee also sold bonds for which he does not account. His report is so framed as to convey the impression that on the 30th day of November, 1885, he had on hand in the vaults of the Safe Deposit Company, United States four per cent. bonds of the par value of \$182,000; when, as his examination discloses, he had not a dollar in bonds of any kind on hand, and had not had for more than a year. This showing was accomplished by crediting on one side of his account purchases of such bonds during the years 1884 and 1885 in an aggregate amount, par value of \$40,000, not one of which he ever bought; and by charging himself on the other side of the account with receipts of interest on coupons he never received, to give color to his report, and omitting to charge himself with the proceeds of bonds actually sold. His system of false entries and omissions of entries has involved the bond investments in hopeless confusion. We have data, however, for a finding that is approximately correct and that can do no injustice at least to Mr. Mannix. In his testimony he admits purchases of United States four per cent. bonds in par value, aggregating \$116,400; that \$24,400 of the same were sold as charged in his account; that he hypothecated \$73,500 of the same with his brokers; that he sold the rest to buy stocks; and that he was overwhelmed with losses in his stock speculations in the month of May, 1884. It appears, therefore, that he sold \$18,500 of these bonds at rates and prices that do not appear. We charge him with the market value of the same on the 1st day of May, 1884.

His account filed does not credit him with the purchase of a \$500 United States three per cent. bond, sold by him Jan. 26, 1884. We credit him with the purchase of the same on the 12th day of September, 1883, from data in evidence furnished by the United States Treasury Department.

Corresponding corrections of interest entries have been made wherever it is clear that the entries charged in the account filed are erroneous.

8. There is fine irony in one item of expense that may be disposed of in this connection. He credits himself with a payment of twenty dollars for rent of box in the Safe Deposit Company, April 17, 1885, nearly a year after it had been despoiled of its valuables. His explanation is that he expected "to recover back what he had lost." The ground of this expectation, however, is not disclosed. We think it was not sufficiently well founded to justify the expenditure.

VI.—In the matter of compensation Mr. Mannix has taken the whole affair into his own hands and deals with it broadly and liberally.

The statute provides that a commission upon the amount collected and accounted for may be allowed to an assignee before any dividend is declared; and that such further allowance shall be made for extraordinary services and counsel fees as shall be considered just and reasonable by the court, but provides that no such further allowance shall be made unless a bill of items shall be filed, with an affidavit showing that the same were performed for, and were necessary to the assignment, and that the amount charged therefor is reasonable, and not more than is usually paid for such services.

No allowance of compensation out of the trust fund has been made, and the statutory bill of items and affidavit are not presented. But the form of the account brings the matter before us, and the technical irregularity may be waived. This account contains seventy-five entries in which Mr. Mannix credits himself with payments to himself and his firm on account of commissions and counsel fees, in the aggregate amounting to over forty thousand dollars. In his examination he says of these credits that "the amounts were entered but just prior to and during the preparation of the account, and the payments were not made as would be indicated by the vouchers." He offers testimony as to the propriety of the charges.

1. The claim for commissions amounts to nine thousand dollars. We think the claim should be denied in any amount. "May be allowed," is the language of the statute. This implies the exercise of judicial discretion. A duty to allow in a proper case imposes the corresponding duty to disallow in an improper case. Courts deal with trustees according to their conduct. Mr. Burrill thus states the rule:

"Where trustees act in good faith, and with due diligence, they receive the favor and protection of the court, and their acts are regarded with the most indulgent consideration; but where they betray their trust, or grossly violate their duty, or where they have been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict, if not rigorous justice." And in a note adds: "It is necessary, in such case, that rules somewhat of a stringent character should be established, to prevent speculation in trust funds, and to induce fidelity of conduct." Burrill on Assignments, sec. 462.

The practical application of the rule is thus stated by the same authority:

"Compensation to an assignee, in any form, is always on the supposition and condition that he performs the duties incumbent on him under the assignment. Hence, if he is guilty of gross carelessness, or misconduct, or violates the trust, no compensation will be allowed him. And if he maladminister and refuse to account, both compensation and expenses may be refused him." *Id.*, sec. 425.

Now if the assignee who presents this claim is not guilty of unreasonable negligence and misconduct in his office; if he has not violated his duty, or betrayed his trust; it would be difficult to conceive a case to which the rule could apply. The law required him to file an account in eight months; and after taking the eight months he neglected for more than six years to file any account whatever. The law required that his account when filed should fully exhibit all his doings and the condition of the estate; and the account he did file was studiously framed not to exhibit his doings and to conceal the actual condition of the estate. The law and every principle of honor, required him to guard and pre-

serve the trust fund as the apple of his eye; and he has deliberately squandered the whole of it in private speculations.

2. The claim for counsel fees exceeds the sum of thirty thousand dollars. This is wholly a claim for compensation, and is in addition to an actual expense for legal services of over three thousand dollars already paid, charged in his account, and allowed. But for one element it would raise only the question just disposed of. These counsel fees are credited in part on account of the services of Mannix himself, and in parts on account of the firm of Mannix & Cosgrave, and Mannix & Moorman, of which he was a member.

(a). It is quite clear from the authorities that Mr. Mannix is not entitled to any allowance for legal services he has performed. In the case of *Gilbert v. Sutliff*, 3 Ohio St., 129, an assignee who had maladministered was refused compensation on the ground that he had involved the beneficiaries of the trust in more expense than he had incurred. So here. It is apparent that the beneficiaries of this trust have incurred much more loss by the maladministration of the assignee than all his claims for compensation together. No allowance to Mr. Mannix for counsel fees could be "considered just and reasonable," in our view of this matter, and none is made.

(b). No testimony was offered to show that Mr. Moorman has performed any legal services on behalf of this trust. Services by Mannix, while a member of the firm, and in the name of the firm, would give the firm no better claim upon the trust than Mannix would have in his own name and behalf.

(c). But it does appear that during the existence of the firm of Mannix & Cosgrave, Mr. Cosgrave did perform services to the estate. We have had and considered testimony as to the value of his services in that behalf. In a general way he gave valuable attention and services to the estates from the assignments down to the dissolution of the partnership. He spent much of this time in the preparation and trial of the case of *Mannix v. Purcell* already mentioned. Other counsel were employed to conduct the trial, and the litigation has not yielded much profit to the trust. It is not usual to allow large counsel fees in an unsuccessful suit. But we think Mr. Cosgrave performed services which should be credited in this account. Considering all the circumstances we think the sum of five thousand dollars would be a just and reasonable allowance for the same, to be credited as of the date of December 31, 1882, and divided equally between the two estates.

VII.—Under rules as well established and familiar as any in jurisprudence, this account is to be charged with interest. A trustee of any kind who delays unreasonably to account; who makes false and evasive statements of the condition of the trust estate in his hands; who holds large balances of trust monies without making even a partial distribution; and who converts trust funds to his own use, must account with interest: and there is every element requisite to this case for the application of the rule. In case of gross delinquency the weight of authority seems to favor a charge of compound interest with annual rests, though the practice is not uniform. In the present case only simple interest will be charged. As his account was not due until eight months had elapsed from the date of his appointment and qualification, we do not charge him with interest on monies in his hands during that period. We balance his account on the first day of December, 1879, and monthly thereafter.

These balances on either side of the two accounts will be charged with interest to the first day of this term.

In conclusion we find that on the first day of this term John B. Mannix, as assignee of John B. Purcell, was indebted to the estate of John B. Purcell, in the sum of \$55,827.46 on his account as assignee; and an order will be made that he pay the said sum of money, with interest from the first day of this term, to Isaac J. Miller and Gustav Tafel, trustees of the estate of John B. Purcell in assignment.

And we further find that on the 30th day of October, 1885, John B. Mannix, as assignee of Edward Purcell, had on hand three hundred and one shares of stock in the Cincinnati, New Orleans & Texas Pacific Railway Company, of the par value of one hundred dollars each; and two hundred shares of stock in the Mt. Adams & Eden Park Railway Company, of the par value of fifty dollars each; and an order will be made that he deliver the said shares of stock, with any dividends since received thereon, to Isaac J. Miller and Gustav Tafel, trustees of the estate of Edward Purcell in assignment.

And we further find that on the first day of this term John B. Mannix, as assignee of Edward Purcell, was indebted to the estate of Edward Purcell in the sum of \$305,827.70 on his account as such assignee; and an order will be made that he pay said sum of money, with interest from the first day of this term, to Isaac J. Miller and Gustav Tafel, trustees of the estate of Edward Purcell in assignment.

Samuel A. Miller and E. P. Dustin, for the estates.

Thomas McDougall, E. M. Johnston, Lawrence Maxwell, jr., J. A. Jordan, and P. Mallon, for other parties.

WILLS.

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[Hamilton Probate Court.]

†ROBERT BARR'S WILL.

To admit a copy of a will from another state to record in this state, the original will must have been admitted to probate and record, and the court admitting it to record here must be satisfied of that fact.

GORBEL, J.

This is an application to admit to record a paper writing purporting to be an authenticated copy of the last will and testament of Robert Barr, deceased, alleged to have been executed and proved according to the laws of Pennsylvania, and admitted to probate and record on the 21st day of October, 1822, by the Register of wills of Westmoreland county, Pennsylvania.

The application is made under sec. 5937 of the Rev. Stat., which provides authenticated copies of wills executed and proved according to the laws of any state or territory of the United States relating to any property in the state of Ohio may be admitted to record in the probate court of any county of this state, where any part of such property may be situated.

To admit to record a copy of a will under this section, such will must have been executed and proved according to the laws of the state where admitted. In this case, according to the laws of Pennsylvania, such copy must be authenticated. The evidence of its execution and proof is to be contained in the certificate of the proper officer or officers. *Bailey v. Bailey*, 8 Ohio, pages 239, 243.

† This decision was affirmed by the circuit court; see opinion 1 Circ. Dec. 546. See also note to the circuit opinion for reference to other decisions in the case.

The evident intention of this provision of law being that proof having been once made before a judicial tribunal, so long as the order of approval made by that tribunal remains in force it shall not be necessary again to make proof; so that foreign wills executed in conformity with foreign laws are placed on the same footing with domestic wills executed in this state.

The paper presented is a copy of the will of Robert Barr. It contains the testimony of Samuel Moorhead, one of the subscribing witnesses to the will, who testifies to the signing and mental capacity of the testator, and that he saw Charles Baird, the other witness, sign his name as a witness to the will, and that he (Baird) is dead.

It contains also a certificate of E. F. Houseman, who certifies that he is the Register of wills in Westmoreland county, Pa.; that the foregoing is a true and correct copy of the last will and testament of Robert Barr, deceased, and of all proceedings to prove and admit the said will to record.

He further certifies that such proceedings were at the time in compliance with the practice in admitting wills to record in said county.

But as this is simply an opinion of an individual, and not stating any fact that appears on the record, no importance is attached to it.

The question presents itself whether the paper presented contains the requirements of the statute to admit a copy of the last will of Robert Barr to record in this court. There is no dispute that the will relates to property in this county.

To admit a copy of a will from another state to record in this state, the original will must have been admitted to probate and record, and the court admitting it to record here must be satisfied of that fact.

Whether the court can hear other evidence than that presented by the record to be satisfied of that fact, need not be considered in this case, since no testimony was offered, and counsel rely on the record as presented.

Neither the record presented nor the certificate of the register shows that the will in question was admitted to probate.

But it is strongly urged by counsel for the will that although the certificate of the officer does not contain the evidence of the due execution and proof of the will, yet the will being recorded in the will record of Westmoreland county, a presumption arises in its favor, namely, of its having been admitted to probate and record after due proof.

It is a well settled principle of law that a court in the exercise of its jurisdiction is entitled to the presumption that what it has done was rightly done, and on just ground.

But no such presumption can arise where the record fails to show any act of the court or the exercise of its jurisdiction. If the record had disclosed the fact that the court admitted the will to probate, and nothing more, it having jurisdiction, and had exercised it, a presumption would arise that the court heard the proof and was satisfied of the due execution of the will.

The act of approval and ordering to probate and record a will by the court is a judicial act, and is necessary to give such will full effect.

The recording is a mere ministerial act.

A will appearing on the will records would not of itself be proof of its admission to probate. It must be apparent that the court admitted it to probate and record. If a ministerial act, to give it force and effect, depends upon a judicial act, an omission of the latter invalidates the former. Nor is there a distinction where both duties are united in one office.

The record added no validity to the will, and raised no presumption in favor of its admission to probate, in the absence of proof to that effect. Such presumption would be a presumption of a fact, namely, that it was admitted to probate.

A presumption may be based on a fact, but no presumption can be based on a presumption.

Other questions were raised, but the conclusion to which I have come makes it unnecessary for me to consider them.

The evidence failing to show that the will of Robert Barr was admitted to probate, I shall therefore refuse to admit it to record.

ATTACHMENT.

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[Cincinnati Superior Court, Special Term, 1886.]

ANNIE ROCKE V. GEORGE W. RANEY.

A foreign insurance company which does business in this state may be made a garnishee by serving copies of the order of attachment and notice upon a resident managing agent of such company.

The plaintiff herein caused an attachment to be issued against the property of defendant, on the ground of the non-residence of the latter, and served the Phoenix Insurance Company of Hartford, Connecticut, as garnishee, by delivering copies of the order and notice to their general agent in Cincinnati.

The Insurance Company moves that it be discharged from the operation of the order, because it is a foreign corporation doing business in Ohio, and as such not subject to garnishment. The defendant also moves to dissolve the attachment for the same reason.

PECK, J.

The question is whether a foreign insurance company can be made a garnishee under our statutes.

Section 5530 of the Rev. Stats., as amended 78 O. L., 83, provides that any person, partnership or corporation, may be served with such orders; and sec. 5534 prescribes how service shall be made upon corporations. Nothing in the language of these sections indicates an intention to exempt any class of corporations from their operation; and sec. 5532 plainly contemplates the garnishment of non-residents of the state, by providing that they shall answer to the writ in the county where served. It is difficult to perceive why non-resident individuals should be subject to such process and foreign corporations exempt from it. The latter have often permanent agencies within the state, and transact business here as freely and extensively as home companies.

The case of *Conahan v. Cullin*, 2 Disney, 1, is relied upon in support of the motion. An attempt was there made to serve a Cleveland company by delivering a copy of the order of attachment to an agent in Cincinnati. The statutes then, as now, provided that writs of this sort should be served upon residents of the state in the county of their residence, and it was held that the only proper manner to serve the company would be by an order of attachment issued to Cuyahoga county. The reasons for that decision are plainly inapplicable to this case. The requirement that the plaintiff shall resort to the place of residence of the garnishee, can not apply to a person or company having no residence within the state.

Various decisions have been cited from other states, but they do not seem to furnish authority in support of the motion, either from want of similarity in facts, or because the statutes of those states differ widely from our own. Some assistance may perhaps be derived from sec. 3657 in determining the policy of the statutes on this subject. Every foreign insurance company doing business within the state is thereby required to make careful provision for service upon itself of process "mesne or final." The ordinary definition of "mesne process" would, perhaps, cover an order of attachment (2 Bouv. Law Dict., 31), but I am not disposed to regard the provisions of that section as decisive of the point in

question. Without them, the statute is broad enough to give authority to serve this company with the order, and I perceive no reason why plain language should be given an unusual meaning, to except this class of corporations from its operation.

The motions are overruled.

Stevenson & Day, for the motion.

Howard Douglass, *contra*.

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LIBEL.

[Cincinnati Superior Court, February 19, 1886.]

†GEO CRIST V. BRADSTREET CO.

1. In libel against a commercial agency, where there is no evidence of publication except confidentially to subscribers, asking information concerning plaintiff, the occasion of the statements complained of being privileged, the only question for the jury if they find the statements false and injurious, is whether or not, in seeking information about plaintiff, and in preparing and communicating such statements, the agents of defendant acted in good faith, on information which they had no reason to suspect, but honestly believed to be true.
2. In such case there is no presumption of bad faith from the mere falsity of the statements, and the burden of showing bad faith is with plaintiff.

HARMON, J, Charge to Jury:

Gentlemen: Your duty is to reach and render a verdict simply by deciding from the evidence a few questions of fact which constitute "the issue" referred to in your obligation. The law so limits your functions, wisely reserving to itself, through the judge selected and sworn for that purpose, the duty of deciding by what rules the conduct of the parties and their consequent rights are to be determined. What the judge declares to you as such rules is the "law" of the case. And "the evidence" is not what the counsel have stated they intend to prove; not what they have offered, but have not been permitted to prove; not what having been stated by witnesses has afterwards been excluded by the court—all these it is your duty to utterly disregard. "The evidence" consists in what witnesses have been permitted to state to you as their recollection of facts and circumstances, with the papers, books, etc., which are before you. For it is the province of the judge alone to decide what is and what is not proper evidence under the rules of law to be submitted for your consideration.

I am thus particular in defining to you the exact scope and limits of your duty, because when a jury renders a verdict, as unfortunately juries of inferior intelligence sometimes do, not upon the law and the evidence, as I have defined these terms, but upon some general notions of justice they happen to entertain, or upon something not properly in evidence before them, it tends to introduce irregularity into the administration of law, and prevents that intelligent review of their action to which the parties are entitled.

With the utmost confidence that you will carefully apply your judgment to the questions involved in this case, in the light thrown on them by the evidence, and make your verdict merely the expression of the result, I now proceed to explain to you just what those questions are.

The law recognizes injury to reputation as well as injury to person and property, and permits actions therefor. This is an action of that kind. Your attention has been called during the trial to the distinction between character and reputation. It is perfectly plain. A man's character is what he is in fact. His reputation is what he is generally thought to be by those who know and know of him. It is not the opinion which one man or a number of men entertain of him, but the result

† The judgment in this case was affirmed by the superior court in general term: see opinion, 17 B. 138, *post*. A motion for leave to file petition in error to the district court was overruled, January 29, 1889.

of the opinion of all—the commonly prevailing opinion. Beside the real man, as he is known to his maker and perhaps to himself, walks the ideal man which common opinion has created from observation or information of his daily life and past history. This image of a man may be an exact one. It may flatter him. It may do him injustice. That is to say, he may deserve his reputation, be it good, bad, or indifferent, or he may not. One's reputation, too, may be well settled as either good or bad, or it may be still in a formative condition. He may not yet have acquired any reputation at all, in which case the mere negative quality may be said to have a certain value, because it is easier to build a good reputation upon none at all than upon a bad one.

But whatever a man's reputation, it alone, not his real character, can be the subject of injury. This is manifest. All injuries of this sort are done by statements spoken, written or printed about him. No man is any worse in fact because something ill is said about him, just as he is no better in fact because something good is said about him. But as his reputation is created by the opinions of others about him, so it is liable to be affected by statements made about him, the natural tendency of which is to influence the opinions of those who become aware of them.

When a false statement, which from its very nature or from the circumstances under which it is made is calculated to injure the person whom it concerns in the estimation of his fellows, is written or printed and published, that is to say brought to the notice of others, and this is done maliciously, it is termed a libel. It may relate to the personal conduct or character of its subject, or it may relate to him in his trade or business only.

Plaintiff complains here of statements concerning him in his business as a lumber merchant written and communicated to certain persons by defendant in a report bearing date January 25, 1883. The issue in this case relates solely to that, and all the evidence in the case was admitted, and is to be considered only in so far as it throws light upon that single publication.

Plaintiff charges that these statements were false; that they were made and published maliciously; that they were calculated to injure him and did injure him in his standing, reputation, and credit as a business man. Defendant admits that it wrote or printed the statements, and communicated them to certain persons; but denies that they were prepared or published maliciously; denies that they were calculated to or did injure the plaintiff.

These questions and these alone constitute the issue in this case.

In the ordinary case of the publication by one person of another, if the publishing be admitted and the statement be one which from its nature is calculated to injure the business, reputation, standing, or credit of the person complaining, his case is made out unless the publisher prove the statement to be true. The law presumes such statements false in such cases until the contrary appears, and conclusively presumes them to have been maliciously made; that is, that they were intended to produce their natural effect; and presumes that they have worked some injury. That is to say, while in this country of free speech any one may publish what he pleases about another, yet when he does so without any duty or obligation to do so, he is compelled to take the risk as to its truth, and if prove untrue, he is liable, no matter with how good faith, or how upon reliable information, or with how honest a belief in its truth, he made the statement, such considerations going merely to mitigate the wrong done, not to excuse it.

But when the person making the statement was under some obligation or duty to make the statement on the subject to the persons to whom it was made, a different rule applies and for a manifest reason. Ordinary publications are purely voluntary. The only duty the maker of them owes to any one is to the person whom they concern—the duty not to injure him by stating anything false about him, and this duty is absolute. When, however, the publication is made because the maker is under some obligation to the person to whom it is made to give information about the person concerned, it also owes a duty to the person to whom the statement is made not to mislead him by withholding information received and honestly believed to be true. The law, therefore, which is reasonable in all things, does not in such cases impose upon the person making the statement the absolute risk as to its truth, as in other cases; but protects him although it proves to be false, if it was made in an effort in good faith to discharge his duty of giving information, and with an honest belief in its truth.

Statements made in the discharge of such a duty are called "privileged," and the privilege extends to them whether the duty be imposed by law, as where one is called as a witness; by circumstances, as where one is inquired of concerning a person formerly in his employ by one about to employ him, or voluntarily assumed by undertaking to procure information on the subject dealt with by the statement for persons whose interest makes it proper for them to have it.

The duty of defendant was of the latter class, the others being mentioned merely for illustration.

It was engaged in a business which the commercial world has found useful, and which the law recognizes as legitimate and proper, viz.:—the business of collecting for the use of its customers information concerning the reputation, standing, and credit of persons engaged in various branches of trade and commerce. Persons having, or liable to have commercial dealings with others, have a right to make such inquiries upon all subjects relating to such others, as are calculated to inform them to what extent they would be justified in dealing with or trusting them. Such subjects include the means, past history, present standing, reputation for honesty and fair dealing, personal habits so far as they effect business standing, etc., of such persons.

Those desiring such information for such purposes not only have a right to make such inquiries themselves but may send their employes or special agents to make them, or may employ persons engaged like defendant, in the general business of collecting and furnishing such information. And in order that the duty of supplying such information may be freely and faithfully performed, the law, from motives of sound policy, confers on persons bearing such relations to each other the privilege of freely communicating on such subjects, so long as they have an eye singly to the discharge of such duty.

It is evident that persons so privileged to make statements about others may abuse the privilege, in which event they forfeit the protection provided by law. It is equally evident that they are liable to make honest mistakes to the injury of others who are the subjects of their reports, in which event they do not lose such protection.

It being admitted that defendant was engaged in such business, and there being no evidence that it made any communication of the report complained of except in the course of its business to its subscribers who asked for or were entitled to information about plaintiff, and to them only confidentially, it becomes my duty to charge you as a conclusion of law, that the privilege I have referred to attached to that report. But the plaintiff complains that in collecting information about him, reducing it to writing and communicating it to its subscribers by said report, defendant was guilty of abusing its privilege. This defendant denies, averring that if any untrue statement was made in the report, it was due only to an honest mistake. And this, which is the main question in this case, you are to decide from all the evidence.

Bearing in mind then, what I have tried to explain to you as the issue and principles of law applicable to it, you should proceed to determine:

First.—The true intent and meaning which this report would naturally convey to those who read it. If any of the statements in it were not calculated, either from their nature or from the circumstances under which they were communicated, to injure plaintiff's business standing, reputation, or credit, discard them, for no statements are actionable unless they are of that class.

Second.—As to such of them, if any, as you find calculated to have such effect, next inquire whether they were, when so communicated to defendant's subscribers, true or false. Such of them, if any, as you find to reflect upon plaintiff's business reputation, character, credit, ability or conduct, are presumed to have been false until shown to have been true, and the burden is on defendant to show them to have been true, by a fair preponderance of the evidence. Such of them, if any, as merely referred to the amount of his assets, the state of the title thereto, or the extent of his business, without reflecting on his honesty or fair dealing, are not so presumed to have been false, and the burden is on plaintiff to show them to have been so, by a like preponderance of the evidence. Such of the statements as you find to have been substantially true, if any, you will at once eliminate from the case, for no action lies in Ohio for publishing the truth, no matter about whom, nor with what motives.

Third.—As to such of the statements as you find to have been untrue, if any, you will next proceed to determine from the evidence what I have mentioned as the main question in the case, namely, the spirit or motives with which they were made; because, as I have explained, having been made under privilege, the law raises no presumption of wrong motive or improper spirit from the mere fact that they prove in fact to have been untrue, and the privilege is not abused unless it is used with wrong motive or improper spirit. Defendant being a corporation which can act only by its officers and agents, the inquiry here is concerning the spirit or motives which animated those who acted for it in seeking and securing information, and preparing and communicating this report. If in so doing they were actuated only by a sincere desire to do their duty toward the patrons of defendant's agency; if they proceeded fairly in their efforts to obtain information, and the state-

ments in the report were based upon information so obtained which they had no reason to distrust, but honestly believed to be true; if in short, to use a good old English phrase which covers the whole subject and needs no definition, they acted throughout in good faith, then defendant is not liable, though the sources of their information turned out to have been unreliable, the information incorrect, and the statements of the report untrue. If they acted otherwise, then their conduct was wrongful, and defendant is liable whether their motive was hostility to plaintiff and an actual desire to do him injury, or they were merely guilty of a wanton or willful disregard of the rights of others generally, which resulted in an injury to him, or they acted from some other improper motive. The burden rests upon the plaintiff to establish the fact of a lack of good faith on their part by a fair preponderance of the evidence, which simply means that, of carefully weighing all the evidence, you find it so equally balanced that you are fairly in doubt, defendant is entitled to the benefit of the doubt. The degree of certainty beyond all reasonable doubt is not required, as in criminal cases.

The discovery of human motives requires a broad view as well as a close inspection of the relations and conduct of the parties concerned, and therefore the evidence has been permitted to take a wide latitude. It has been directed to the previous state of feeling between defendant's agents and plaintiff, because, if it had been bad, improper conduct might more naturally have been expected than if it had been good; though previous bad feeling does not necessarily imply misconduct any more than previous good feeling necessarily disproves it. Each is only a circumstance of probability or improbability.

The evidence has also been directed to the subsequent conduct and relations of the parties merely for the same purpose. These might throw some light backward upon their conduct, which is directly in issue, just as their former conduct and relations might throw some light forward upon it. It has also dealt with the usual way in which defendant's agents conducted their business of obtaining and reporting information, as well as that followed in this instance. It would not necessarily follow that they acted in bad faith in this instance, because they proceeded differently from their usual methods, nor that they acted in good faith because they proceeded in their usual way. Whichever the fact was, it is merely a circumstance to be given such weight in the decision of the issue as to good faith, as your good judgment may determine it should have. And much has been said in this connection of defendant's printed rules for the conduct of its business. These are to be regarded merely as in the nature of admissions as to what would be proper sources and methods of inquiry. There may have been others also proper, which is a question for you. It is not bound to follow these rules, and the mere failure of its agents to observe them, if they did fail, would not make defendant liable. They are merely to be considered in connection with what was done with reference to the report in question, in so far as they reflect, if you think they reflect at all, upon the question of the good faith of defendant's agents.

Much has been said as to what sources of information defendant's agents should have sought. Now they were not required to seek all sources, nor such as we might now consider to be the best. The way one proceeds in such a case might be so unnatural and unreasonable as to be evidence of a want of good faith, as if he should knowingly avoid worthy sources or means of information, and seek those he did not know to be so, or knew to be otherwise; or if he should have reason to suspect information received and not try to correct or verify it; or if his conduct should indicate carelessness to a degree inconsistent with good motives. On the contrary, the way he proceeded might be so natural under the circumstances as to be of itself evidence of good faith. Situated as defendant's agents were, knowing what they knew, ignorant of what they were then ignorant of, seeking what they sought for the purpose for which they sought it, acting when they acted, with the light they then had, look through their entire conduct into their minds and hearts, and say whether you do or do not see there a simple desire and honest intention to discharge the duties of their calling.

And so of the writing of the report. It is easy to see that one might from honest inadvertence not make it exactly as the information would justify, and that on the contrary the discrepancy might be so great or of such a nature as to be in itself evidence of a want of good faith.

You have, among other things, the testimony of the man who acted for defendant in making up this report, as to whether at the time he believed its statements to be true. Testimony of this kind is permitted when the existence of good faith is the subject of inquiry, although from the nature of things no other witness can speak directly upon the subject. The jury are to consider this in connection with the other evidence, and give it such weight as they think it deserves in view of all the circumstances, one of which is of course the grounds he had for such belief in

the way of knowledge or information. If he had no knowledge or information which would naturally create such a belief on his part in view of all the circumstances surrounding him at the time, you would give less weight to his evidence, if any at all, than if he had knowledge or information which naturally tended to induce such belief.

But it is useless to discourse further on this subject to men of your intelligence. Deciding for yourselves who best remembers and most truly and most accurately speaks when witnesses disagree considering their interest or prejudice or want of them, the degree of attention they were likely to give at the time of the events or facts of which they speak, their manner and appearance, contradictions or corroborations, where such exist, and also determining for yourselves what inferences are fairly to be drawn from the facts and circumstances as you find them, I leave you to say whether or not you are fairly satisfied that there was a lack of good faith in the preparation and publication of this report. If you are, plaintiff is entitled to your verdict, and you will assess his damages at such sum as you think fairly proportioned to the injury actually sustained by him by reason thereof, some, at least nominal damages being presumed. And in determining such damages, it will be proper for you to consider what nature and extent of his business and what his business reputation and credit were, as shown by the evidence, at the time of this report, and its probable effect upon them.

It is discretionary with you, in the exercise of your good judgment, whether or not you will consider, in estimating damages, the time and expense of plaintiff in prosecuting this action, including reasonable counsel fees.

In case you should find that actual malice—an express design to injure, existed on the part of defendant's agents, or willfulness or wantonness of a culpable nature, you have a like discretion to increase the damages by way of punishment or example. And, on the contrary, you may consider any circumstances in mitigation of damages which in your judgment should have that effect.

If on the contrary, you find that, although the statements in the report, or some of them, were untrue, this was not due to any lack of good faith on the part of defendant's agents in their preparation and publication, but only to honest mistake on their part, then defendant is entitled to your verdict, whatever the result to plaintiff; for in that case he will merely have suffered from one of those accidents for which the law, from wise and just motives, gives no remedy.

J. J. Glidden and I. M. Jordan, for plaintiff.

Wilby & Wald and T. B. Paxton, for defendant.

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HOMESTEAD.

[Warren Common Pleas, 1886.]

JOHN T. NIXON v. DAVID W. VAN DYKE.

Where, at the time the land of a judgment debtor was levied upon, and ordered to be sold, he was unmarried and was not living with an unmarried daughter, nor an unmarried minor son; but previous to the day fixed for the sale of the land, he married. Held, he was entitled to the benefit of the homestead law.

O'Neill, J.

Plaintiff asks that the assignment of a homestead in the lands ordered to be sold be set aside, and that the sheriff be ordered to sell the said lands under the appraisal heretofore made, and assigns the following reasons: "First, because at the time said lands were ordered to be sold said David W. Van Dyke was an unmarried man and was not living with an unmarried daughter nor an unmarried minor son; and, second, because at the time said lands were levied upon and at the time the same were ordered sold, the said David W. Van Dyke was not entitled to demand a homestead; and, third, for other reasons appearing upon the proceedings and papers on file in this case."

It is admitted that at the time said lands were levied upon, and at the time the order of sale was granted and issued, said David W. Van Dyke was an unmarried man and was not living with an unmarried daughter nor an unmarried minor son, but previous to the day fixed for the sale of the lands levied upon, said David W.

†This decision was reversed by the circuit court; see opinion 1 Circ. Dec., 364.

Van Dyke married and became the head of a family. It is also admitted that at the time of the levy said David W. Van Dyke was not entitled to demand a homestead.

Section 5435 of the Revised Statutes of Ohio provides that: "Husband and wife living together, a widow or widower living with an unmarried daughter or an unmarried minor son, may hold exempt from sale, on judgment or order, a family homestead not exceeding \$1,000 in value; and the husband, or in case of his failure or refusal, the wife shall have a right to make the demand therefor; but neither can make such demand if the other has a homestead." This section points out the parties entitled to a homestead, provides that the value shall not exceed \$1,000, and gives the wife the right in case of the failure or refusal of the husband, to make demand therefor.

Section 5438 points out the manner of setting off a homestead. In this section (5438) this expression is used: "If such debtor has a family, and if the lands or tenements about to be levied upon, or any part or parcel thereof, constitute the homestead thereof, etc.," from the expression the attorneys for plaintiff claim that the right to demand a homestead must exist at the time of the levy.

Section 5441 provides that: "Any resident of this state who is the head of a family, and not the owner of a homestead, may hold exempt from levy and sale real or personal property, to be selected by such person, his agent or attorney, at any time before sale, not exceeding \$500 in value, in addition to the amount of chattel property otherwise by law exempted."

It is argued by Mr. O'Neill, of counsel for plaintiff, that section 5435 points out the persons who are entitled to a homestead, fixes the time when the demand for homestead may be made, but does not fix the time when the right to the homestead must exist; but that we must look to section 5438 in which we find the expression already referred to, to-wit: "The lands or tenements about to be levied upon;" that the language of sections 5438 and 5441 are almost exactly the same, and he refers the court to the case of *Selders v. Lane*, reported in the 40th O. S., 345, in which case said section 5441 was construed, by our own supreme court, where it held that the claim of Lane based upon his marriage subsequent to the levy, is neither within the letter nor spirit of the statute. It was further argued by Gov. McBurney, also of counsel for plaintiff, that the rendition of this judgment and levy fixed the rights of the parties, and no act of the defendant, Van Dyke, could divest plaintiff of his lien.

A lien having once attached continues so long as the judgment has life, such lien by assignment of homestead is not cancelled, but its enforcement by sale is prevented so long as the premises so assigned remain the home of the debtor's family, and no longer. The assignment of the homestead does not detach or remove the judgment lien. Upon the death of Van Dyke's present wife plaintiff would be entitled to an order of sale. Judgment liens, however, cannot destroy the home, no matter when the marriage was consummated. The leading object of the homestead act is to protect the home—a home not for the husband alone, but for him and his wife and children; a place where they may live in society beyond the reach of financial misfortune and the demands of creditors, unless they, by mutual act, as by sale, divest themselves of the homestead. But it is argued that the levy divested the defendant, Van Dyke, of his homestead; that he was not entitled to a homestead at the time of the marriage; that he had been divested of the homestead by the levy prior to his marriage, and that his marriage would not re-invest him. Not so; the levy was only one step in the direction of divesting him of his homestead, he could not be divested except by sale; he had a right at any time before confirmation to pay off the judgment; if at any time before sale he became the head of a family, either he or his wife had a right to demand that a homestead be set off. He did become the head of a family prior to the sale and demanded a homestead. I think it will be found upon careful examination of the statutes, that our law makes a wide distinction between holding a homestead, not exceeding \$1,000 in value, exempt from sale, on judgment or order; and holding in lieu of a homestead \$500 worth, exempt from levy and sale; that judgments are not liens on goods and chattels until levy is made on them. What is held in lieu of a homestead, that which keeps the wolf from the door, with which the comforts of a home may be secured, may be held exempt from levy and sale; but a homestead may be held exempt from sale. In my opinion the motion is not well taken, and is, therefore, overruled.

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ATTACHMENT—AFFIDAVIT.

[Ashtabula Common Pleas, 1886.]

LEONA M. MCDOWELL v. WM. PITT NIMS.

The next friend of an infant, can, in that capacity, make an affidavit for an attachment, in the cause, and the statement in the affidavit that S. deposes that she has commenced an action as next friend for M., sufficiently avers the agency.

Hearing upon motion to dissolve an attachment.

SHERMAN, J.

An order of attachment was issued in this action and levied upon lands of the defendant in said county of Ashtabula, after the filing of the following affidavit:

CAPTION.

"The said Sarah A. McDowell, being first duly sworn, deposes and says that she has commenced an action in said court, as next friend for Leona McDowell, an infant, against the said William Pitt Nims, defendant, to recover the sum of five thousand dollars, criminally contracted to the said plaintiff by said defendant, as damages for divers assaults and batteries, committed upon the person of the said Leona McDowell, plaintiff, in manner and form as charged in her petition; and the said affiant, Sarah A. McDowell, says that the claim is just, and there is now justly due to the said Leona McDowell, as damages which she has sustained by reason of said assaults and batteries, from said defendant, the said sum of five thousand dollars, which she ought to have and recover from said defendant. Affiant further says, that the said defendant is a non-resident of the State of Ohio; and that he criminally incurred the obligation for which this suit has been brought. * * * *

This affidavit was duly signed and sworn to by Sarah A. McDowell. Pinney & White, for the motion, cited sec. 5522 of the Rev. Stat., and maintained that the affidavit must contain a specific allegation that the affiant was the agent of the infant plaintiff, and also that the next friend was not to be considered as agent in the absence of such an allegation.

Talcott Brothers, and Northway & Fitch, for plaintiff, claimed:

1. That an affidavit or attachment under sec. 5522, Rev. Stat., need not state that it is made by the plaintiff, his agent or attorney; the fact, if disputed, can be proven by evidence *aliunde*. *Sutliff v. Bank of Chenango*, 1 W. L. M., 214; *Winchester v. Pierson*, 3 W. L. J., 181; see *Walker & Bates' Digest*, vol. 1, page 95.

2. Affidavits filed after the order of attachment was granted and which fully establish the fact of such agency, are offered in evidence at this hearing.

3. Should it be necessary to allege such agency in the affidavit, it is not indispensable that the words of the statute should be used, if the affidavit contains language fully equivalent, or clearly showing the fact of agency. See *Creasser v. Young*, 31 Ohio St., 57.

4. This affidavit alleges such agency in that it describes the affiant as next friend, and also states that the action is brought for the benefit of the infant; and under section 4498, Rev. Stat., a court is authorized to take judicial notice that the next friend is the agent. In fact the next friend can be nothing but an agent so far as the suit is concerned.

SHERMAN, J.

This motion raises the question, as to whether or not the allegations of the affidavit do substantially amount to a declaration that Sarah A. McDowell, the *procheinami*, was the agent of Leona McDowell, the infant, and acting as such agent when she made this affidavit. This court is of opinion that the allegations of the affidavit are a sufficient declaration of agency; and that the motion to dissolve the attachment should, therefore, be overruled. In coming to this conclusion it is unnecessary to pass upon the further question raised, and hold that the affidavit need not state the fact of agency at all, but that it could be made to appear from evidence *aliunde*. Nor is it necessary to determine what authority the cases cited by counsel for plaintiff from the district court of Cuyahoga county, and the superior court of Cincinnati, shall have in this county.

EMINENT DOMAIN.

384

[Hamilton Probate Court, 1886.]

CINCINNATI & SPRINGFIELD R. R. CO. V. SPRING GROVE AVE. CO. ET AL.

1. The rule that the power of a railway company to appropriate property is not exhausted by one exercise, but may be exercised for side tracks, depots, etc., as its necessities may require, is not confined to private property.
2. Under the amendment of the act of 1852, providing that railroads may condemn lands for the purposes of side tracks, depots, etc., as the necessities of its business may require, a railroad may appropriate a right-of-way across a turnpike for its side tracks.

GOEBEL, J.

The plaintiff alleges that it is a corporation organized and doing business under the laws of Ohio and owning a railroad running from the city of Cincinnati to the city of Springfield; that the defendant, The Spring Grove Avenue Company, is a corporation owning and controlling Spring Grove Avenue; that part of the property described in the petition adjoins and abuts on said avenue, that by reason of the increase of business at and near this point it has not sufficient tracks and facilities to do said business, and that it has not the right-of-way and grounds to build the necessary additional side tracks and connection, and it is necessary to appropriate said lands and the right-of-way to cross Spring Grove Avenue.

A motion was filed by the Spring Grove Avenue Company to dismiss the proceedings as to it for the following reasons: (1.) Because it does not appear by the petition that said company has power to make the appropriation sought. (2.) Because said petition does not show a necessity for said appropriation.

As to the first objection made, has this company the power to condemn the right-of-way to cross Spring Grove Avenue for the purpose in the petition stated?

It was a doubtful question until after the ruling made by the supreme court in the case of T. & W. R. R. v. Daniels, 16 O. S., 390,

whether a railroad company had power after the location of the road to make alterations or additions to the road other than by a change of the location or grade, such as making new side tracks or the like; but that doubt no longer exists.

The amendment of the act of 1852, which provided for a change of location or grade of roads and to add to it side tracks, depots, etc., and condemn anew lands for that purpose as the necessities of the business require, has been incorporated in substance in the Rev. Stat., and received a construction in the case referred to. In that case it was held that the power to appropriate property was not exhausted after the location of the road, and that a railroad company had power to condemn land for new side tracks when they became necessary in the proper management of the road.

Is this power limited to private property or does it confer power to appropriate a right-of-way across a turnpike?

The ruling made in *T. & W. R. R. v. Daniels*, as to the appropriation of private property by a railroad company, is equally applicable to the appropriation of public property. There is no difference except as to the nature of the property and its uses. The defendant is a corporation holding a franchise of a turnpike for the use of the public. It is subject to legislation and the use may be limited by public exigency.

But where such franchise is held for an important public use, an appropriation can not be made when such taking would defeat the former use, and in effect overrule the corporate franchise. But that is not this case. Here it is sought to cross the turnpike to have access to other property. It does not appear that the two uses are inconsistent, or that the railroad company will defeat or materially interfere with the turnpike company.

The question of its interference becomes one of compensation.

As to the second objection, I think the petition on its face shows a necessity for the appropriation asked. Whether the allegations made in connection therewith are true are matters of proof.

The motion to dismiss will be overruled.

C. B. Matthews, for Railroad Co.

E. A. Ferguson, for Turnpike Co.

419**CRIMINAL LAW.**

[Miami Common Pleas.]

STATE OF OHIO V. GRANVILLE.

The court has power to admit a prisoner to bail after conviction and before sentence.

WRIGHT, J.

The defendant was tried and convicted at the present term of the court of perjury. Pending the hearing and determination of a motion for a new trial, the defendant, through his counsel makes an application to be admitted to bail; the grounds being that his financial affairs are in a complicated and unsettled condition, demanding his personal attention,

and that he may have the opportunity to prepare for the hearing of his said motion. That the court has discretionary power, at any time after conviction, and before sentence, to admit to bail in proper cases, is fully established in this state by a recent decision, viz.: Hampton's case, 42 O. S., 401.

The court's decision in that case is based on our bill of rights, to-wit: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption is great." Section 9.

The court say, that the only limitation on this section of our constitution is sec. 7325, Rev. Stat. This provides that "when a person is convicted of a felony, and execution of the sentence is suspended, the court shall order him into the custody of the sheriff, to be imprisoned until the case is disposed of, etc." This section as it plainly shows, only applies after sentence. There is then, no limitation on the constitutional right to bail until after sentence; and hence the right to bail after conviction, and before sentence is as complete as before conviction. No one doubts, that in cases of felony, before conviction, a defendant is entitled to bail, as a matter of right, upon tendering sufficient sureties. No reason can be assigned why it is not equally so after conviction, and before sentence.

I therefore hold, that the defendant is entitled to bail upon tendering sufficient sureties. The only difference between the taking of bail before, and after conviction, being the amount of it, it should as a rule be much larger after conviction. Defendant's bail is fixed at \$4,000.

POOLING AGREEMENT.

419

[Cincinnati Superior Court, General Term, May, 1886.]

GRIFFITH P. GRIFFITH V. H. J. JEWETT, ET AL.

An agreement by which the stockholders of a railway company confer the power to vote upon their shares, for a lawful purpose, is not illegal, or against public policy, but such agreement may be revoked at any time by any one of the subscribing shareholders, notwithstanding it is in terms irrevocable.

The case was reserved to the general term upon motion for a temporary injunction. It was heard upon the pleadings and certain depositions and affidavits filed by the parties.

The material facts of the case, about which there is no dispute, are that the Cincinnati, Hamilton and Dayton Railroad Company is organized under the laws of Ohio, having a capital stock of \$3,500,000, divided into thirty-five thousand shares of \$100 each. In the month of March, 1886, the owners of 19,854 shares of said stock entered into an agreement of which the following is a copy:

"TRUST AGREEMENT."

"Whereas, it is deemed important to the interests of the stockholders of the Cincinnati, Hamilton and Dayton Railroad Company to create a trust with a shareholding body as beneficiaries thereof, in order that the stock of said company shall not be liable to be brought up for speculative control, and to secure safe and prudent management in the interest of the public as well as the stockholders, and likewise, to guard against the consolidation of the stock of said company with another

company, or a sale or lease of its road, or the granting of aid to, or leasing or purchasing other roads without full knowledge and due consideration on the part of stockholders, the undersigned stockholders in said company, either at law or in equity, each in consideration of the agreement of the other, and of the benefits to be derived from the stipulations hereinafter contained, have agreed as follows:

"1. To assign and transfer on the books of said company to the trustees hereinafter named the number of shares of stock owned or held by them in said company set opposite their respective names; and they and each of them, for the consideration aforesaid, and of \$1, to each of them paid by the trustees hereinafter named, the receipt whereof is hereby acknowledged, do hereby sell, assign, and transfer to said trustees the said shares of stock so held or owned by them and set opposite their respective names, and do hereby respectively authorize and empower the said trustees hereinafter named, or any two of them, as their attorneys in fact, to cause said transfer to be made on the books of said company, subject to the trusts and conditions herein declared.

"2. The said shares of stock so transferred shall be held by said trustees for the common benefit of all the parties to this agreement, and of those who may become such as herein provided.

"3. The said sale and transfer of stock shall become operative when the owners of a majority of the thirty-five thousand shares into which the capital stock of said company is divided, shall in person, or by attorney, have signed or ratified this agreement.

"4. As soon as practicable, after said transfer of stock on the books of said company has been made, said trustees shall execute and issue to the subscribers hereto assignable trust certificates for the number of shares set opposite their respective names, or to the persons who may by assignment have become entitled thereto, which certificate shall be in the form following:

"The Cincinnati, Hamilton and Dayton Railroad Company Trust Certificates:

"This is to certify that— and assigns — entitled to — shares of one hundred dollars each of the beneficial interest in the capital stock of the Cincinnati, Hamilton and Dayton Railroad Company, certificates for which are issued to Hugh J. Jewett, Casimir L. Werk, and A. S. Winslow, trustees, under and in pursuance of a certain trust agreement made in the year 1886, between certain stockholders of said company and the said Hugh J. Jewett, Casimir L. Werk and A. S. Winslow, as trustees under said agreement.

"The holder of this certificate is entitled to the beneficial rights and interest provided in and by the said trust agreement, including a proportionate share of all dividends declared and paid on the stock of the Cincinnati, Hamilton & Dayton Railroad Company, held in trust as aforesaid.

"In witness whereof, the said trustees have caused this certificate to be signed by one of said trustees, and countersigned by their secretary, at Cincinnati, this — day of — A. D. 18—.

"5. Said trustees shall serve for the term named herein and until their successors shall be elected and qualified; shall provide for the orderly transfer of said certificates, and for the registration thereof, at some convenient place in the city of Cincinnati.

"6. The trust hereby created shall vest in the trustees herein named, their survivors and successors; and in case of any of them declining to accept or serve, or the death, resignation or disability of one of them during the term for which they are or may be appointed or elected, the surviving trustees shall appoint a new trustee to fill the vacancy, with like powers, duties, etc. In the event of said trustees failing to agree to fill such vacancy, or of two of said trustees resigning, dying, or becoming disqualified, so that there shall be but one trustee surviving, then the holders of the trust certificates shall be called together to elect a trustee, or trustees, to fill such vacancy or vacancies.

"7. Said trustees shall have power to admit to the benefit of this trust on an equal footing with the original parties hereto, such stockholders in said company as may desire to become parties to this agreement, reserving a sufficient number of shares which are required under the laws of Ohio for the preservation of the corporate privileges, franchises and property of said company.

"8. The trust hereby created shall continue until the first Monday in May, A. D. 1891, and thereafter shall be determined by a vote or the written assent of two-thirds of the holders of said trust certificates, and a meeting shall be called for that purpose by said trustees during April 1891; provided, that whenever said trust expires or is in any manner terminated, the trustees shall forthwith cause to be transferred on the books of the Cincinnati, Hamilton & Dayton Railroad Company the stock so held in trust, and deliver the certificates thereof to the holders of the said trust certificates.

"9. Said trustees shall receive no compensation for their services; but nothing herein shall be so construed as to prohibit either of said trustees from becoming individual owners or holders of said trust certificates, or voting for themselves as directors of said railroad company.

"10. It is understood and agreed that the legal title to the stock transferred under or by virtue of this agreement shall remain vested in the said trustees, their survivors and successors during the continuance of the trust herein provided, and that they shall demand, receive and collect the dividends thereon from time to time as they may be declared by said railroad company, which they shall pay or cause to be paid to the holders of the trust certificates aforesaid.

"11. The stockholders, parties hereto, hereby constitute and appoint the said trustees their true and lawful attorneys and proxies to appear, represent and vote for them at all meetings of the stockholders of the said Cincinnati, Hamilton and Dayton Railroad Company, and the power hereby given shall continue irrevocably and be jointly exercised by them, their successors as herein provided, or any two of them during the existence of the trust hereby created, subject, however, to the conditions following:

"That when the question to be voted on is one relating to the consolidation of the stock of the said company, or the sale or lease of said company's road to another company, or the granting of aid to or the leasing or purchasing of other roads, or the issue or guarantee of bonds, or the creation of preferred stock, which requires the approval of the owners of a certain portion of the whole stock, the trustees shall notify the holders of said trust certificates, at a called meeting, of the nature of the questions upon which a vote is desired, and said trustees shall cast their vote in accordance with the determination of such certificate holders at such meeting.

"12. Whenever meetings of the trust certificate holders are to be held as herein provided, at least ten days notice thereof shall be given by publication in at least one daily newspaper of Cincinnati, and by notice mailed to each of said certificate holders, whose place of residence is known, stating in such notice and publication, specifically, the time, place and object of the meeting.

"In witness whereof the undersigned stockholders as aforesaid have hereunto, or agreements of the same tenor and effect, subscribed their names and set opposite thereto the number of shares held or owned by them respectively, which they desire to be held in trust as aforesaid, and the said trustees have likewise, as evidence of their acceptance of said trust, hereunto affixed their respective signatures, this 24th day of March, A. D. 1886."

Pursuant to the agreement, the shares of stock owned by the subscribers thereto were transferred on the books of the company to the trustees, Jewett, Werk and Winslow, and a trust certificate in the form prescribed in the agreement was issued by the trustees to each of the subscribers for shares equal in number to the shares so by each transferred. On the back of each of the "trust certificates" was indorsed these words: "The within certificate does not give the holder a right to vote at the meetings or elections of the company;" also, a form by the use of which the holder might transfer the certificate to another. After the execution of said agreement and the delivery of the "trust certificates," the plaintiff became the purchaser of more than three thousand shares, represented by such certificates, and the cross-petitioners, Christopher Meyer, Eugene Zimmerman and Henry S. Ives, who join with plaintiff and pray for the same relief, have in like manner become the holders of "trust certificates" representing over three thousand shares of said stock. The certificates held by the plaintiff and other parties above named were, before the commencement of this action, tendered to the trustees with the request that the shares of stock represented by them be transferred on the books of the company to the respective holders of the trust certificates—which request was declined by the trustees. The plaintiff and the defendants who join with him, allege that the trustees retaining the legal title to said stock intend voting upon the same for directors of the company in disregard of the wishes of the holders of the trust certificates. The answer of the

trustees formally denies some of the foregoing facts, but they were not disputed at the hearing. The trustees also allege that the agreement was made in good faith for the purposes set forth in the preamble thereto, and that plaintiff and others have combined together to purchase the stock of the company and obtain control thereof "for speculative purposes; that is to say, for the purpose of selling or leasing said property to some other corporation or body of individuals, making to themselves a profit thereby." These allegations are strenuously denied by plaintiff and the other parties who have purchased trust certificates. They ask an injunction to restrain the trustees from voting upon the shares of stock represented by the trust certificates, and to compel the transfer to them on the books of the company of the shares represented by certificates held by them.

PECK, J.

The construction of the agreement is much disputed and its legality questioned. Perhaps the most important point is to determine, if we can, what is its real purport and effect. By means of the agreement a large number of the stockholders of the Cincinnati, Hamilton and Dayton Railroad Company have combined together and placed the legal title to their stock in the hands of the three trustees, and the latter are thereby, as well as by the express terms of the agreement, authorized to cast the vote of such shares at elections for directors of the company. There was no consideration moving from the trustees to the stockholders to support the agreement, and the trust is not coupled with any interest in the trustees. The consideration between the *cestuis que* trust is found in their mutual promises and action. The transfer of each is made in consideration of a like transfer by the others.

Thus far we find nothing illegal in the agreement. We know of no reason why two or more stockholders may not combine their shares in the hands of a common trustee, either for the simple purpose of empowering the latter to cast the vote of the shares, if the object for which the vote is to be cast be not illegal, or upon such terms as will give to each of them a beneficial interest in the whole of the stock so transferred. In the latter case the agreement could only be revoked, as it was made by the consent of all the parties beneficially interested. As the entire stock of one shareholder may be purchased by another, there seems to be no reason why one may not acquire less than an entire interest in the stock of another. Shares of stock are frequently held by partners, by unincorporated companies, and by other associations of individuals, and there appears to be nothing in the law or its policy which forbids the practice.

The right of the plaintiff to the relief demanded seems to us to depend upon the question whether this agreement is such as to confer upon each subscriber a beneficial interest in the stock of all the others, or whether it is in effect a mere combination of the voting power of the shares owned by the parties to it, leaving to each of them in severalty the entire beneficial interest other than the voting power. The purpose of the agreement was to control the company and its property. That purpose is avowed in the preamble, the statement being that it is made "to secure safe and prudent management" of the road, and to guard against the consolidation, sale or lease of the road, and against other action which it appears the subscribers feared might be taken if the company should pass into the control of other parties. The management of the

company could only be secured by controlling the votes of the shareholders. Hence the provision requiring the signatures of the owners of a majority of the shares to give effect to the agreement, and hence the numerous and careful provisions confining the power to vote the shares of the subscribers upon the trustees, some of which were unnecessary, for the placing of the legal title of the stock in the trustees would of itself authorize them to vote upon it. (*Franklin Bank v. Commercial Bank*, 36 Ohio St., 355.) To secure the vote of this stock was then the main purpose of the contract. That being secured to the trustees in the manner described, it is provided that they shall forthwith issue to each subscriber an assignable trust certificate for the number of shares opposite his name. The trustees are authorized to receive and pay over to each of the beneficiaries a proportionate share of the dividends from time to time declared by the company. They are required to make provision for the orderly transfer and registration of the certificates, and are authorized to admit to the agreement such other stockholders as may desire to become parties to it. The certificates were to be so worded as to show that the holders were entitled to the same number of shares as they had subscribed, and the shares were of the same value, viz., one hundred dollars each.

The principal rights of a stockholder, are said to be to participate in the dividends of the company, and on the winding up thereof to receive a proportionate share of the assets. There is also an incidental right of a shareholder of great value, that of assigning or transferring the stock to another party at will. (*Morawetz on Corporations*, sec. 321.)

The provisions of the "trust agreement" above referred to, carefully preserve to the holder of each certificate issued under it, the right to dividends, and the power to assign. In connection with the latter the division of the stock into shares of moderate amount is important as an aid to transfer. This, too, is provided for by the agreement. The right to participate in the assets of the company upon dissolution in this case depends upon a contingency so remote and improbable that it may fairly be presumed that the parties did not deem it worthy of mention, but it is plain that if such contingency should happen the holder of a certificate, under this agreement, would be entitled to his proportionate share of such assets.

This, then, is the state of the case. As soon as the stock was transferred to the trustees they issued a certificate to the person from whom they received it, showing that he was entitled to every element of value that enters into the stock in the same proportion and the same manner as when he held the certificate of stock, except the right to vote upon it. The latter is all that is left to the trustees. The power to collect and pay over the dividends is simply a power to collect and pay to each certificate holder the dividends declared upon the stock of each. The trustees can not change or re-distribute the amount in any way, but must pay over the same amount of dividend the certificate holder would receive if he held the certificate of stock.

The interests of these trust certificate holders in everything except the voting power of the stock are as distinctly separated as are the interests of the stockholders of a corporation, or the depositors in a bank. It has been suggested that if the trustees were to lose part of the money received by them as dividends, the certificate holders might be compelled to distribute the loss among themselves *pro rata*, and that this shows a joinder of interests; but a common calamity does not necessarily imply

a joint interest. The failure of a bank may cause a proportionate loss to all depositors, but it will hardly be contended that their interests in the assets of the bank are other than several.

The agreement may finally be reduced to this: the entire beneficial interest in the stock is severally vested in the certificate holders, the voting power in the trustees, and the situation does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy authorizing the trustees to cast the vote of all of them for directors.

We can perceive no reason why any number of shareholders, either by means of a proxy or by vesting the legal title in another, may not authorize him to vote upon their stock, and, as such is the substance of this agreement, we consider it not illegal. So long as the parties to it, or their successors in interest, are satisfied with it, no other person may complain, and the "irrevocable clause" does not affect the rights of any one. But if the equitable owner elects to withdraw the legal title from the holder thereof, the case assumes a different aspect. As we have heretofore seen, it is a dry trust—the trustees having no interest to set up in favor of its continuance; but the parties have agreed that this power to vote, vested in the trustees, shall be irrevocable. Can this provision be sustained as against the demand of certificate holders—that they be permitted to revoke? If such demand be not complied with, the party holding the entire beneficial interest in the stock can not cast the vote thereof, while it may be voted upon by one having no interest in it or in the company; and so it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably invested in others. It seems clear that such state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is that the control of stock companies shall be and remain with the owners of the stock. The right to vote is an incident of the ownership of stock, and can not exist apart from it. *Freon v. Carriage Co.*, 43 O. S., 38; *Hafer v. N. Y., L. E. & W. Ry. Co.*, 14 W. L. B., 68. The owners of these trust certificates are, in our opinion, the equitable owners of the shares of stock which they represent, and being such, the incidental right to vote upon the stock necessarily pertains to them. They may permit the trustees as holders of the legal title, to vote in their stead, if they choose, but when they elect to exercise the power themselves, the law will not permit the trustees to refuse it to them.

As to the allegations of the answer concerning the motives of defendants in entering into the agreement, we can only say that we see no reason to doubt that their motives were laudable; but that can not materially affect the case, as we have only to do with their action and its effect. So, also, as to the allegation that plaintiff and certain of the defendants have combined to purchase a controlling interest in the stock of the company for speculative purposes, we can only say that it seems probable that they have combined to purchase a majority of the shares in order to secure control of the company, but that is not of itself an unlawful proceeding, and as to their alleged speculative purposes, no proof to sustain the allegation has been offered. Moreover, we are dealing with rights of property, and it is no answer to one's demand for the possession and control of his own property to say that he intends to use it for an illegal purpose. The law gives to every one not under disability, the control of his own property, and imposes upon him the duty of making

lawful use of it. If the illegal proceedings feared by defendants should be undertaken by any of the parties, the law will doubtless afford remedies, and the courts be ready to apply them.

It follows that the motion for a temporary injunction should be granted to the extent of restraining the trustees from voting the stock which is represented by certificates held by the plaintiff and the cross-petitioners. Should a mandatory order to compel the transfer of the shares to the trust certificate holders be granted on preliminary hearing, it might work great injury to the parties if the court make a different order upon final hearing. A mandatory order is therefore refused.

The case of *Zimmerman v. Jewett et al.*, with one important exception involves the same facts as the case preceding, and was heard with it. The difference is that *Zimmerman* here sues as the owner of stock of the company which was not included in the trust agreement. He claims that the agreement is illegal, and asks that its operation be enjoined. As above stated, we only hold the agreement illegal in so far as it attempts to confer an irrevocable right to vote upon the trustees. This provision is separable from the remainder of the contract. The fact that it appears in the agreement is not an objection as long as the parties to the agreement, or their successors in interest, do not object, and the power to revoke may be exercised only by the holders of trust certificates. The case differs in this respect from that of *Hafer v. Ry. Co.*, cited above. There a majority of the shareholders, for a pecuniary benefit to themselves, transferred the right to vote upon their shares to a party not otherwise interested in the road. The principal object of the contract was illegal, and we granted an injunction at the suit of a shareholder, not a party to the agreement, to restrain its operation, because the effect of it was to remove the control of the company entirely away from its stockholders. The case at bar is very different. If a stockholder were to attempt to prevent the casting of a vote by the holder of a proxy from another stockholder, on the ground that the holder of such proxy was not acting in accordance with the wishes of the owner of the stock, it would be sufficient answer to the person making the attempt, to say that such an objection may be made only by the owner of the stock represented by the proxy. Such we think is substantially the position of *Zimmerman*, and his motion for injunction is overruled.

FORCE and HARMON, JJ., concur.

Hoadly, Johnson & Colston, Paxton & Warrington, and Chas. W. Cass, of N. Y., for plaintiffs.

Kittredge & Wilby, E. A. Ferguson, and Ramsey, Maxwell & Matthews, for defendants.

6

SERVICE OF SUMMONS.

[Cincinnati Superior Court.]

Force, Harmon and Peck, JJ.

DAVID WILSON, ADMR. V. NORTHERN PACIFIC RAILROAD CO.

Service of summons upon a foreign railroad company cannot be made by serving the writ upon a mere traveling solicitor of business for such company.

On motion to set aside service of summons.

PECK, J.

I have carefully considered the motion to set aside the service. The gentleman who was served appears to be a traveling passenger agent, and from what I gather from the evidence, his business is to travel about and solicit passengers, to talk up the road, and also to talk with persons who wish to purchase lands along the line of the railroad. He does not appear to have any contracting capacity whatever; he does not even sell tickets; and he has nothing to do with the freight department of the road; which does not come nearer the state of Ohio than St. Paul, Minnesota. The only office that he maintains here is a small desk in the corner of an office, to which he resorts when he comes in from his trips through Ohio and the neighboring states, where he goes in the course of his business to solicit passengers for his road.

Our statutes, are very liberal in permitting service on railroad companies through agents, both as to home and foreign companies, and provide that any ticket agent, conductor or freight agent, may be served with summons (Rev. Stat., 5044, 5046); yet I do not think they are wide enough to cover this case. The position held by this gentleman does not come within any of the agencies designated in the statutes. He is neither a ticket agent, nor a managing agent, nor any other sort of an agent that would authorize the service of summons upon him. *Gibbon v. Coal Co.*, 2 Sup. Ct. Rep., 75. The motion is granted.

Hoadly, Johnson & Colston, attorneys for N. Pac. R. R. Co.

Baker & Goodhue, attorneys for plaintiff.

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FIRE INSURANCE.

[Cincinnati Superior Court, General Term, 1886.]

Force, Harmon and Peck, JJ.

HOWARD FERRIS, ASSIGNEE V. KENTON INSURANCE CO.

Where the sworn preliminary proofs allege the goods lost at a fire at a number and value more than double what the jury find them to be, and no explanation of this has been attempted, such finding is so far proof of fraud, that the court will set aside the verdict, the defense of false swearing having been made.

Reserved from special term on motion for new trial.

FORCE, J.

The action is to recover upon a policy of fire insurance for \$1,000, upon a stock of goods in a store. The fifth defense is upon a condition

in the policy that any fraud or attempt to defraud will forfeit any right to recovery.

The jury found for the plaintiff and found the loss to be \$600. Paver in his affidavit of loss for preliminary proof, stated the loss to be \$1,528.36. It has been held that when the jury finds for the plaintiff, and finds the loss to be less than one-half the amount sworn to in the preliminary proof, such finding is proof of fraud, and the verdict must be set aside. *Levy v. Baillie*, 7 Bing., 349; *Wall v. Howard Ins. Co.*, 51 Maine, 32; *Sleeper v. New Hampshire Ins. Co.*, 56 N. H., 401. We suppose the rule to be, that in the absence of satisfactory explanation in the evidence, such finding is proof of fraud. In this case no explanation was attempted. On the contrary, it appears that the affidavit of loss in the preliminary proof was compiled from Paver's bills of purchase, containing the same items in the same consecutive order. But in the affidavit a large proportion of the items are overstated, some in quantity, some in value. As the evidence stands, it appears to be a case of deliberate and willful overstatement.

The verdict is set aside and the case remanded for new trial.

Cowan & Ferris, for plaintiff.

Williams & Wambaugh and Clement Bates, for defendants.

MUTUAL BENEFIT ASSOCIATIONS.

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[Cincinnati Superior Court, Special Term.]

MARY PELLAZZINO, GUARD. V. GERMAN CATHOLIC ST. JOSEPH'S SOCIETY.

An amendment to the by-law of a mutual benevolent society providing for the payment of stated benefits to sick members, which reduces the amount of such benefits, does not affect a right to such benefits which had become vested before the adoption of such amendment, although made by virtue of a by-law, in force when such member joined the society, permitting the amendment of any by-law. The right to amend a by-law is not a right to repudiate a debt.

HARMON, J.

Defendant is a mutual benevolent society of which plaintiff's ward, her husband, Joseph Pellazzino, had been for sixteen years, and when this action was brought was a member in good standing. By one of the by-laws, sick members were entitled to receive three dollars per week, while unable to pursue their usual business, and by another such benefits were guaranteed to sick members, though in public charitable institutions.

In October, 1881, Pellazzino became insane, and in April, 1882, was sent to Longview Asylum. He escaped in July, and remained at home until October, when he was returned to the asylum where he still remains.

There is no question about his having been in good standing when he became insane, and none about his good standing having been maintained by proper payments and tenders. The question as to his having reported himself well just before his return to the asylum, and so, under the rules, lost his right to benefits until again reported, visited, etc., is not worthy of attention, because the officer to whom such report was made gives such an account of the interview as to leave no doubt that it

was merely due to the delusion of an insane man that he was well and had work, and the officer so understood it.

By the original by-laws of defendant, the usual right to amend them was reserved; and on October 31, 1882, after due presentation and notice, an amendment was duly adopted limiting said benefits to sick members to thirteen weeks in each year. The only question in the case is whether the rights of Pellazzino to benefits during his then existing inability were affected by this amendment, he not having been present at or agreed to its adoption.

That members whose rights to benefits have become fixed by illness are liable to have them lessened or taken away entirely by such amendments was decided in *Fugate v. Mut. Soc'y. of St. Joseph*, 46 Vt., 362; but the court's reasoning and conclusion are so wide a departure from the common principles of our system of law and of natural justice that I should hesitate to follow them if that case were the only authority on the subject. I certainly am not willing to do so after reading *Poultney v. Bachmann*, 62 How. Pr., 466; *Gundlach v. Ger. Mech. Assn.*, 4 Hun., 339, and *Herschel on the Law of Fraternities*, etc., p. 61.

It is true as argued by counsel for defendant, and held by the court in Vermont, that by the terms of the agreement between the members which constitutes the society, and of that between the society and each member which amounts to a policy of insurance, a right to amend was reserved. But it was a right to amend the by-laws, not to repudiate a debt. A by-law provides what the rights of members shall be in certain events if they continue to pay their dues until such events happen; this, of course, by virtue of the reserved right, may be amended or repealed. But when the event happens, what was a contract depending on a contingency becomes in law a debt. The right to modify a contract does not include the right to repudiate a debt, any more than the reserved right of a legislature to repeal the charter of a corporation gives it the right to confiscate its property. The rights of Pellazzino as a member, including his contingent right to benefits, were subject to modification, whether he consented at the time or not; his rights as a creditor when by falling ill he became one, this contingent right so becoming fixed, are not made so by the language of the contract between him and defendant, and therefore can not be surrendered except by his consent. This dual character of a member who has fallen ill, which is analogous to that of a borrowing member of a building association, was, we think, overlooked by the learned court in Vermont and the learned counsel in Cincinnati.

Judgment for plaintiff.

F. M. Gorman, for plaintiff.

Campbell & Bettman, for defendant.

June 26, 1886.

JURISDICTION OF PROBATE COURT.

38

[Hamilton Common Pleas, 1886.]

†IN THE MATTER OF THE SIMPSON & GAULT MAN. CO.

A company in contemplation of making an assignment for the benefit of creditors, executed preferential mortgages to certain creditors, and the assignee reduced the assets to money. The mortgage creditors asked to have the proceeds distributed to them as preferred claimants, certain other creditors set up that the mortgages were fraudulent and void. Held, that the probate court has no jurisdiction to determine the amount of the claims or the validity of the mortgages, as they are equitable issues.

BUCHWALTER, J.

The Simpson & Gault manufacturing company, in contemplation of making an assignment for the benefit of its creditors, executed mortgages to certain of its creditors with intent to prefer them, and thereupon made a general assignment of its assets for the benefit of its creditors under the statutes of the state. The deed of assignment was filed in the probate court of Hamilton county, and in the administration of the estate the assets covered by said mortgages were reduced to money, which is now held by the assignee. The creditors holding such mortgages filed their applications in the probate court, asking that the proceeds arising from such mortgaged assets be distributed to them as preferred claimants. Certain general creditors thereupon filed answers in the probate court to such applications, setting up that the said mortgages were fraudulent and void, and averring that the probate court had no jurisdiction to try the question of their validity. The matter was heard in the probate court, and that court, notwithstanding such defense, did proceed to pass upon the validity of the mortgages and to fix the priority of liens. From this judgment of the probate court the assignee appealed to this court, and the case was duly docketed. Thereupon certain general creditors filed a motion in this court to dismiss the appeal, for the reason that the probate court had no jurisdiction to try the issues, and that therefore this, as an appellate court, has no jurisdiction in the matter. The jurisdiction of this court is dependent upon the jurisdiction of the probate court from whose order the appeal is taken. Upon an examination of the statutes and the authorities, I am of opinion that the probate court did not have jurisdiction to determine, either the amount of the claims, or the validity of the mortgages given. There was clearly an issue made in equity as to the validity of the mortgages, whether they were part and parcel of the assignment transaction and in fraud of the rights of the general creditors. The power to try that issue has not been given to the probate court; and it does not appear by the pleadings, or by the record before me, that such issues had been determined in any other court of competent jurisdiction, and the record thereof submitted to the probate court, on which its order was founded. A serious question in my mind has been that as the probate court had jurisdiction in all matters as to the assignment except this one issue as to the validity of the mortgages, whether this court would not thereby have jurisdiction by appeal, and if the original jurisdiction which it would have as to the issue of the validity of mortgages, might not be taken by this court as an adjunct to the appellate jurisdiction in the general matters of the assignment. But I have concluded that as no issue was made of any matters pertaining to the assignment except that as to the validity of the mortgages, and that no order made by the probate court was appealed from except as to that which I have held it had no jurisdiction to try, that therefore nothing was before this court except the issue as to the validity of the mortgages. The motion to dismiss the appeal will be granted, and the order made by the probate court be held void for want of jurisdiction.

Citing *Fidelity Trust Co. v. Gill Car Co.*, 25 Federal Rep., 737; *Gilliland v. Adm'r of Sellers*, 2 O. S., 223; also an unreported decision of Judge Baxter in the matter of the removal of the issues relating to these mortgage claims to the federal court.)

Thos. McDougal and Ham. Avery, for mortgagees.

Stallo, Kittredge & Wilby and J. C. Harper, for general creditors.

Sayler & Sayler, for assignee.

† This decision was reversed by the circuit court. See opinion 1 Circ., Dec., 370. The circuit decision was affirmed by the supreme court; see opinion 45 O. S., 141. For the probate decision see Goebel, 256.

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REMOVAL FROM OFFICE.

[Hamilton Probate Court, 1886.]

†CHARLES L. COLBURN ET AL. V. FRANK NEUFARTH.

1. Misfeasance, as a ground of removal from office,—of an infirmity director—is not doing a lawful act in a proper manner, as, approving a bill, which ordinary care would have shown was improper, as being at excessive prices or for private use, and misfeasance must be proved by a preponderance of evidence. Sec. 1732 Rev. Stat.
2. Malfeasance is doing a wrongful act, as approving fraudulent bills, purchasing for private use, permitting the board to contract with his partner, buying unnecessary articles without money in the treasury, or other acts involving fraud or known violation of law, and malfeasance must be proved beyond a reasonable doubt.

CHARGE TO THE JURY.

GOEBEL, J.

Gentlemen:—Charles L. Colburn files his complaint in this court, alleging that he is an elector of this county, and that one Frank Neufarth was, at the April election, 1885, held in the city of Cincinnati, duly elected a director of the board of city infirmity. That said Neufarth on the 15th of April, 1885, entered upon his duty as such director, and is now, and has ever since been acting as such. That said Neufarth has assumed and is bound to perform the duties of said office, with his co-directors, in the management of the infirmity of the city, and is in control of its expenses, with authority, as provided by law and the ordinances of said city, to manage its affairs, to take care of its inmates, erect, enlarge and repair its buildings and additions thereto, and provide for the furnishing thereof, taking care of the grounds connected therewith, and with authority to grant out-door relief to the poor. And he further alleges that the said Neufarth has not faithfully and honestly performed his duties and administered the trust confided to him; but on the other hand, has been guilty of both misfeasance and malfeasance in his office, and makes twelve specific charges against Neufarth, of which I shall speak hereafter.

This proceeding is under section 1732 of the Revised Statutes, which provides in substance, that if complaint, under oath, be filed with the probate judge of the county in which that corporation, or a large part thereof, is situated, by an elector of the corporation, signed and approved by four other electors thereof, charging that any member of any board, or officer of the corporation, has been guilty of misfeasance or malfeasance in office, a citation shall issue to such party charged in the complaint; and if upon such hearing, such officer shall be found guilty of misfeasance or malfeasance in office, either by the judge or the jury (if one be demanded), he shall be removed from office.

It is admitted that Charles L. Colburn, the complainant, and John Poland, E. P. Sheppard, J. H. Beattie and Chris. A. Adams, who approved the complaint, are electors of this county. It is also admitted that Frank Neufarth was duly elected and qualified as a member of the board of directors of the city infirmity; that he entered upon the discharge of his duty as such director, and that he is still acting as such; that he had the management with his co-directors of the infirmity of the city, and was in control of its expenses, taking care of its inmates, the erection, enlargement and improvement of its buildings, of its grounds, and of its authority to grant out-door relief to the poor.

Before proceeding to dwell upon the twelve charges contained in the complaint, it is proper for me to explain the statutory grounds upon which a conviction may be had. It will be seen the statute requires, before a conviction can be had, that he must be either guilty of misfeasance or malfeasance in office, and it is proper for me to define what is misfeasance and malfeasance.

Misfeasance may be defined to be a default in an officer, in not doing a lawful act in a proper manner, omitting to do it as it should be done; in other words, it was the duty of Frank Neufarth, as a member of this board, to approve any lawful bills. If in the performance of that duty, he should approve a bill which, by the exercise of ordinary care and diligence, he would have discovered, as presented, not to be a proper bill, then he would, while in performance of the lawful act, have failed to do it in proper manner, and by approving it, he would be guilty of misfeasance in office.

Malfeasance is the doing of an act wholly unlawful and wrongful; and let me make that a little more definite. It was the duty of Neufarth to approve any lawful

†This opinion, first paragraph of syllabus was reversed in the common pleas, as to degree of proof. See note to Goebel 24.

bill, and if a bill was presented to him, which bill he knew to be fraudulent, either in the amount of the work, if such bill purported to be for work, or in the prices charged, the approval of that bill was wholly wrongful and unlawful, and he would be guilty of malfeasance in office.

The first charge, in substance is, that Frank Neufarth, as such director, has permitted a wasteful and dishonest administration of the affairs by its superintendent and the associate members of the board of directors, in the purchase of materials needed by the infirmary and the employment of labor at extravagant prices, in excess of their fair value and the usual and customary rates at which they could have been purchased and employed; and has authorized and permitted the purchase, for consumption in said institution, of large amounts of material unsuited and unnecessary to its use, such as whiskey and other descriptions of liquors and luxuries inappropriate for such institution, and which no charity would require the taxpayers and the city of Cincinnati to furnish for the maintenance of its poor. I charge you, that the superintendent of this institution was under the control of the board of directors; they are responsible for his acts in the management of the institution in so far as they approve them. If the superintendent, in the management of the institution, purchased materials and employed labor at extravagant prices, and that fact was known to the directors, who acquiesced in it by the approval of such bills, and of bills presented for such material and labor, they are in no better position as if they had themselves contracted for such labor and material. This institution contained many old and feeble persons. It was proper, under medical advice, to prescribe and give to such inmates whiskey and stimulants of that kind; and it was proper to expend a reasonable and just amount for that purpose. It was improper to purchase for consumption whiskey and liquors of other description in excess of what would be necessary and at what would be reasonable and just to pay for such liquors. In the management of an institution of this kind, being a charitable institution, depending for its support on the bounty of the tax-payers of this city, all that could be reasonably expected in the upholding of this institution, was to give to these inmates shelter, proper clothing, wholesome food, and such other things as may have been reasonably necessary to maintain health and life. And I charge you, that before you can find a verdict of guilty on this charge, which, so far as I have related to this point, would be guilty of malfeasance in office, you must first be satisfied, by a preponderance of the evidence, that such materials, supplies and luxuries, were purchased unnecessarily and for extravagant prices; and that there was an unlawful use of whiskey and other liquors in the institution, and that Frank Neufarth approved of the same.

Secondly. That Frank Neufarth approved such bills, either by the signing of the vouchers, or permitted such use of said liquor, and permitted the employment of labor at extravagant prices.

The first complaint further charges that Neufarth, either actually knowing the bills to be excessive and fraudulent, or willfully failing to examine into the matter, joined with his associates in the directory, in the approval and payment of bills for the purchase of such materials and supplies and luxuries, and the employment of labor at the excessive prices. As I have already defined what is misfeasance and malfeasance, it is sufficient for me to say, that if you find that Neufarth knew these bills to be excessive and fraudulent, and approved them, he was guilty of misfeasance; or if he willfully failed to examine into such bills, having reason to believe that they were fraudulent, he was guilty of malfeasance. And if you so find, you must return a verdict of guilty.

The second charge is, that he, as a director, wrongfully purchased, and approved of the purchase of large quantities of liquors, for use at the infirmary, during the time that he has been a director, amounting to the very large sum of nearly \$1,800, at extravagant and excessive prices, the same being wholly unnecessary for the use of said institution; and on the other hand, calculated to injure its officers, servants and inmates. This charge is, to some extent, included in the first charge, and leaves but little for me to say. If you find, from the testimony, that he did wrongfully purchase or approve of the purchase of unnecessary quantities of liquor, at prices far above the market price, or that the excessive use of it demoralized the officers, servants and inmates of the institution, he is guilty of misfeasance in office. But I charge you, before you can return a verdict of guilty on this charge, you must be satisfied, by a preponderance of the evidence, that such purchases were unnecessary; that the excessive use of it did demoralize the officers, servants and inmates, or either of them; otherwise your verdict must be "not guilty."

The third charge alleges, that said Neufarth has acquired and held interest in contracts of purchases and employment by said board executed in behalf of the city, for the purchase of materials and performance of labor, for the use of said infirm-

ary, during his term of office, in violation of the statute, and in fraud of the rights and interests of the city, the details and conditions of which the complainant can not more particularly state and allege. There was no evidence offered to sustain this charge, and I instruct you to return a verdict of "not guilty" on this charge.

The fourth charge alleges, that the board of infirmity directors, on or about the first day of July, 1885, entered into a contract with one John Haders, an overseer of the poor, in the service of said infirmity board; and an officer of the city of Cincinnati, then in the service of the city, for papering the office of the said infirmity board in the city of Cincinnati, in violation of the statutes of the state of Ohio, and in violation of the duties of said infirmity board, which contract was approved by the said Neufarth. The complaint says, that afterwards, for the purpose of concealing from the records of said board said violation of law, a bill for said work was then made out in the name of one George Haders, approved by defendant Neufarth, and upon warrant of said directors paid out of the treasury of the city. The said bill was grossly excessive in amount, fraudulent, and intended to cover money to be taken from the treasury of the city for the use and benefit of said board of directors, some or all of them; of the fraudulent character of which the said Neufarth had knowledge. I charge you, that it was unlawful for the board of directors to enter into a contract with John Haders, if John Haders was an officer of the board or city. If you find, from the testimony, that John Haders was an overseer of the poor, such contract made with him would come under the provisions of the statute. But, before you can find the defendant, Frank Neufarth, guilty, you must be satisfied beyond a reasonable doubt that Frank Neufarth had knowledge of such contract. If, on the other hand, you should find he had no knowledge of such contract, your next inquiry will be, was the bill rendered to the board for such services a reasonable one. If you are satisfied that it was, then you must return a verdict of "not guilty." If you should find, however, that the bill rendered was grossly excessive in its amount, and therefore fraudulent, of which Frank Neufarth had full knowledge, then he is guilty of malfeasance, and you must so find. Before you can convict him of malfeasance, as charged in this charge, you must be satisfied, beyond a reasonable doubt, that Frank Neufarth had knowledge of the fraudulent character of the contract, or of the bill, and that he approved of the same.

Fifth charge—"Complainant says, that during the winter of 1884 and 1885, and in the spring and summer of the year 1885, Michael Hauck, the owner of a small tinning establishment in the city of Cincinnati, was employed by said board of directors to do some repairing, as it is claimed, upon the roof of the infirmity building at Hartwell; and that during that time, he rendered diverse and sundry bills professedly for the labor and materials furnished in making said repairs, amounting in the aggregate to the sum of \$6,007.05. That said bills were submitted to and approved by all of said directors, including said Neufarth, and warrants issued for the same, beginning on the fifth day of May, 1885, and ending on the 31st day of July, 1885; but complainant says, that said bills were false and fraudulent, being for an amount eight or ten times as large as that to which the said Hauck was reasonably entitled for said work and material, and were made, and intended, and were approved, for the purpose of covering large sums of money to be drawn from the treasury of the city of Cincinnati, in fraud of the city and its tax-payers, for which no equivalent in labor and material had been rendered. The said Neufarth, either actually knowing the same to be excessive and fraudulent, or having full knowledge of the circumstances and consideration of such bill, and willfully failing to examine into the matter, joined in approving and ordering said bills paid." You must first find, and I so charge you, that Hauck presented bills between the fifth day of May, 1885, and July 31, 1885. If you so find, did he do such work for which bills were rendered? If he did, was the amount charged reasonable or otherwise? If you find that Hauck presented bills during this period of time, for work never done, or the price for work done was far in excess of its actual value, then such bills for work never done were fraudulent, and bills for work done at excessive prices to the extent of such excess were fraudulent.

Your next inquiry will then be, did Frank Neufarth have knowledge of such fraud. If you find from the evidence that he had knowledge of the fraudulent character of such bills, or if he had not such knowledge, if he failed to examine into such bills having reason to believe them to be fraudulent, he is guilty of malfeasance in office, and in determining the question of his guilt on this charge you should consider all the facts and circumstances connected with the transaction, and if these in your opinion, clearly point to fraud on the part of Neufarth, and there is no reasonable doubt of his guilt in your mind, then you must find him guilty on this charge.

Sixth charge—"Complainant says, that James M. Cronin, a resident of the town of Newport, in the state of Kentucky, was during the years 1884 and 1885, employed

by the board of directors of said infirmary to erect some fences, and do some jobbing and carpentering, in and about the grounds of said infirmary building; and that, in pursuance of said contract, he performed said work, the fair value of which did not exceed \$3,300. But complainant says, that instead of rendering bills for such fair and reasonable value of said work, he, under the direction of the said board of directors, with the intent to cheat and defraud the city of Cincinnati, rendered bills, from time to time, in a large measure fictitious and grossly excessive, for an amount in the aggregate of about \$17,250; which said bills were presented to and approved by said board of directors, and warrants issued for the payment thereof. That a large portion of said bills were approved by the said Neufarth, with knowledge of the grossly excessive and fraudulent character thereof." Now, if you find from the evidence, that he had knowledge of such fraud, then he is guilty of malfeasance; and I can only repeat what I have said in the previous charge, that you may consider any collateral facts, in which he bore a part, for the purpose of establishing such guilty knowledge. But you must be satisfied before you can return a verdict of guilty on the charge of malfeasance contained in this count, beyond a reasonable doubt, that Frank Neufarth had knowledge of such fraud, or not having such knowledge, willfully failed to examine into the matter, having reason to believe that such bills were fraudulent.

Seventh charge—"Complainant further says, that during the year 1884, said board of directors purchased of S. Schott & Co. a large amount of Brussels carpeting, to be delivered and put down, for which the said Schott & Co., rendered a bill dated August 29, 1885, for the sum of \$669.20. Which said bill was approved by all of said directors, including Neufarth, and a warrant issued therefor. But complainant says that said bill was excessive and fraudulent; that a portion of said carpeting was never delivered to the said infirmary; but, if delivered at all, it was delivered elsewhere, to the houses or homes of the directors or other persons, as complainant believes, for their private use, under the direction of one or more of the directors of said infirmary. That the prices for said work and material were extravagant and excessive; that the original bill for said carpeting, according to the prices charged by the said Schott & Co., amounted to \$451.65. But that the same was ordered to be changed by said directors, so as to include a large additional sum, being the difference between said true bill and the amount of the bill as rendered, designed for the use of the said directors. That of the fraudulent character of the bill aforesaid, the said Neufarth had knowledge."

It will be seen that this bill was contracted for prior to the time that Frank Neufarth came into office. With the contracting of this bill, he did not, or could not have had anything to do. The bill was, however, presented to the board after he came into the office, for the sum of \$669.20, which is not disputed.

Before you can return a verdict of guilty on this charge, you must be satisfied that the bill was excessive, and that the same was approved by Frank Neufarth, knowing such bill to be excessive. To the extent of such excess above a fair and reasonable amount it was fraudulent. And before you can return a verdict of guilty, you must be satisfied, beyond a reasonable doubt, that Frank Neufarth had knowledge of such fraud, or not having knowledge, willfully failed to inform himself, having reason to believe that the bill was excessive.

Eighth charge—"Complainant says, that at the time said Neufarth entered upon the office of director of said city infirmary, he was in partnership with one McDonald in the business of plumbing and gas-fitting, at No. 109 East Pearl street, in the city of Cincinnati, and that said partnership is still in existence and carrying on business at the same place. But the complainant says, that the said Neufarth and his co-directors have entered into contracts with the said partner of Neufarth, for furnishing work and material in plumbing and gas-fitting at the infirmary from time to time since said Neufarth has been in office as director; but that in order to conceal the interest of the said Neufarth in said contracts, he fraudulently caused bill-heads to be struck off in the name of Joseph E. McDonald, his partner, and bills for the work and material furnished upon said bill-heads, under such contract, were rendered to the board of directors to the amount of \$201.66; which amount complainant alleges is an unreasonable and excessive charge for the work and material actually furnished; in all of which proceedings by the board of directors the said Neufarth participated, and of which he had knowledge, in violation of the laws of Ohio."

I charge you that Frank Neufarth, as a director of the infirmary board, is an officer of the city of Cincinnati. As such officer, it was unlawful to enter into any contract with any person, when such contract is made with the board of which he is a member, and when he would participate in the fruits of such contract. As a member of such board, he was not disqualified from being a partner, or having any in-

terest in any business or contract, not connected with the board of which he was a member. He had a right to carry on any lawful business with any person that he saw fit. Before you can return a verdict of guilty on this charge, you must be satisfied, beyond a reasonable doubt, that at the time that Joseph E. McDonald entered into a contract with said board, Frank Neufarth was a partner of Joseph E. McDonald and that he had an interest in such contract. If you so find, then he was guilty of malfeasance in office, and you must return a verdict of guilty after having satisfied yourselves beyond a reasonable doubt of his guilt. If upon the other hand, you should find that Frank Neufarth, at that time, was not a partner of Joseph E. McDonald, or if a partner, did not participate or have any interest in this contract, your verdict must be "not guilty." Your inquiry will stop there, for however excessive the bill may have been, not having been approved, although presented, no harm was done to the city.

Ninth charge—"Complainant further says, that during the years 1884 and 1885, one John Heffling, the keeper of a saloon on the turnpike near the infirmary, furnished, with the approval of the board of directors, to the infirmary, for the use of its servants and inmates, quantities of whiskey, wine, beer and cigars, in boxes, bottles and demijohns, and on the 29th of April, 1885, the bills therefor were presented to the board of directors, of which the said Neufarth was one, and were by them approved and ordered to be paid, and on that day a warrant therefore was issued, signed by the said Brockman, Herrmann and Neufarth, for the amount thereof, being \$157.40; which warrant is described in the account as being on account of provisions, medicines and farm. But complainant says that said articles were unnecessary for the use of said infirmary, and that the defendant well knew that their purchase was not authorized by law, and that it was a misapplication of the funds of the infirmary for hurtful and unlawful purposes to pay for them." It is admitted that John Heffling presented this bill and that it was described in the account, or voucher, as being on account of provisions, medicines and farm; when, in fact, it was, in part, for whiskey, beer and cigars. I charge you that it was improper to purchase such articles when the same were unnecessary for the use of the infirmary; and if Frank Neufarth, as such director, had knowledge of the improper purchase and use, for excessive prices, and approved the bill, then he was guilty of misfeasance in office; and you must return a verdict of "guilty." On this charge it is not necessary that you must be satisfied beyond a reasonable doubt, but by a fair preponderance of the evidence, that Frank Neufarth had knowledge of the improper purchase and use of these articles, or of their purchase excessive in amounts or prices. If the voucher was a proper one, then it made no difference under what head the clerk designated the articles for which the voucher was issued. But if it was an improper voucher, a fraudulent one, then the fact that he designated the articles as he did, may be a circumstance, and should be considered in determining the intention of the party to cheat and defraud the city.

Tenth charge—"No evidence having been offered on this charge, I instruct you to return a verdict of "not guilty."

Eleventh charge—"Complainant further says, that defendant has been grossly and willfully negligent and derelict in the performance of his duties, as to the examination of accounts and doing what his office and the law required that he should do in aiding and assisting in the economical and proper administration of the affairs of said infirmary, and in protecting the city of Cincinnati from misappropriation of the funds provided for its support. That the purchases of groceries and provisions for said infirmary, were for prices largely in excess of their market value and of the wholesale rates at which they could have been obtained. That the provisions bought and used by the infirmary were likewise bought at excessive prices, and greatly above the rates at which, with reasonable diligence, they could have been purchased. That the work, material in repair of the infirmary buildings, or of the improvement of the infirmary property, were likewise furnished at extravagant and fraudulent prices; and that for all of these accounts, bills were rendered from time to time for such excessive and fraudulent prices, which included items never rendered and work never performed. That large accounts of luxurious articles were purchased not necessary or appropriate for the use of the infirmary, that were, in fact, designed for the use of the servants and officers in their own families, and for the unlawful entertainment of personal guests at the infirmary, all of which were fraudulent bills and unlawful purchases, and were approved by said Neufarth without remonstrance or objection, and without any effort to protect the city from the fraud attempted to be practiced upon it through them. Complainant says, the said Neufarth had notice of the fraudulent mode of conducting the business of the said infirmary from the beginning of his term of office, and had reason to believe and did believe and know, that the affairs of said infirmary were being so fraudulently conducted; and notwithstanding that, he made no effort of any description to pre-

vent the city from being defrauded, to defeat the payment of the fraudulent bills, that were being presented and allowed by the board of directors, or otherwise to protect the interests of the city."

Some of the matters mentioned in this charge are specifically mentioned in some of the charges upon which I have instructed you. I shall therefore instruct you only on matters not heretofore mentioned. It is charged in substance that Frank Neufarth, as a director, was grossly and willfully negligent and derelict in the performance of his duties in not aiding and assisting in the economical and proper administration of the affairs of the infirmary, and not preventing the misappropriation of the funds. That he has permitted the purchase of groceries and provisions for the infirmary for prices largely in excess of their value and of the wholesale rates at which they could have been purchased; that some of them were made for the use of the officers and servants of the institution, and for unlawful entertainment of personal guests. That Frank Neufarth well knew these facts, and that he made no objection or effort to protect the city.

A public office is a trust, and the law imposes upon a person who assumes a public office, that in the management and in the discharge of his duties he must exercise care and prudence, not necessarily of the highest degree, such as a very vigilant and extremely careful person would exercise; but such care as good faith, exact justice and public policy may require; and the public has the right to expect of such officer, that he will exercise ordinary care and prudence in the trust committed to him. An officer cannot sit by and permit a fraud to be perpetrated without objection, knowing it to be a fraud, or willfully fail to inform himself, if he had reason to believe from the circumstances surrounding him at the time that a fraud was being committed. He is bound by the acts of his associates only so far as his acts aided and assisted, or as by his conduct he acquiesced in the fraud. His objection need not be in any particular form; but he must in some way make manifest his objection, so that there can be no doubt of his disapproval. It is not necessary where fraud is alleged, to prove a participation in the spoils of such fraud of the party charged with fraud in a proceeding of this kind; but such fraud, when proven against an officer, would be malfeasance; nor would it make any difference that after a fraudulent bill was presented and approved and a voucher issued therefor, it was not paid. In such case everything was done by the party in the furtherance of the fraud that he could do, and the failure to get the money or any part thereof, was no fault of his if such officer is charged with the duty of approving bills and issuing vouchers.

It was the duty of Frank Neufarth to assist and aid in the economical and proper administration of his trust; in the discharge of that duty he was bound to purchase the necessary provisions at the wholesale rate in the market. It was unlawful to misapply the funds of this institution for any other purpose than the one for which it was intended. The entertainment of guests at the cost and expense of the institution was illegal and unlawful, and a misappropriation of the funds.

I charge you that if you find from the evidence that Frank Neufarth willfully neglected to do his duty, omitting to do it as it should have been done, by purchasing goods far in excess of their market value, or purchasing articles unnecessary for the use of such institution, or not objecting to the purchase of such articles by the other directors, or permitting such unlawful entertainments, knowing the facts and making no effort to prevent them, or willfully refusing to inform himself, he is guilty of misfeasance in office, and you must so find.

In determining the question as to whether he "willfully" omitted to do his duty, you may consider any circumstance or fact connected with any transaction involved in this charge, which would satisfy your mind that he had knowledge of their character.

The twelfth and last charge in substance is that Frank Neufarth, as a director, contracted for supplies and work after the funds had been exhausted, and when there was no money in the treasury to the credit of the infirmary board, and approved bills and issued warrants therefor contrary to law.

Some years ago the legislature passed two acts which are commonly known as the Worthington and Burns laws, which provide in substance that a warrant issued for money by an officer having the control of such money, unless there was money set apart to meet such expenditure, was void, and the penalty for violating the law by an officer is that he shall be disqualified from holding any office of trust or profit in the city; and if the person be in office, he shall be dismissed.

I charge you that it was unlawful to issue any warrants for any purpose by this board, unless there was as at the time money in the treasury to cover such expenditure. But if you find from the evidence that in order to maintain this institution in providing for the inmates food, clothing, shelter and other things necessary to maintain health and life, warrants were issued to cover such expenditures, while it

was a violation of the law, you cannot convict Frank Neufarth for his participation in the issuing of such vouchers or in the purchase of such articles. The law will not permit an officer to suffer for a violation of a statute, when under certain circumstances it became necessary to violate it in the discharge of his duties. The necessity of the case and good faith must be apparent.

If upon the other hand you should find from the evidence, that it was not necessary to issue such vouchers; that a necessity did not exist, or that contracts were made not necessary under the circumstances to which I have referred, and Frank Neufarth signed such warrants and approved such contracts, knowing at the time that there was no money in the treasury, or if he did not know it, failed to inform himself when he had reason to believe that the fact existed, he is guilty of malfeasance in office and you must so find. But, before you can return a verdict of malfeasance contained in this charge, you must be satisfied beyond a reasonable doubt from the evidence of his guilt.

I have charged you specifically upon the twelve charges and I desire to instruct you upon the subject of burden of proof.

In criminal cases, and in such civil cases where the fraud alleged involves a crime, the presumption of innocence exists in favor of the accused, and the jury must be satisfied in such case beyond a reasonable doubt from the evidence of his guilt, and so I charge you that before you can return a verdict of guilty on any of the charges where such charge involves fraud or want of good faith, or known or continual violation of law, which I have heretofore defined to be malfeasance, you must be satisfied beyond a reasonable doubt, from the evidence, of his guilt. The law is too humane to demand a conviction while a rational doubt remains in the mind of the jury; but when after a fair and full consideration of the evidence, it has produced a conviction and satisfied your mind to a reasonable certainty of his guilt, you must say so. If you are not fully satisfied, but find only that there are probabilities of guilt, your only safe course is to acquit.

But this rule does not apply to any of the charges where fraud or want of good faith, or a known or intentional violation of law is not involved. In such charges alleging only acts of misfeasance in office as before defined, the rule is that you must be satisfied by a preponderance of evidence.

Finally, let me say that you have listened to the testimony of the witnesses and the arguments of counsel, during the many days of this trial, with a patience that I commend in the highest degree; you have heard the instructions of the court, and when you retire to deliberate on your verdict, be swayed neither by considerations personal to the defendant, nor by the demands of public clamor; but remember your oaths to try the defendant according to the law and the evidence, and if you will adopt that as your guide, you will have discharged your whole duty to the defendant, to society and your own conscience.

69

OFFICIAL ADVERTISEMENTS.

[Franklin Common Pleas.]

ELLIOTT V. FRANKLIN CO. (COMMISSIONERS.)

Section 4367 Rev. Stat., gives no power to officials to contract for insertion in more than two papers, and no recovery can be had by the owners of the additional papers.

EVANS, J.

In view of the issues joined in the pleadings, and the admissions of the parties made in open court, the determination of this case depends upon the decision of a single question, to-wit: Did said county treasurer and sheriff authorize plaintiff to make said publications in said newspaper so as to make the county liable to plaintiff for the rates allowed by law for such publication? And in the determination of this question is involved a consideration of the powers and duties of certain public officers to make various publications.

The powers with which public officers, such as county treasurers

and sheriffs, are clothed to make contracts obligatory on the county, is conferred upon them by statute, and unless the statute expressly, or by implication, gives them the power to make a particular contract for and in behalf of the county, the authority to do so does not exist. It is therefore necessary for us to examine the legislation of this state to ascertain the power of county treasurers and sheriffs in respect to the publication in newspapers of election proclamations and rates of taxation. The provisions of the statutes touching the subject under consideration, are contained in the Rev. Stat., sec. 1087, 2977, 4367 and 4368. These several provisions are *in pari materia*, and must be construed together and the legislative intent arrived at by giving to the language used in the several sections, its ordinary and natural import. The court is of the opinion that the county treasurer is the person who is authorized to cause to be published his notice of the rates of taxation, and, under limitations of the statute, to select the newspapers in which the same may be published. Under section 1087, the county treasurer was authorized and required to publish his rates of taxation in some newspaper, which, when properly understood, means in one English paper. But section 4367 authorizes and requires him to publish his rates of taxation in two English newspapers of opposite politics. If there be more than two competent English newspapers, he shall, with regard to the limitations contained in the section, select the two in which publication may be made. The only authority which he has to make such publication is found in the sections above referred to; and as he is an officer having no authority to make any publication at the expense of his county, unless authorized by statute, it follows that the language of the statute conferring its authority, will show its true limit. The treasurer was authorized to make publication of his rates of taxation, by section 1087, in but one English newspaper, and by section 4367, in two English newspapers of opposite politics. The authority conferred by section 4367 cannot be construed as authorizing publication in more than two English newspapers.

The sheriff is authorized and required by section 2077 to publish his election proclamation, and under this section to publish it in but one English newspaper; and his authority to make publication thereof under section 4367, is the same as that of county treasurers to publish rates of taxation.

Upon the facts as we find them to exist in the proofs, and the application thereto of the law as we understand it, the plaintiffs cannot recover for either of said publications. Said publications, respectively, had been given to the Journal and Times before application was made to have them published in the Sunday Capital, and this fact was known to plaintiff, or his agent, at the time of such application, as well as the further fact that the board of county commissioners had resolved that they would pay but two English newspapers for the publication of said proclamation and rates. The legal presumption is that every person knows the law, and the evidence shows that plaintiff, or his agent, had due notice of all the material facts.

69

GUARDIAN'S ACCOUNT.

[Muskingum Common Pleas.]

PORTER & WILES V. BROWN, GUARDIAN.

1. The filing of exceptions to guardian's account in the probate court, for the purpose of having the account corrected, is proper practice although no statute expressly gives the right; and upon the hearing of exceptions to a final account, any mistake or error in a former account, not theretofore adjudicated as to the exceptor, may be corrected.
2. The sureties of a guardian may, on their own motion, become parties to the settlement of final account, for the purpose of correcting errors in that or a former account.
3. Where a guardian's sureties have filed exceptions to his final account, alleging mistake and error, to the prejudice of the guardian, in both final and former accounts, it is error for the probate court to strike such exceptions from the files.

PHILLIPS, J.

Defendant filed in the probate court his final account, showing a balance in his hands due his ward. Plaintiffs, the sureties on his bond, filed exceptions to the account, alleging that in fact no amount was in the guardian's hands, because in a former account he had charged himself with money that never came to his hands as such guardian. On the motion of the ward, the exceptions were stricken from the files, on the ground that the exceptors were not proper parties, and had no interest in the settlement. The account was approved, and the guardian ordered to pay the said balance to his ward. The order of the probate court striking the exceptions from the files, is assigned as error.

Defendant claims, *arguendo*, that there is no authority in law for filing exceptions to a guardian's account; that an error in a former account can not be corrected in the settlement of his final account; and that his sureties can not become parties to such settlement for the purpose of asking the correction of such error.

In the absence of express statutory provision, the right to except to a guardian's account rests upon necessity, analogy, and the uniform practice. The right, upon final settlement, to correct any mistake or error in a former account, is expressly given by statute. (Sec. 6332.) The claim that these rights can not be exercised by the guardian's sureties, can not be so summarily disposed of.

It is settled law in Ohio, (1) that the probate court has exclusive jurisdiction of the settlement of guardian's accounts; (2) that an action by the ward against his guardian's sureties, for the amount remaining in the hands of the guardian, can not be maintained until such amount is ascertained by the probate court, on the settlement of the guardian's final account, (*Newton v. Hammond*, 38 O. S., 430); (3) that in such action the sureties, though not parties to the settlement, are concluded thereby, and can not be heard, in the absence of fraud and collusion, to question its correctness. *Braiden v. Mercer*, *ante*, 29.

The sureties are concluded by such settlement, not on the ground that it operates as a judgment against them,—for they may be neither parties nor privies thereto,—but on the ground that it is a part of their contract obligation that the guardian shall pay over to his ward the amount judicially ascertained to be in his hands at the conclusion of his

trust. (Braiden v. Mercer, *supra*; 32 Am. Dec., 197; 58 Am. Dec., 604.) This distinction was not made in Todd v. Lewis, 2 Handy, 280.

The operation of this rule of law is such that if the guardian should, by mistake, charge himself in his final account with an amount not properly so chargeable, and, after approval of his account, make default, his sureties would be liable for the whole amount adjudged to be in the guardian's hands, including that so charged by mistake; and in an action on the bond they would be absolutely defenseless. As to them, though they were not parties to the settlement, the account would have passed *in rem judicatam*, and they could "not be heard in the absence of fraud and collusion, to question its correctness."

From this state of the law it follows that a guardian's sureties are remediless to correct a mere mistake in his account, unless allowed to do so by exceptions in the probate court.

This rule, making the settlement of a guardian's account conclusive upon his sureties, rests upon the authority of both reason and precedent; but it was never intended that it should work injustice. The object of the hearing before the probate court is to correct errors in the account. It cannot be to the prejudice of surety, guardian, or ward, that an error should then and there be corrected at the instance of any one. It is grossly prejudicial to the surety to deny him all opportunity to correct an error in the ascertainment of the amount which he has undertaken to pay.

The law—and especially the law of procedure—is not made up of independent rules, to be adhered to regardless of consequences; it is formulated, and is to be applied to facts, as a harmonious system of principles, for the protection of rights, the prevention of injuries, and the redress of wrongs. It would be an anomaly in jurisprudence, if one whose rights have been prejudiced by the mistake of another, should be irrevocably bound by the mistake, when its correction could prejudice no one.

The question here is mainly one of practice. The right of the probate court to correct errors in the accounts of guardians is not mooted; nor is it denied that in no other way can such errors be corrected. Have the sureties a right to have such errors, if prejudicial to them, corrected? If they have, then they have the right to bring them to the attention of the only court that can correct them. As to fraud and collusion, the sureties, in an action on the bond, may defend, notwithstanding the settlement; but as to mistake or error, unmixed with fraud or collusion, they can not defend after settlement, and must of necessity be allowed to seek its correction in the settlement, and by the mode authorized by the law, by the practice in such cases.

Any person who has or claims an interest in the controversy in an action, may be made a party thereto. (Rev. Stat., 5006.) The filing of a pleading by leave of the court, makes one a party to the action, without formal order making him such. Rosenthal v. Sutton, 31 O. S., 406.

In this case, the sureties having filed their exceptions alleging only error in the account, they had such status in the court as entitled them to have their exceptions heard. In striking the exceptions from the files, I think there was error. To hold otherwise would be to invite friendly and insolvent guardians to a degree of indifference as to mistakes in their accounts, and would leave their sureties no means of escape, but the uncertain defense of fraud and collusion.

Judgment reversed.

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RELIGIOUS SOCIETIES.

[Montgomery Common Pleas.]

DANIEL M. SHOUP ET AL., EX PARTE.

Where property is given to a religious denomination in a city, that part of the Baptist brethren called Dunkers, and part of the congregation form a separate organization, with the consent of the rest, but afterwards change their usages as to matters of church polity, though not as to belief, so as not to be the same as the Dunkers, when it becomes necessary to sell the property and divide the proceeds, the latter are not entitled to demand a share. The different orders of Baptists explained.

ELLIOTT, J.

Shoup and others filed a petition in this court, on Feb. 22, 1883, in which they set forth that on the 7th day of March, 1845, one Peter Aughenbaugh and wife, by deed conveyed, in fee simple, to Henry Yost, Levi Boogher and William Bland, as trustees of the Baptist Brethren, commonly called Dunkers, and their successors in office the real estate situated in the city of Dayton, then designated as lot No. 77, but now known as lot —, of revised numbers, being on the southeast corner of Jackson and VanBuren streets. That the petitioners are the successors in office of said Yost, Boogher and Bland, holding said property under said trust; that a meeting house for said religious denomination was, many years ago, erected on said lot and used for religious meetings by said society in and for what is known as the Beaver Creek district, until the year 1881. At this latter period the meeting house was somewhat damaged by fire, and thereby rendered unfit for the use; that few members of said denomination reside in and about the city, and in consequence the house has not been repaired or used, nor will it be repaired and rendered fit for such use; that the society of which petitioners are the trustees, desire said property should be sold and the proceeds used for the building of churches elsewhere for the use of said Dunker society. Petitioners further say, that the church has become divided into three separate organizations or orders, commonly known as the "Old Order Brethren," the "Conservatives" or Annual Meeting Brethren, and the "Progressives;" that the petitioners represent the Old Order Brethren, and that they deem it equitable and just that the property should be sold and the proceeds divided equally between the three societies or orders, to be used as above indicated in the building of churches. They therefore pray for an order for the sale of the property and division as aforesaid, and for such relief as would be equitable in the premises.

On March 14, 1883, Kiehl, Duncan and Stickrath filed their answer and cross-petition as trustees of the Dayton Church of the Baptist Brethren (Progressives), in which it is averred that this Dayton church was a part of the Beaver Creek district or charge, until March 7, 1882, at which time the members of said church residing in Dayton presented to the regular quarterly council of the Beaver Creek charge or district, their petition, praying that the portion of the membership of the Beaver Creek charge residing in the city, might be made a separate organization and district; that on said day, in due form, according to the usages of said church, said request was granted; that up to said date the Beaver Creek district had two churches and two congregations, the one in the city and one at Zimmermanville in Greene county; that on April 20, 1882, the members residing in the city, in pursuance of the authority and

action of the Quarterly Council, met and organized a separate church of said Baptist Brethren, and have regularly used and occupied and still use and occupy said meeting house for religious worship; that on March 12, 1883, said Dayton church regularly elected said Kiehl, Duncan and Stickrath trustees, and they still hold that and all other property of said society for church purposes as originally contemplated in the deed from Peter Aughenbaugh; that said Dayton church is the real owner and entitled to the property, and that petitioners have no interest therein; and ask that the property be not sold, but that the title of the Dayton church, (the Progressives) be quieted and confirmed.

On May 7, 1883, and August 3, 1885, Stine, Haverstick and Zimmerman, claiming to be the regular trustees of the Baptist Brethren Church, commonly called Dunkers, of the Beaver Creek district, including Dayton, and the successors of said Yost, Boogher and Bland, in said trust, filed their answer and amended answer and cross-petition, in which they contest the claims of both the petitioners and of Kiehl, Duncan and Stickrath, and claim to be owners in trust of the property in question for the use of the regular Baptist Brethren (the Conservatives) and are in possession thereof. They deny that the petition of the Dayton members for a separate organization was ever granted by the Beaver Creek charge, as is averred in the answer of Kiehl et al., or that such separate organization was ever effected according to the usages of the church, or that the Dayton organization under Kiehl and others belongs to or is in any way connected with the Baptist Brethren (commonly called Dunkers) or has any title or interest in the property in question, or in any property of the said Baptist Brethren. They, therefore, ask that the title of Stine and others as such trustees for the regular Baptist Brethren, or Dunker Church, be quieted and confirmed.

Since the filing of the several answers and cross-petitions of Kiehl and others, and Stine and others, the original petitioners, Shoup et al., being opposed to litigation, have withdrawn from the case, and the action now proceeds upon the issues raised by the pleadings of the other parties, the respondents Kiehl, Duncan and Stickrath, representing the so-called Progressives, and Stine, Haverstick and Zimmerman, representing the Conservatives, or regular Baptist Brethren of Beaver Creek church and district. For the sake of convenience we will, in the discussion of the questions arising in the case, designate the parties as "Conservatives" and "Progressives." Happily there are no questions of doctrine of serious importance to be considered, dividing the two organizations. Their religious beliefs are substantially, if not entirely alike; their principal differences are as to matters of church polity, dress and custom and usage, and other questions of conduct.

It seems from the evidence, that the large and influential religious denomination of Baptist Brethren commonly known as Dunkers, has in recent years, because of the differences referred to, been divided into three orders or organizations. There are other divisions, but the ones represented here are the leading ones. It may be more or less important to determine which of them represents the true and original church of that denomination. As before said the "Old Order Brethren" are out of the case, and hence we have only to deal with the Conservatives and the Progressives.

The conveyance and consequent trusts created in this instance date back to 1845, long before the divisions in the church here referred to occurred. The grantors in the conveyance, Peter Aughenbaugh and

wife, were, we assume, members of that church as it then existed, and mindful of its interest and welfare, and desirous that the faith and practices of their church should be encouraged, determined to donate a valuable lot in a growing part of the city, upon which a meeting house might be erected, and where the good people should meet and hear the pure doctrine of the society proclaimed. Therefore "in consideration of \$1 in hand paid by Henry Yost, Levi Boogher and Wm. Bland, trustees of the Baptist Brethren Community, called Dunkers or Tunkers, have bargained and sold, and do hereby bargain, sell and convey unto the said Yost, Boogher and Bland, and their successors in office," the premises in question. This property was taken possession of by Yost, Boogher and Bland as such trustees for the Baptist Brethren or Dunkers, and by the contributions, and labor and zeal of the brethren recognizing the then organization, a meeting house was erected, and thereafter used, as a place of worship and preaching by those adhering to its faith and practices. This condition of things continued without serious interruption until March 7, 1882, or more properly until April 20, 1882, at which time the Progressives claimed to have affected a separate organization of the Dayton church. Manifestly the conveyance created a trust for the use of the church as it then existed and was known. This trust was cast upon Yost, Boogher and Bland, and their successors in office. This doubtless means such official trustees as the church, according to its forms and usages, should designate to hold its property. The original trustees, Yost, Boogher and Bland, have long since ceased to hold their office and others in due form have succeeded to the trusts.

At the beginning of this controversy and long prior thereto, the Dayton and the Zimmermannville congregations constituted one district or charge, according to the economy and usages of the church. A district is usually presided over by a presiding elder or bishop, and may embrace one or several churches. According to the policy and usages of the church, a congregation composing a portion of a district may, by pursuing certain forms, become a separate district or be transferred to an adjoining district. The congregation so desiring to be organized into a separate district presents its petition therefor to the district conference or council, which council is usually composed of delegates representing the various churches in the territory composing the district. If this council grant the request of the congregation, it may be organized according to the usages of the church as a separate district having its own Bishop and council.

As the first important fact in this controversy, it is claimed by the Progressives here that the Dayton church, in due and proper form, in the spring of 1882, presented its request to the council of the Beaver Creek district, praying for its separate organization according to the usages of the church; that the request was granted; that in pursuance thereof it effected a regular and loyal organization as a district, elected its own officers and a presiding elder to be head minister, and trustees to hold and manage its property; that the respondents here, Kiehl, Duncan and Stickrath were so elected trustees, and have ever since, and do now hold the property in question for the uses designated in the deed and as contemplated by the grantor.

In answer to this claim the "Conservatives" contend, that the Dayton church was never regularly organized as a separate congregation and district according to the policy and usages of the Dunker church, and that the property in controversy is still under the control of the respondents.

Stine, Haverstick and Zimmerman, trustees of the Beaver Creek charge, whose territory includes this property. Hence, they say that Kiehl and his associates, are in no sense trustees of this property, not having been properly elected as such.

A question of more importance in this case is this: Conceding that the Dayton church was legally separated from the Beaver Creek church, and organized according to the forms and usages of the society, has it, since that time, separated itself from the mother church, the regular Baptist Brethren, and allied itself with another organization? And if so, then under the trusts created by Peter Aughenbaugh's conveyance, does the Dayton Society carry with it the property in question? In other words, does the property follow the society or does it remain in the church from which the Dayton church seceded?

It is claimed in this connection, that the great Baptist Brethren church was from the beginning and is still a strictly congregational church—that each church or congregation manages its own affairs in its own way, without being amenable to any other body, and that the functions of the annual meeting and other councils outside of the local church, are and should be confined to giving advice, which the local society may follow or reject at pleasure. In short, the Progressives reject the power and authority of the annual meeting, and of all other councils not of the local church. On the other hand the Conservatives claim to be the regular church, and that it is not strictly congregational, but an association of churches, and that the various councils, and tribunals known as district councils and annual meeting are binding on all the churches.

Looking to the results of the best and most reliable testimony before us, it is safe to say that as now organized the great Dunker Church has five principal tribunals for the settlement of matters arising in church discipline, whether these matters pertain to doctrine, or usage, or habit, or polity:

1st. There is the local church, with its council, and bishops and elders. From the decisions of this local council an appeal may be taken to the next in order.

2d. The council of adjoining elders, which is a meeting of the elders of the districts adjoining the one in which the difficulty arose.

3d. The district council, composed of representatives from the various churches in a given territory, embracing several local churches and districts.

4th. The matter may next be presented to the annual meeting, which usually refers it to a committee, whose duty it is to visit the local church or brethren therein and endeavor to adjust the difficulty. This failing, an appeal is had to the great assembly known as—

5th. The annual meeting.

This church recognizes the word of God—the Holy Scriptures—as the only infallible rule of faith and practice. It has no written creed or constitution apart from the Bible. The proceedings, decisions and resolutions of its various councils, constitute in some sense the unwritten law of the church. Sometimes these proceedings are put into permanent form by being printed; at other times no record is kept. The aim is to imitate as closely as possible the simplicity and informality of the primitive church, as the brethren understood it. The answer to all inquiries is, "thus saith the Lord."

Disputes frequently arise in the local churches and elsewhere, as to matter of doctrine and duty. These controversies or inquiries, as they usually happen to be, must be settled by some tribunal. This settlement must have a binding effect on the conduct of the societies and individuals, else the church would soon be rent asunder. The Progressives, adhering to the strict congregational idea, claim that the local society is supreme and is entitled to settle for itself all questions arising amongst its membership. It may ask the superior councils for advice, but is not bound by such advice. On the other hand the Conservatives claiming to be the regular church, adhere to the idea of an association of churches, and that the decisions of the various councils are binding according to their order of superiority—the annual meeting being the supreme authority, whose decisions on any matter properly before it are final. It is important to rightly understand this difference between the parties, and that the question here raised be properly decided. Hence we must look to the authorities. In the year 1866 Elder Henry Kurtz, an eminent minister of the denomination published the Brethren's Encyclopedia, which is recognized as high authority by all parties. He says on p. 58 "there are three systems of church government in vogue among protestants in this country, the Episcopal, the Presbyterian, and the Congregational. Neither of these answers or corresponds with our system, which we will call the primitive system." After averting to the three other systems above mentioned, and showing that the Brethren Church is not at all like any of them in its government system, Mr. Kurtz continues: "If any one will say now, then of course you must be Independents or Congregationalists, are you not? To this, we answer most emphatically, no!" The following reasons among others are given:

1. The oldest church in America was organized by Peter Becker, at Germantown, Pa., in 1722. That church might have acted on the congregational principle, but did not. Before taking any step toward organization, he visited and counselled the dispersed brethren through the country. "And this principle," he says, "that a local church should not undertake anything of importance without the counsel and consent of the brethren generally outside of that locality, has ever been upheld to this day, with very few exceptions, and these exceptions have most always proved calamitous to such churches as ventured upon the exceptional course."

2. The second fact to prove that local churches among us do not pretend to act independently of other churches, is this, that to every love feast that is held in any church * * * members and ministers are invited from other churches to this day.

3. No choice is held in any church, even only for a single deacon, without two or more elders being present from other churches to conduct the choice.

4. No case of censure against an elder, minister or deacon, is taken up in council before a local church without the presence of the elders and as many ministers and private members from other churches.

5. No case of which avoidance may probably be the result, is undertaken in a local church without some elders from other churches.

Now these facts prove very evidently that a local church among us does not lay claim to possessing all power, unless in contradistinction to the fundamental principles and practice of our brotherhood. He follows this with a citation from the proceedings of the Annual Meeting held in 1853.

"Article 20. Can an arm of the church (or a local church) be congregational, or act independent from all the churches of our fraternity, and still be in full union with the church? Answer—It cannot, according to the Gospel and the order of the Brethren."

It would seem to be pretty well settled, from a reference to the authorities and the action of the church, that the Conservatives are right in their claim that the great Baptist Brethren, organizations are not merely congregational, but are fraternal and associated—acting together as a union of churches. The question naturally comes up as to the authority of the great councils of the church, including the annual meeting. It is manifest, if the bond of union between this great association of churches is not a mere rope of sand, to be severed at the instance of any local church, that the recognized annual councils should be accorded some sort of authority. Their decisions ought to be binding on the consciences of the membership as authority, and not as advice merely.

It is very natural that as the churches increase in number, extent and influence, many new questions will arise, demanding new and decisive action. Without this there could be no union or association worth the name. Elder Kurtz, in the able work above referred to, vigorously combats the idea that the action and decisions of the annual meeting and other great councils of the church are mere traditions, or for that matter, mere voluntary advice. In his introduction, Mr. Kurtz says some are disposed to treat the united counsels and conclusions of the annual meeting too highly, treating them as rules and laws of equal authority as Divine Writ, and which, like the laws of the Medes and Persians, could not be altered. Others put too low an estimate upon them, considering them as a bundle of traditions of the elders, to be soon forgotten. He says, when any question is answered by the express word of God, there could be no question; but practical questions also may be raised, in which the scriptures afford no direct answer; now as the church is to be of one mind, co-workers together, it becomes necessary to agree. "Suppose the New Testament," he continues, "is silent on the subject, but the brethren have come to a unanimous agreement in the matter, all one, whether it was yesterday or a hundred years ago, by brethren representing the whole fraternity in yearly meeting, then such agreement is binding upon all, as the contract of a parent or duly authorized agent or attorney, is binding upon the children or parties, their heirs or assigns, until it is either fulfilled or lawfully cancelled or recalled." He says furthermore, that it was and is considered that "those who would act contrary to these articles of agreement are disturbers of the peace of the church, whom they (the churches) could not fellowship unless they repented indeed." If this be good authority, it is difficult to see how those who reject the counsels and decisions of the church in its fraternal gatherings as of binding effect, can claim to be members of the "Baptist Brethren," commonly called Dunkers. So far from the annual meeting being new in its acts and counsels, it is co-extensive with the church itself.

Indeed, the local churches discovered early that it was necessary for the carrying forward of their work that these annual councils should be held; at least they acted upon that idea. It was counselled, in 1813, that the local churches should be represented in a yearly convocation. It was decided in 1837, that the great annual council meetings ought to consist of the elders and members of the particular church at which

such council might be held, and also such teachers, ministers and private members, as might be sent as delegates from other churches.

In subsequent annual meetings more decided action was taken, as, for instance, 1850, art. 5—"whether it is right for brethren in different arms of the church to go against the counsels of the yearly meeting? Considered that it is wrong for brethren to go against the counsel of our great annual meeting." In 1860, art. 1—"Inasmuch as we publicly denounce (human) church discipline, and claim the New Testament Scriptures as the only rule of our faith and practice, is it consistent with our profession to make a direct observance of the minutes of the annual council a test of fellowship? Answer—The decisions of the annual meetings are obligatory until such decisions shall be repealed by the same authority.

As early as 1805 (art. 2) it was considered that when brethren would not heed or obey the conclusions of annual meeting, they should be set back until they learn to do better and become obedient. Also, 1845, (art. 8)—"How is it considered if brethren will rebel against the counsel held at council meetings and say it is an abomination to God? Considered that such a brother should be visited and exhorted, and if he would not hear and obey the admonition, he could not be held as a brother." In 1850 (art. 5) it was considered wrong for brethren to go against the counsel of the great annual meeting. At the annual meeting of 1875 Elder Prather was charged with claiming to belong to the Congregational party as opposed to the annual meeting party. He was required to and did retract, agreeing to accept the supremacy of annual meeting. Elders Wolf and Meyers were charged with reflecting upon the annual meeting in their writings in the Gospel Trumpet. They were required to and did retract and agree to acknowledge the supremacy of the annual meeting, and to respect its counsels.

There is no controversy but that the annual meeting of 1882 passed orders making the decisions and conclusions of the annual meeting mandatory, and providing at the same time that the annual meeting might give advice whenever it was deemed proper, but such action should be so marked in the minutes.

We think it pretty clear, judging from the various decisions and orders of the church, that the counsels of the adjoining elders and brethren of the district council are of like binding authority with the annual meeting when not in conflict with that supreme conference, unless an appeal in due form be taken from the decisions of such inferior tribunals.

The formation of districts composed of several churches, embracing a considerable extent of territory, seems to have been intended, in part at least, to afford the local churches a convenient tribunal for the settlement of differences and complaints among the membership.

After an investigation and decision by the local church council, an appeal may be had to the district council, and from the latter tribunal to the annual meeting. Quite frequent, as it seems, an appeal is first taken from the local church to the adjoining elders, and from thence to the district council.

At the annual meeting of 1856 a proposal was adopted of forming districts of five, six or more adjoining churches for the purpose of meeting jointly at least once a year, settling difficulties, etc., thus lessening the business of the annual meeting.

At the annual meeting of 1862 it was concluded that inasmuch as the brethren in annual council of 1856 have recommended the churches to hold district or council meetings, which has been accomplished, inquiry was made as to whether minutes of the proceedings should be taken. It was adjudged that no question of importance acted on by the sub-district meeting should be confirmed until presented to the annual meeting for sanction. At the yearly meeting of 1886 it was recommended that each state form itself into convenient district meetings, to be composed of one or two representatives from each organized church. A record of these meetings might be kept, but not published. They should endeavor to settle all questions of a local character; but questions of a general character, or those concerning the brotherhood in general, should be taken to the annual meeting, and all questions that can not be settled at the district meetings should be taken to the annual meeting. It was further decided that no business can come before the district until it has passed through the church in which it originated. Provision is also made for appeals from the district to the annual meeting.

There is, likewise, as before stated, an inferior tribunal, or authority rather, in the person of the "adjoining elders"—that is, elders of adjoining sub-districts.

These adjoining elders are called in for advice and decision in the organization of new churches, in the settlement of local differences, to assist in ordination, and to set a local church in order, as it is called, which is out of order, or otherwise neglecting its duties. In the various annual meetings this custom or rule has been sanctioned and recommended, and as the years have come, been more and more appreciated; and the adjoining elders have thus come to be an important conservative commission for the settlement of difficulties.

In 1853, it was decided that two or three adjoining ordained elders should be present at the election of teachers and deacons. In 1867, it was held that where the "housekeeper" (Bishop) in an arm of the church neglects certain duties, the elders of adjoining churches should visit him and admonish him to proceed according to the rule of the church. In 1869 held, where the majority of a congregation decide against the decisions of the annual meeting, that the bishop of that church should adhere to the annual meeting. In 1871 held, that where there is want of harmony, or considerable difficulty in a local church, the adjoining elders should visit that church and set things in order. In 1875 held, that when brethren do not conform to the order of the church, or when the elder neglects his duty and permits disorder or disobedience, the adjoining elders should visit that church and set the house in order. In 1881 it was decided that "where churches are out of order, the elders themselves not carrying out the order, it is the duty of the adjoining elders to notify the resident elder to call his church together at a set time, the elders and church involved having the privilege to call any disinterested elders, if they are such as are in the general order of the brotherhood, from any church." In 1879 it was held that where members are being expelled in violation of the decisions of the church, the expelled members may and should call on the adjoining elders, and if they cannot get justice in that way, then to appeal to the annual meeting.

The local church, where properly organized, elects, according to the custom and law of the brotherhood, its various officers, teachers, deacons, elders, and the trustees to manage and hold its property.

It will thus be seen that the regular church known as the Baptist Brethren or Dunkers, in its aggregation, is an association or brotherhood of churches, acting together by its various councils and its great annual meetings; and the local churches are, therefore, neither independent of each other, or purely Congregational. It has no acknowledged written law but the Holy Scriptures, which are accepted as the only infallible rule of faith and practice. There are, however, a mass of customs and usages which have grown into law, and these, together with the decisions and determinations of its great religious feasts, called annual meetings, constitute the unwritten or common law of the church.

The question arises first, whether the Dayton church, here represented by the Progressives, was, as is claimed, separated from the Beaver Creek charge, and organized into a separate society according to the forms, usages, and customs of the church; and whether its trustees, Kiehl, Duncan and Stickrath, were properly elected, and were entitled at any time to hold the property in question; and second, whether in any event the members of the Dayton church have not been disowned by the regular church and joined another organization, thereby forfeiting their right to the use of the property.

To constitute a legal separation—according to the law of the church we mean—it was, 1st, necessary that the Dayton members should petition the Beaver Creek charge for a separation and permission to organize a church in the city. This was done in the spring of 1872. 2d. It was necessary that by a vote of the Beaver Creek church as it then existed, the prayer of the petitioners should be granted. The matter was properly brought before the church and the prayer of the Dayton brethren was granted. 3d. Next in order should have been an orderly proceeding to organize the Dayton society, and according to the customs and usages of the church, as we understand them, the bishop of the district, and the adjoining elders, or some of them at least, should have been called in to give official character to the organization. Until a permanent and legal organization should be effected, the Dayton church would be without officers of any kind or an elder to preside. It was but the proposal to organize a church within the bounds of the Beaver Creek charge, and when so organized to be cut out of that church, and form an independent sub-district. Upon the plainest principles, it was a part of the Beaver Creek charge until organized into a new one, and hence Bishop Haller was not released from his obligation to the Dayton society nor it to him, until that event occurred. So far from pursuing the legal course, the Dayton members called a meeting for organization without the presence of the presiding bishop, and without so much as inviting him to be present. Nor were any adjoining elders called in or consulted. Elder Beer, not an adjoining elder, was called to preside at the organization, and on April 20, 1882, church officers, including an elder, were elected and installed. So soon as the bishop was notified of this informal action, he notified some of them of its irregularity, and that he would not in his official capacity recognize it, but should continue to regard himself as elder of the Dayton brethren, and their church as part of the Beaver Creek charge. A consultation of adjoining elders was had, and the whole matter of the new organization was by them referred to the district meeting and council soon to be held at Harrisburg. The matter was there discussed, and the decision rendered was that the Dayton church had not been properly or legally organized, and that its elders and representatives could not be admitted to the district council. Mr.

Kiehl was present as the representative of the Dayton church, but not admitted, for the reason that his church had not been organized.

Elder Beer, who was also present, acknowledged the informality of the organization, and that he and the brethren acting with him, were at fault in the matter. No appeal was taken by any one from the action of the district meeting, nor were steps taken to correct the organization and make it conform to the rules of the church. There were other irregularities in the organization equally objectionable, but we will not refer to them here. Subsequently, Kiehl, Duncan and Stickrath were elected trustees. At the time of the attempted separation, there were some twenty members of the Dayton church—not more than half of whom have adhered to the new organization, while the residue either cling to the old church or remain passive. It therefore becomes, in this connection, an interesting and somewhat important question, whether the property in dispute here does not remain in the trustees of the Beaver Creek church, in trust for the use of the Baptist Brethren commonly called Dunkers. However, before adverting to the law of the case, we should notice the second inquiry heretofore propounded. Have not the Dayton brethren abandoned the regular church and connected themselves with another organization known as the Progressives? The Dayton church has at no time since its attempted organization in 1882, been represented in the district or annual meetings of the Dunker fraternity. Nor has it been recognized by the church. A meeting of the "Progressives" was held in the city of Dayton in June 1883, at which, to all intents and purposes, a separate church was organized. Of this the records afford abundant proof. The Dayton church has connected itself with that branch of the Dunker family, and is today as separate from the old church as it is possible to be. The members who thus adhere to the progressive organization, have been disowned by the Baptist brethren, and are not now members of that church.

In the proceedings of the Dayton meeting of Progressives above referred to, the name "Brethren" was adopted as that by which the new organization should be known. A committee consisting of Elders Worst, Holsing and Hixon reported that there was no essential difference between the Progressives, the Congregational, and the Leedy churches, and recommending that they all act together. The Leedy Brethren and Congregationalists, be it known, had before that broken off from and been disowned by the regular church. P. J. Brown, while favoring the name of "Progressive Christian church" offered a resolution, which was adopted, that the Leedy Brethren, the Congregationalists and the Progressives, all unite under the name of "Brethren."

Mr. Worst said the question is, "What shall we be called legally?" * * * We are not naming ourselves from a political standpoint; we are giving ourselves a legal name." Why give themselves "a name" if it was the same old church well known all over this land for over one hundred and fifty years? Among the delegates or representatives in this convention to organize a new and vigorous religious movement, we find the name of S. Kiehl, one of the parties representing and speaking for the Dayton church in this action.

Elder Brown, in a very able and eloquent address, declared that "our creed is the Bible, the perfect law of liberty, interpreted by the light of common sense and the best scholarship. Other creeds have we none, and will accept none, though we be called rebels, schismatics and

fanatics. * * * The yoke was gradually projected by the annual meeting magnates, conceived in the love of power, born at Doubt Pipe Creek, coronated at Arnold's grove, and christened mandatory. Will you have it put upon your necks?" After associating the name of Holsinger with those other fiery reformers—Luther, Huss, Wesley, Knox and Mack—he declares that but for their moral heroism "all would have remained in spiritual serfdom, and those who now crack the ecclesiastical lash over heads would have the lash of the Romish hierarchy cracked over their own heads to their heart's content." "Thank God" says elder Brown, "the world moves! the sum of science has penetrated the gloom of ignorance and prejudice. Christianity cannot be chained to the unchristian dogmas of even forty years ago." Now, so far from these being any indication here of loyalty to the old church, we have the spirit of defiance, and a firm declaration of independence. He continues: "Much has been done. * * * Our enemies predict great laxity in discipline, and consequent disintegration; they must be disappointed in this. It is necessary to organize into a general brotherhood, representing general principles in common, leaving each local church free to discipline her own members according to the gospel, and let Christ be the head of each and all of us."

The Black River congregation send greeting to the Dayton meeting, saying that inasmuch as the German Baptist church has departed from the landmarks of the fathers, leaving no hope of furthering the cause of the Master under the present system of government, and urging the brethren there assembled to form an organization that will enable them to spread the gospel, etc.

A petition was also presented from Ashland, Ohio, promising that it was useless to attempt reformation with the annual meeting party, and counseling a separate organization. All man-made creeds, including the annual minutes are denounced, and advising that the name by which the annual meeting church is known be abolished.

The committee on publication presented a report which was adopted, among other things providing for the establishment of a publishing house, with a capital, board of directors, managers and editors, all to be under the control of the new organization. A committee on charter and incorporation was appointed, with instructions, that if they deemed it advisable to take out a general (church) charter to do so. "If by the advice of counsel, they conclude it would be better not to take out a general church charter" none should be taken out. Previous to adjournment, in answer to inquiry, the moderator said: "For my part I feel that after adopting the rules, profession of faith and system of government we have adopted today, it will be a long time before we need another convention." On motion, a committee of five, distributed through the several states, was appointed as a National Executive Committee, to arrange for a future convention, if occasion should require.

A resolution was adopted expressing sincere sorrow and regret, as Elder Worst expressed it, at leaving behind them such a large body of brethren. Thus the convention of talented and zealous reformers launched upon the world a new and promising church, as far removed from the old time-honored Baptist Brethren church, commonly called Dunkers, as it is from any other protestant church.

Having found the two important facts, to-wit: First, that the Dayton church was never legally separated from the Beaver Creek charge, nor properly organized; and second, that the respondents, Kiehl, Dun-

can and Stickrath, with the organization and members which they represent here, have in fact seceded from and been disowned by the regular Baptist Brethren church, what is the law as to the property in controversy resting on those facts?

As heretofore stated this property was conveyed in 1845, by Peter Aughenbaugh, to Yost, Boogher and Zimmerman "Trustees of the Baptist Brethren commonly called Dunkers," etc., "and their successors in office forever." The act of Jan. 3, 1825, S. & C., 305, then in force provided: "That all lands and tenements, * * * that have been or may hereafter be conveyed by devise, purchase or otherwise, to any person 'or persons as trustees, in trust for any religious society' within this state, either for a meeting house or burial ground, etc., 'shall descend with the improvements and appurtenances, in perpetual succession, in trust to such trustee or trustees as shall from time to time be elected or appointed by such religious society, according to the rules and regulations of such society respectively.'"

If this statute is to be taken as it reads, then this property, having been deeded to Yost and others, trustees, for the use of the Baptist Brethren, commonly called Dunkers, as that society was then known, would inhere in, and pass in perpetual succession, for the use of that church, to such trustees as might be elected according to the rules and regulations of that church. That would mean the trustees duly elected of the Beaver Creek charge, as it cannot be pretended that the "Brethren" church, called Progressives, are, or represent the church for which this trust was created. It will not do to say, as was in the case of Keyser v. Standsifer, 6 O. R., 364, that this property was conveyed to a local society which had authority to change itself as often as it deemed necessary, without regard to other societies. In that case it was shown that each "Baptist Church" is of itself a whole, separate and independent, at liberty to form its own creed. Hence, the court say, "the opinions of such a body cannot but change." In such a case the property follows the "fleeting wherries" of the society. The principle announced in the case of the M. E. Church v. Wood, 5 O. S., 288, is more in point. It is held "The seceders from the Methodist Episcopal church, who have organized a separate conference, and reject the office of bishop, are not entitled to any portion of the property of the society from which they seceded." In Harrison v. Hoyle, 24 O. S., 254, the court hold that where not incompatible with the positive law of the land—in a case growing out of a separation of the Friends or Quaker church—the court will regard the orders and decisions of such society when made in conformity to its polity. This was the case wherein the division of a society had, as here, brought up the question of property. The court found that the Binns party had maintained intact the accustomed relations of the yearly meeting with such society, had kept every rule and order of the society for the preservation of its unity. On the other hand the Hoyle party had not observed all these things, but had at all times been excluded from fellowship with the society. The court, therefore, find that the Binns party must prevail, and in so holding announce this important principle equally applicable to the case before us:

"If such society be composed of separate bodies, whether co-ordinate or subordinate, the rules of the society for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the law by which they should be governed."

The case of the Presbyterian churches in 25 O. S., 128, is particularly in point as to the identification of the particular church intended to be benefited by the trust. Mrs. Berthia Tupper died in 1855, leaving a will in which she directed her executor "to invest the sum of \$2,000 as a permanent investment for the use of the 'First Presbyterian Society' of Gallipolis, the income of said fund to be applied toward the support of a Presbyterian preacher in said society." At the time of the bequest there was but one church in Gallipolis to which the trust applied. The "Old School" church kept up its trustees from the organization of the society in 1828. In 1855 a division occurred in that society resulting in an "Old School" and a "New School" church, each electing trustees and laying claim to the trust fund. The court found the "Old School" to be the regular organization, and the one contemplated in the bequest, and therefore entitled to the benefit of the trust. The "New School" were in that instance the "Progressives." They had gone out and organized for themselves.

Earl v. Wood, 8 Cush., 430, is a leading case, and many of the essential questions arising in our case are there met and decided. That was a conveyance of real estate, in consideration of a sum of money received of A, B and C, on behalf of the Swanzey monthly meeting of the people called Quakers, to said A, B and C, for the uses and purposes of "the people called Quakers forever." The monthly meeting of the Society of Friends at Swanzey divided into two parties, and each organized and claimed the property. The court held that by the terms of the deed the land was given to the people called Friends, at Swanzey, upon which to build a meeting house—that so much was clearly shown to have been the intent of the grantor in the use of the term "Quakers;" and that the question which party represented the true "monthly meeting of Quakers" "is to be determined according to the discipline of that body, expounded by the general usages of those persons of most experience and judgment, who have acted under it and acknowledged its authority." Chief Justice Shaw says, in his able opinion: "It is a question of property; the nature of property mainly consists in the right of control and the power of disposing of any estate, real or personal. There can not be two adverse owners of the same thing at the same time; the disposing power and dominion of one proprietor is conclusive against the same in any other. However plausible therefore, may be the grounds of the claim on each side, however minute the line of distinction between them, and how great the difficulty in discovering it, we know there is such a line, and it must govern in deciding the question." There is no such difficulty in discovering 'the dividing line between the Conservatives and Progressives in the case before us, nor in determining what church was intended to be the beneficiary of Aughenbaugh's deed. In the "Friends" case, in 89 Ind. R., 136, the same principle is laid down. The Friends or Quakers, as they are called, have in many respects a series of meetings and councils closely resembling those of the Baptist Brethren. They have their monthly meeting resembling the local church council of the Dunkers, next their quarterly meeting, resembling the district meetings and finally, the great annual convocation and council called the yearly meeting. In the Indiana case there was a division and the organization of two yearly meetings. It was held that "when a yearly meeting separates into two distinct and competing bodies, the body which adheres most closely to the ecclesiastical laws and usages under which such yearly meeting was

brought into existence, and to the acknowledged organism of the meeting as it existed before the separation took place, and which is recognized by its co-ordinate yearly meeting, will be accepted by the civil courts as the true yearly meeting."

The case of *Kniskern v. Lutheran church*, 1 Sand., 439, is the most exhaustive discussion of these subjects to be found in the books, and in its conclusions fully sustains the position we have taken as well as of the other cases cited. In that case a division occurred and a separate synod was organized. The seceding party abandoned the Augsburg confession of faith and adopted a constitution for the government of the synod, containing a new declaration or confession of faith. By this constitution it was declared "that the church council is independent of any synod or other superior control; thereby making its decisions final and conclusive, and depriving the members of the right of appeal to the Synod or General Synod guaranteed by the usages and constitution of the Evangelical Lutheran Church." "It was easy to see that such a body was not the regular church."

In *Primitive Society v. Pilling* (4 Zabriskie, N. J. R., 653) it was held: "That a congregation or inferior ecclesiastical corporation, which by its organization is connected with and subject to the superior jurisdiction of the church to which it belongs, cannot, by the act of the corporation, or a majority, secede from the denomination, declare themselves independent, and take their corporate property with them."

In *McGinness v. Watson*, 4 Pa. St., 9, it is held: "The title to church property of a divided congregation is in that part of it which is acting in harmony with its own laws; and the ecclesiastical laws, usages, customs and principles which were adopted among them before the dispute began, are the standard for determining which party is right," and the court further held, that "a majority of a single congregation dissenting from the act of union, and seceding therefrom lose all their rights to the church property."

In *Winebrenner v. Colder*, 43 Penn. St., 244, it is held: "In church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority are the true congregation and corporation, if incorporated." And when it was provided by the constitution of the religious denomination that no one should be an accepted minister without a license annually renewed by the elder; in course of time one congregation, in consequence of some dispute, refused to accept the minister sent them by the eldership, and by a majority retained possession of the church buildings and property, supporting and receiving their former minister, who, for non-conformity to the rules and discipline of the denomination, and disobedience to the eldership, had been suspended, and finally expelled from the church; held, "that the church property was held in trust for the use of such of the congregation as adhered and were willing to submit to the regular order and discipline of the denomination."

The last case we cite is that of *Roshi's Appeal*, 69, Pa. St., 462, wherein it is held: "The title to the church property of a divided congregation is in that part which is acting according to its own laws; and the right is to be determined by the ecclesiastical laws, etc., which were accepted among them before the suit began. Those not conforming to their laws may form another connection, or become independent, but must abandon all claims to the property."

From the foregoing considerations the conclusion would seem to be inevitable:

1. That the Dayton society, or Progressives, represented by Kiehl, Duncan and Stickrath, is not the regular Baptist Brethren or Dunker church, but have seceded from and been disowned by the church, and are not entitled in law to the property in controversy.

2. That the Beaver Creek charge, embracing the territory of Dayton and vicinity, as represented by Stine, Haverstick and Zimmerman, is the rightful Baptist Brethren or Dunker church. That said Stine, Haverstick and Zimmerman are the regular successors in trust of Yost, Boogher and Bland, and entitled to hold said property for the uses and purposes originally intended.

3. That it was the manifest intention of the grantor of the premises in controversy, that the lot donated should be held and used for the benefit of the Baptist Brethren commonly called Dunkers, in and about the city of Dayton. We do not find it was for the general uses of that church any where, but to afford them a place of worship. Hence, if sold, the proceeds should be used to build or provide another place of worship for that people.

The court has been anxious since the development of the facts in this case to come to a conclusion somewhat different. It has felt that it would be eminently fair and liberal, looking to the mere questions of policy and morals, that church property should be equitably divided between the parties. Both the contending organizations are opposed to litigation; the great Dunker family, of whatever name or order is a church of peace and good will. Both the Conservatives and Progressives are earnestly engaged in going about doing good, and bringing men under the illuminating influences of the Son of Righteousness. The law, as we interpret it, does not permit the court to make such a disposition of the case as we wish; nevertheless this suggestion is modestly made to the parties: That they agree that the property may be sold, the proceeds divided, one-third to the Progressives, and the residue to the Conservatives, to be invested in the building of churches for the use of the Dayton membership respectively

121 VACATION OF PRELIMINARY INJUNCTION.

[Mahoning Common Pleas, August 6, 1886.]

JOHN M. WEBB ET AL. AND JAMES PREDMORE ET AL. V. OHIO GAS FUEL CO.

1. A private corporation, organized for the purpose of transporting and selling natural gas for fuel, has no right, under an ordinance of a city council permitting the company to lay its pipes through the streets of the city, to enter upon the public streets of the city, and to operate its plant without the permission of and compensation to the holders of the fee in the street. The laying of such pipes in the public streets subjects the street to an additional burden and servitude.
2. The laying in a street of pipe for natural gas for fuel, authorized by a city council, will not be enjoined at the suit of an abutting lot owner, because not first submitted to a popular vote under sec. 4551, Rev. Stat., only the public, and not a private citizen can right a wrong of this kind.

The plaintiffs reside on Boardman street in the city of Youngstown; the Predmores owning to the line, and the Webbs to the center of the street. The defendant is a corporation, organized for the purpose of transporting natural gas for fuel. The city council passed an ordinance permitting the company to lay its pipes (one ten inch) through Boardman street, without a previous vote of the citizens as required by statute. Thereupon, without any agreement with plaintiffs, and against their objection, the defendant was proceeding to lay its pipes through said street (37 feet wide) when the provisional injunction herein was allowed. The further facts appear in the opinion.

THAYER, J.

In the matter of the hearing to vacate the injunctions heretofore granted by me, at chambers, in above cases, I have carefully examined the affidavits (62) submitted, and the authorities cited, and have arrived at the following conclusions:

1. It is of no importance, in this case, that the defendant has failed to comply with sec. 4551 Rev. Stat. requiring a popular vote before such company shall be authorized to enter upon the streets and public grounds of a city to operate its plant.

This arises from the well settled rule of law that wrongs of this kind, public in their nature, are only remediable by a proceeding in the name of the state—in *quo warranto*. *Ohio v. Cincinnati Gas Co.*, 18 O. S., 262.

That a private citizen has no power to right such a wrong, where the injury is to the public generally, and is not special to him, was early established. *Fineux v. Hovenden*, Cro. Eliz., 664; *Cummins v. City*, 41 Am. R., 626.

What the holding would be, upon this point, were this a proceeding in *quo warranto*, it is unnecessary to suggest.

2. There is no force in the points urged relative to eminent domain. No such question is, or can arise, in this case. Corporation for this kind can only acquire the land of the others by purchase. They have no power to make compulsory appropriation. Therefore it is that the right of eminent domain is outside the case.

3. It is urged that the plaintiffs, considered only as abutting lot owners, have a peculiar interest in Boardman street, which the defendant is attempting to appropriate, without right.

Just what that peculiar interest is, counsel are unable to state. They say, however, "that it cannot be seen, that it has no length, breadth or thickness, but still is a property interest."

The right of an abutting lot owner in a public street is, in short, an easement, or facility, including ingress and egress in the largest sense of these terms; and the invasion of such easement is an injury, entitling the lot owner to redress. *Ry. Co. v. Lawrence*, 38 O. S., 41, 45.

Anything outside, or beyond such invasion, such as the laying additional burdens upon the highway, is an injury only to the owner in fee of the road bed, or to the public generally, and not to the abutting lot owner.

It follows that the plaintiffs, in order to sustain the injunction, must show some special interference with their easement in and to Boardman street.

They claim to have shown that the laying and operating of the gas pipes in question, would amount to a private nuisance, (1) because of the

necessary leakage of gas; (2), for the want of proper gas escapes; (3), because the pipes are laid within the frost line; (4), insufficient gates.

The most satisfactory evidence given, to my mind, bearing upon these points, and, as it seems to me, entirely conclusive, is that of Messrs. Larkin, McFadden and Browne—the present postmaster, secretary of the board of underwriters, and superintendent of the water works, for the city of Pittsburg—commissioned by the court of common pleas of Allegheny county, Pa., to investigate, report upon, and recommend the safest and best methods to be adopted to transport natural gas.

They unite in the opinion that the screw joint is absolutely unsafe, unless the pipes be laid below the frost line, and have proper gates, and be provided with suitable escapes.

A mass of evidence from other witnesses was given, pro and con—but the weight of it all, very clearly, supports the views already given.

It must follow, that for want of these precautions, and perhaps others, the laying and operating the gas pipes in question, would seriously interfere with the easement of the plaintiffs on Boardman street, entitling them to the injunction heretofore granted herein.

4. It appears, from the evidence, that the Webbs are the owners in fee of that portion of Boardman street upon which the defendant is seeking to lay its pipes.

That the public only holds the bed of a street in trust for the uses contemplated in the original dedication, that is, for ordinary travel and transportation in the customary manner; and that no additional burdens, or servitudes, can be placed thereupon, without the consent of the owners in fee—are propositions clearly settled in this state. *R. R. Co. v. Williams*, 35 Ohio St., 168, 171.

It is, however, urged by the defendant that gas pipes for carrying fuel come within such original dedication, and are comprised in the term urban servitudes.

Ordinary sewers, and, perhaps, illuminating gas pipes, and some kind of water pipes, laid in public streets, comprise one class of urban servitudes, arising out of reasons of public health, convenience and necessity.

But how can a use such as the one at bar be brought within this doctrine? Here we have a corporation, organized for the purpose of producing, transporting and selling gas for fuel, anywhere in the district named in its charter. For aught that appears, the city of Youngstown is—and the evidence tends to so show—only one of the stations in its system. It is, in fact, a private corporation, with some public features, organized, not for one city alone, but for the entire district named, or any part of it, as it may select. How such an institution, contemplating the supply of fuel for manufacturing and other purposes, anywhere in said district, can be brought within the doctrine, of urban servitudes, I am unable to see. Even were it confined to the city of Youngstown alone, the doctrine of urban servitudes would not apply.

But the defendant claims that the plaintiffs have stood by and permitted its pipes to be laid without objection, and are therefore estopped. I am unable to so hold from the evidence.

It follows that the property of the Webbs in Boardman street, cannot be appropriated by the defendant as a matter of right and without the consent of the plaintiffs.

If the motion had been to modify, not to vacate, said injunctions, upon terms as to safety to be named by the court, I am not prepared to say what the holding would be save as to the Webbs; but the motion can-

not be considered in this light, and therefore the opinion expressed is confined solely to the motions made.

For these reasons the motion to vacate is overruled.

Counsel may prepare a journal entry accordingly.

Hon. L. D. Woodworth and Johnson & Thoman, for plaintiffs.

Messrs. Hine & Clarke, for the Ohio Gas Fuel Company.

BIDS FOR PAVING.

211

[Cincinnati Superior Court, 1886.]

CINCINNATI (CITY) V. DAVID FOLZ ET AL.

1. When bidders for granite paving are required, by specifications furnished in advance, to accompany their bids by specimen blocks of granite, with the name or the quarry, etc., the specimen so filed becomes part of the bid, and when the bid is accepted, becomes part of the contract which stipulate for blocks according to the specifications which it adopts by reference, and the use of blocks like the specimen and from the same quarry will not be enjoined in the absence of any charge of fraud, collusion or mistake on the part either of the city officers or the contractors.
2. Such clause in the specifications is in furtherance of, not repugnant to, another clause stating that the blocks required must be equal in quality to a certain granite named.

HARMON, J.

Defendants are engaged in paving Central avenue with granite under a contract duly made with the late Board of Public Works thereto authorized by the act of April 25, 1885 (82 O. S., 156). The city seeks to enjoin the intended use in said work of certain granite blocks, which, it charges, fall below the requirements of the contract it sets out in full in the petition, to which a demurrer is filed. The contract merely requires work and materials according to the specifications, which were printed before the reception of bids, as appears from their terms, and are made part of the contract in reference.

Section 25 of such specifications provides, that "the blocks may be of any granite equal in quality to what is known as standard Richmond granite," describing certain qualities they must, and certain defects they must not have.

Section 28 requires that "All bids must be accompanied by a specimen block of the size and quality described in these specifications, labeled with the name of the bidder and the locality of the quarry; also with a statement of the contractor as to the number of blocks that can be delivered daily in Cincinnati from said quarry on cars; provided that the contractor may, in carrying out his contract, use granite from any other quarry of the kind required by these specifications."

It is admitted in the petition that defendant's bid was so accompanied by a specimen block, etc., and that the blocks, whose use the city seeks to enjoin, are like the specimen in size and quality, and are from the same quarry. The city relies only on its averment that these blocks are not equal in quality to standard Richmond granite.

There being no averment of fraud, collusion, or mistake, nor of any facts from which these might even be suspected, the question can only

be one of the proper construction of the writing by which the parties have expressed the terms of their agreement.

It cannot escape notice that the form of expression, though common in public contracts, is not what we usually find where parties, after coming to terms, proceed to reduce them to writing. The parties here adopt as expressing their final agreement, language in fact used only in negotiation, and this is to be remembered in construing it. For this reason, the contract as we find it, referring to a specimen to be filed with the bid, is exactly equivalent to what it would be if it referred to a specimen which had been filed with the bid.

It is to be observed, too, that there are some purely contractual clauses in the specifications; for instance, the last clause of sec. 28, which it is conceded have the same effect as though found elsewhere.

Are secs. 25 and 28 repugnant, and if so, which shall prevail? The solicitor contends that they are, and that the former must govern.

I need only to refer to the maxim which requires such construction, if a reasonable one, as will give effect to all the language used. In view of this, can the conclusion be resisted that instead of being repugnant to sec. 25, sec. 28 is merely in furtherance of it?

A private person, in inviting bids for such work, might simply have asked for bids, accompanied by specimens, and have accepted any one he preferred.

The necessity of competitive bidding made such a course improper for the city. There would be no real competition unless all bids should be to furnish the same thing. It was necessary therefore to specify the quality of granite required. But as granite is not of human manufacture, it is manifest that a requirement of granite from a particular quarry, or even region, might result in unduly limiting the number of bidders. The only wise course, therefore, seems to be the one adopted. It certainly did not tend to diminish the number of bidders, nor to prevent that exactness as to what would be required, without which the lowest bids cannot be expected, to require the filing of specimens, as they are termed. Specimens of what? Of the granite the bidder proposed to furnish, of course. This could not be made plainer by any form of expression. When a specimen was so filed it became part of the bid. When the bid was accepted the specimen became part of the contract. It expressed more clearly than words what the parties meant.

The specimen, however, did not when so offered and accepted, eliminate from the contract sec. 25. If the contractor should choose to furnish granite from some other quarry it is to be compared, not with the specimen, but with standard Richmond. The board specially intrusted with authority to act for the city by the statute referred to, simply said in advance that granite like the specimen was up to the required standard and would be accepted as such.

This being part of the contract, with the making of which the engineer had nothing to do, the other provisions making his judgment final, as the work progressed, have no bearing. His judgment was to be directed to the inquiry whether the blocks were such as the contract required. Besides, it is not alleged that the engineer has decided the blocks in the controversy to be below the quality required by the contract.

The analogy sought to be drawn from cases of sales after the exhibition of samples does not apply, because here the sample was not only required and furnished, but was referred to and made part of the contract,

and because it is admitted that these blocks are granite, so that the thing furnished is not a different one from that bargained for.

It may be added, too, that whatever might be said in an action at law involving the same question, the principles upon which courts of equity proceed, especially in the granting of extraordinary remedies, do not help the city's case. Its officers having, after full opportunity for tests and inspection beforehand, agreed to the use of these very blocks, at a price which must have been fixed largely in consequence of such agreement, its attempt now to prevent their use after their purchase and shipment here by the contractors, does not appeal very strongly to the conscience of a chancellor, especially as the petition contains no averment from which it can be inferred that there is any objection to the blocks more serious than a difference of opinion between the present board and its predecessor or a question possibly not capable of exact decision.

Coppock & Cox, for the City.

Wulsin & Perkins, and L. W. Goss, for defendants.

EMBEZZLEMENT BY AN ASSIGNEE.

212

[Hamilton Common Pleas, 1886.]

STATE OF OHIO V. JOHN B. MANNIX.

1. An assignee for creditors is embraced in the term assignee in insolvency in the act of 1885, but only as to money received after the act passed.
2. If the assignee uses the trust money, intending to benefit the estate, it is not embezzlement, for it is not for his own use. He cannot use any part for compensation until allowed by court.
3. Unauthorized investments are prima facie for his own use, and he must prove the contrary. So of investments on margins, or in futures, since the statute forbidding it.

CHARGE TO THE JURY.

ROBERTSON, J.

Gentlemen of the Jury:—The defendant, John B. Mannix, as assignee in insolvency of Edward Purcell, is charged in this indictment with the crime of embezzlement, in this, that on the 30th day of November, 1885, he did unlawfully and fraudulently embezzle and convert to his own use, without the consent of his assignor or any creditor or owner thereof, certain money of the amount and value of \$12,888.90, which had come into his possession and care by virtue of his appointment as such assignee. The particular sums of money embraced in and covered by the sum of \$12,888.90 charged in the indictment as embezzled are set out in detail as to dates, names of persons from whom received, and amounts, in the "bill of particulars," which, together with the indictment, you will be permitted to have with you in your retirement for deliberation, and to which you can refer for any more particular information as to the charges.

The statute under which the defendant was indicted was passed on the 17th of April, 1885, and took effect on and after its passage, and the language of the statute, so far as it applies to this case, is as follows:

"An * * * assignee in insolvency * * * who embezzles or converts to his own use * * * anything of value which shall come into his possession by virtue of his employment or appointment such

* * * assignee in insolvency * * * is guilty of embezzlement and shall be punished as for the larceny of the thing embezzled."

Before coming to the instructions which I shall give you, as to the meaning of the language of this statute, I wish to say that at an earlier stage in this case the question was raised whether an "assignee in trust for the benefit of creditors" under our laws in that regard, was such a person as fell within the purview of this statute prescribing punishment for "assignees in insolvency" who embezzle, etc.; and I held as matter of law that the class of persons designated in the statute "as assignee in insolvency" was intended to and did embrace, persons who are commonly designated "assignees in trust for the benefit of creditors," so that in this case, if it is established by the evidence beyond reasonable doubt, that this defendant was in fact the assignee of Edward Purcell for the benefit of creditors, then as matter of law I instruct you that he was an assignee in insolvency, within the meaning of this statute.

Next I direct your attention to the fact that as to "assignees in insolvency" this law only came into existence on the 17th of April, 1885, so that such an assignee in insolvency can only be amenable to the provisions of this law for money which came into his possession as such assignee after the passage and taking effect of the law on the 17th of April, 1885.

I now ask your attention to the particular language of this statute as determining the essential elements of the crime charged against this defendant.

"An assignee in insolvency who embezzles or converts to his own use."

The word "embezzles," as used in this connection, is simply the equivalent of the expression "converts to his own use" the expressions are interchangeable. To embezzle is to convert to one's own use anything of value which came into his possession by virtue of his employment or appointment; but let us here inquire as to what is meant by the expression "convert to his own use." To convert, in law, is to appropriate or to take to one's self in exclusion of others; to claim or to use as an exclusive right. The charge in this indictment is that the defendant has converted to his own use money which came into his possession as assignee of Edward Purcell—that is to say, that he has unlawfully appropriated, or taken to his own use and purposes, or used as his own or for his purposes such money.

You will observe that in the crime of embezzlement, such an assignee has the lawful possession of the property charged as embezzled, and that the use by such an assignee of money in his possession is not in itself criminal. Such funds or money in possession of assignees, may be put to use, with entire integrity of purpose, as when invested by order of court, or possibly under other circumstances, where, in entire good faith it is lawfully put to use for the benefit of the trust. The inhibition of the statute is against the conversion or appropriation of the money by such an assignee to his own use—against him using such money as his own money and for his own use and purposes—hence when such an assignee has made use of such money, and is charged with embezzling it, the inquiry must extend to the question of his purpose or intention when he used the money—whether he used it intending such use for the benefit of his trust; or whether he used intending such use for himself or for his own purposes.

If such an assignee having money in his hands (belonging to the estate of which he is assignee) which he appropriates and uses, but

which appropriation and use he at the time honestly intended for the benefit of the estate, and if his conduct in relation to the transaction is such as to show such intention to have been in good faith, he would not be guilty of embezzlement if such money was lost; while if his conduct was such in relation to the transaction as to show the appropriation and use of the money was intended for his own use and purposes, then he would be guilty of embezzlement.

Or in case of the appropriation and use of such money by such an assignee under a belief honestly entertained by him, and upon reasonable grounds for such belief that he had lawful right to so use it, that would not be such an appropriation and use as would render him guilty of embezzlement if the money was lost; while if he did not have reasonable grounds for believing that he had a lawful right to make such use of it, and did so use it, as and for his own, then he would be guilty of embezzlement.

In judging and determining Mr. Mannix's intention in this regard, his conduct is to be measured by the standard of the conduct and acts of men of ordinary intelligence, judgment and integrity, placed under like circumstances as he was at the time. And in judging of whether his acts and conduct were in pursuance of an honest belief on his part that he had a legal right to do as he did, and whether he had reasonable grounds for such belief, you are to test the honesty of such belief, and the reasonableness of the grounds for it, by the same standard—that of a person of ordinary intelligence, prudence and judgment—whether such a person would have done as he did, placed under like circumstances, or would have believed as he is claimed to have believed in the light of all the facts and circumstances which he had knowledge of at the time, as shown by the evidence.

The question of what the intention of such an assignee was at the time of the appropriation and use of the money is a question of fact which has to be found and determined by the jury from all the facts and circumstances of the case in evidence; but there is a presumption of law which it is your duty to observe in connection with the facts as to this question of intent—namely, that where a wrongful act is shown to have been committed, the law presumes that it was intentionally committed; so that if it is shown by evidence, beyond reasonable doubt, that such an assignee has wrongfully appropriated and used money belonging to the estate as and for his own, then the law infers from such facts that he intended such appropriation and use as and for his own; that presumption of law prevails, and should prevail, unless from a consideration of all the evidence bearing upon the point the jury entertained a reasonable doubt whether such intention did exist—when, if they do entertain such reasonable doubt on that point, the accused is entitled to the benefit of said doubt by a verdict of not guilty.

Coming now to the application of these instructions of law to the evidence in the case on trial. You start out with the presumption of innocence in favor of the defendant. The law presumes that he is innocent of the crime charged until such time as every material averment in the indictment is proved to the satisfaction of the jury beyond any reasonable doubt—until your minds are satisfied from the evidence, to a reasonable certainty on such points.

Before you can find John B. Mannix guilty as charged in the indictment your minds must be satisfied from the evidence, beyond reasonable doubt, of the following material facts, viz.:

First—That in this county and state he was the assignee in insolvency of Edward Purcell.

Second—That after the passage of the act 17th of April, 1885, referred to, and while continuing as such assignee, the money or some portion of the money charged in the indictment and enumerated in the bill of particulars, came into his possession by virtue of his employment or appointment as such assignee.

Third—That with intent, as before explained, he unlawfully converted such money, or some portion of it, to his own use.

Fourth—The amount, as show by the evidence, if any, of such money he so converted, and its value in dollars and cents.

If, from the evidence and all the facts and circumstances of the case, all of these facts are found against the defendant, then it is your duty to find him guilty as charged in the indictment—but if any of these material facts are not established by the evidence beyond reasonable doubt, then it is your duty to acquit him.

As incident to the finding of some of these questions of fact from the evidence, I further instruct you.

First—With reference to what would constitute the defendant, in law, and for the purposes of this case, this assignee in insolvency of Edward Purcell. If he was made the assignee of Edward Purcell by a deed of assignment filed in the probate court of this county, and accepted and qualified by giving bond and acted as such assignee under such assignment, then he was the assignee in insolvency of Edward Purcell as charged in this indictment, up to the time of his resignation.

Second—With reference to the actual ownership of the assets assigned to this defendant by Edward Purcell—whether those assets were, in fact the property of Edward Purcell, or whether they came to Edward Purcell by assignment from John B. Purcell, or were they held in the name of Edward Purcell for the Archbishop, or whether in law such assets should be distributed to the creditors of the Archbishop or to the creditors of Edward Purcell, is immaterial in this case; if you find from the evidence beyond reasonable doubt, that the whole or any part of the money alleged to have been embezzled was received by the defendant, in his capacity as assignee of Edward Purcell, upon claims which came into his possession by the assignment of Edward Purcell to him.

Third—With reference to the appropriation and use, by such an assignee, of money in his hands belonging to the estate, under claim of right, by reason of his having claims against the estate for special or general services rendered the estate as assignee.

Under the insolvency laws of this state such claims by an assignee are required to be presented to, and allowed by, the probate court before such an assignee can legally appropriate and use the money belonging to the estate in his name, or any part of it, as and for his own.

Fourth—With reference to the question of demand, upon the defendant, by his successors in office, and his duty as to turning over to his successor the property and effects of the estate.

On the resignation of an assignee in insolvency the probate court appoints one or more trustees in his place; such trustees, when so appointed, are required to give bond in ten days, which being done, and approved, they succeed to all the rights, powers and privileges of the original assignee; and the probate court may make and enforce all orders necessary to put the trustees in possession of all property and effects in any way belonging to the trust.

On the resignation of such an assignee the law is that he shall forthwith file and settle his account and immediately after such settlement shall pay over to his successors all money found due from him to the trust. It is the duty of the probate court to pass upon and settle the amount to be allowed the assignee for his ordinary and extraordinary services rendered to the estate, and to examine and approve all items of receipts and disbursements covered by the account, and to find the balance, if any, due from such assignee, which balance so found, to the extent that it is undisputed, it is the duty of such assignee to immediately pay over to his successors.

If in such account claims are made by the assignee for allowance which the probate court does not allow, the assignee has the right of an appeal from the judgment of the probate court, upon his giving bond according to law—but such an appeal does not relieve such assignee from the duty of paying over to his successor the admitted or undisputed amount due by him on the account.

Fifth—As to confessions: If the jury believe from the evidence that the defendant made the confessions which have been testified to, then such confessions should be treated and considered as any other evidence in the case—in other words, the jury are to judge of confessions, like other evidence, in view of all the circumstances of the case.

Sixth—As to evidence of previous good character. Such evidence is always competent in criminal cases, in favor of a party accused, as tending to show that he would not be likely to commit the crime charged against him; but if the evidence establishes beyond reasonable doubt the fact that the defendant committed the crime charged in the indictment, then your duty as jurors is to find the defendant guilty, even though the evidence may satisfy your minds that the defendant, previous to the commission of the alleged crime, had sustained a good reputation and character for honesty.

Seventh—As to the investment of trust funds by an assignee.

An investment of trust funds by an assignee, made without authority of the probate court, if made in any mode or manner, or in any transaction or business prohibited by law, would be *prima facie* evidence of an appropriation of such funds or money to his own use, and would put the burden of proof upon such assignee to show by a fair preponderance of the evidence that such a conversion or appropriation to his own use was not so intended.

On the 4th of May, 1885, the legislature passed a law which, among other things, provides that "all transactions in stocks by 'margin' or 'futures' are declared gambling and criminal acts, whether the person buying or selling, or offering to buy or sell, acts for himself or as an agent or broker for any firm, company, or broker's office."

After the passage of that law, any investment by an assignee in stocks by "margins" or "futures" was prohibited by law, and such an investment by an assignee would be *prima facie* evidence of an appropriation to his own use; but in this case it is a question of fact to be determined by you from the evidence whether the investments shown to have been made in stocks were made after the passage of this law, and if they were, whether they were transactions by "margins" or "futures," or whether they were legitimate transactions in the regular course of trade.

Under our statute the test as to whether the transaction was a legitimate purchase of stock, or was a transaction by "margins" is this: If by the agreement or understanding between Mr. Mannix and the broker

the transaction was intended by Mr. Mannix as purely speculative, and without any intention on his part that there should be any real purchase of stocks, but merely an exchange of balances as the stocks might rise or fall, the transaction would fall under the inhibition of the statute, but if the intention of Mr. Mannix was that the stock should be in good faith bought for him, and the money advanced by him was intended as part payment, then transaction was not on "margin" within the meaning of the statute. It is a question of Mr. Mannix's intention to be found by you from the facts and circumstances of the case and his conduct in relation to the transaction.

Eighth—If part of the money charged in the indictment and bill of particulars as embezzled was received by the defendant as his own money, by reason of his actual ownership or part ownership and interest in the claim collected by him, and such money was not received by him as assets of the estate of which he was assignee, he could not be guilty of embezzling such sums of money.

Ninth—It is your special province to judge of what credit, weight or value is to be given to the testimony of any and all the witnesses who have testified—and in determining that it is pertinent and proper for you to consider the opportunity each or any witness had of knowing the facts testified to—whether such witness had given sufficient attention to qualify him as a reporter of the occurrence about which he testifies, and whether he honestly relates the facts fully as he knows them—whether he is interested in the result, whether he is biased, or has any end to serve—and the weight of credibility of the testimony of any witness is in proportion as it carries conviction of its truth to your minds.

With these instructions, together with the special charges asked and given, the case and its responsibilities are submitted to you, in full confidence that your deliberation will be characterized by intelligence and a conscientious regard for the obligations of your oath, to well and truly try and true deliverance make between the state and the defendant.

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LICENSE TAX.

[Guernsey Common Pleas.]

EX PARTE HENRY CLAMP.

1. The legislature cannot authorize a municipal corporation to discriminate against articles manufactured without the state, and an ordinance requiring those who canvass for the sale of such articles first to pay for a license is void.
2. Where a municipal ordinance is wholly void, a conviction under it may be declared void, and the prisoner released on habeas corpus.

PHILLIPS, J.

Relator was convicted and imprisoned for the violation of a village ordinance requiring those who canvass and take orders for goods and merchandise "not manufactured in the state of Ohio," to first obtain and pay for a license. Held:

1. Section 2669, Rev. Stat., as amended April 22, 1885, so far as it authorizes municipal corporations, to discriminate against articles manufactured without this state, is in conflict with the provision of the constitution of the United States, giving to congress the exclusive power

"to regulate commerce among the several states." Welton v. Missouri, 91 U. S. Rep., 275; Weber v. Virginia, 103 U. S. Rep., 344; Walling v. Michigan, 116 U. S. Rep., 446; Marshalltown v. Blum, 58 Iowa, 184; McGuire v. Ohio, 42 O. S., 530, 535.

2. Only the municipalities of Youngstown and Sandusky may legally impose a license tax upon canvassers for orders for goods and merchandise. Rev. Stat., 2669 and 2669a, in 82 O. L., 148, 171.

3. For the reasons aforesaid, the ordinance in question was passed without legal authority, the proceeding against the relator was *coram non judice*, and the judgment of conviction is an absolute nullity. Relator is entitled to be discharged upon a writ of *habeas corpus*. *Ex parte Shaw*, 7 O. S., 81; *ex parte Van Hagan*, 25 O. S., 426.

STREET ASSESSMENTS.

249

[Cincinnati Superior Court, Special Term.]

JOHN MATTHEWS V. CINCINNATI (CITY) ET AL.

When the owner of adjoining lots in a recorded subdivision has permanently improved the land included in them so as to make lots fronting on a street on which only the side of one of the lots, according to the plat, abutted, the property is assessable as lots fronting on such street.

HARMON, J.

Plaintiff seeks to enjoin the levying of an assessment for the improvement of East Court street. His property consists of three adjoining lots on a plat of subdivision duly made, and recorded, according to which plat they all front on Hatch street, one of them being at the corner of said two streets.

Plaintiff contends that the corner lot only is assessable for said improvement, its average front being fixed therefor in the manner provided in Rev. Stat., sec. 2269. It appears from the petition, however, that plaintiff has permanently improved this property so as to make it four lots fronting on East Court street instead of three fronting on Hatch street, and the proposed assessment is calculated accordingly.

Counsel for plaintiff relies on the clause of sec. 2269 which requires the mode of assessment for which he contends "if there be lots numbered and recorded bounding or abutting said improvements and lying lengthwise thereof." This language seems, however, to refer to an actual existing subdivision, by reference to which the land is occupied at the time of the assessment; or, if vacant, by reference to which it is dealt with with respect to sales, taxation or potential use.

When, however, the owner of adjoining lots sees fit to do so, he may ignore such plat, and either sell or improve the land without reference to it; and when he does so ignore it, as plaintiff has done here, he cannot, it seems to me, invoke the plat as a protection against assessment. This certainly was not intended by the legislature. The intention was merely to protect the owner of a corner lot from having its side counted as ordinary frontage. There is no longer any such corner lot here. The theoretical lots have disappeared by the lawful act of plaintiff. There are now in actual use and enjoyment by him one hundred feet front on E.

Court street, and behind each one of these feet front is a corresponding portion of all the three lots, enjoying access to that street and gaining value thereby. His property no longer "lies lengthwise of said improvement." The law was not intended to permit property to "stand one way and face another."

Demurrer to the petition sustained and application for injunction refused.

O. B. Jones, for plaintiff.

J. D. Gallagher, for the city.

285**WITNESSES—HABEAS CORPUS.**

[Cincinnati Superior Court, Special Term, October, 1886.]

IN RE WILLIAM HEFFRON.

The power to subpoena and compel the attendance of witnesses and examine them under oath given the board of revision, (83 O. L., 169), does not include the power to imprison a witness so attending for refusal to answer questions.

HARMON, J.

The petitioner, having been summoned to appear before the board of revision, and attended, refused to answer a question, for which as for contempt he was by an order of the board committed to jail. He now raises the question of the authority of the board to make such commitment.

It is a general principle of all laws in free countries, that any power affecting life or liberty must be found clearly to exist.

The right exercised by this board can not possibly be derived from the sections of the code of civil procedure which have been cited by the learned counsel for the respondent, because by their terms they apply only to judicial proceedings, and the cases of witnesses failing to answer questions or obey subpoenas, referred to in those sections, are only those in which the subpoena has been issued or the question asked by a court or officer mentioned in that code, and connected with a pending action at law.

One of the authorities relied upon here—the case of *Clark v. The State*, 1 Ill., 266—states the rule which prevails everywhere, that the right to call persons as witnesses, and punish them for refusing to answer, is inherent in all judicial bodies. It is equally well settled—the best known decision being that of *Kilbourn v. Thompson*, 103, U. S., 168—that this power is not inherent in any other body whatever. In that case the house of representatives had, by its sergeant-at-arms, imprisoned the plaintiff for refusing to answer a question, and the sergeant-at-arms was sued by plaintiff for false imprisonment.

The supreme court of the District of Columbia decided that the House of Representatives had that power; that consequently its officer was protected in executing its order, and gave a judgment for him. This judgment the supreme court of the United States, speaking by Justice Miller, reversed, and, as is well known, a heavy verdict of damages was afterwards rendered against the sergeant-at-arms. The court held that no power to punish for contempt was possessed by the House

of Representatives in such cases; that it had no such inherent power, and there was none conferred by statute; that, therefore, the only power of that nature which it could have, was in such matters as by the constitution it was authorized to try, as in the nature of a judicial body, namely: questions of contested elections of members of its own body, and so on. And by the universal course of legislation in this and other states, power of this sort, when it has existed outside of courts of justice, has been conferred by express legislative enactment.

The question, therefore, is: Has this Board of Revision been by any law invested with that power?

The board was created by section 1720 of the Rev. Stat. It was made to consist of the mayor, president of the board of councilmen and the solicitor. It was made their duty to meet as often as once every month to review the proceedings of the council and other departments of the city government, and report to the council anything which they thought worthy of a report.

In volume 83, page 169, Ohio Laws, that section was amended so as to provide that in making any such investigation the board should have power to send for persons and papers, issue subpoenas, enforce the attendance of witnesses, and examine them under oath. This is the only legislation upon the subject. It is evident from the reading, that no express power to punish a witness for refusing to answer after he has attended, although his attendance may be enforced, is conferred by law. But it is contended that such power is conferred as necessarily incidental to the powers given.

In deciding that question it is necessary, therefore, to examine the course of legislation in Ohio, and in so doing we find that the right to compel the attendance of witnesses and examine them under oath has been conferred upon a great many bodies and officers. Some of them are bodies or officers, acting as mere auxiliaries of a court, and, so to speak, under its supervision, such as the grand jury (Rev. Stat., sec. 7200), arbitrators (section 5606), ordinary referees (section 5213), and referees in aid of execution under special proceedings (section 5481). There are, besides, the common council and either branch or committees thereof (sections 1186 and 1187), the superintendent of insurance (section 273), the commissioner of labor statistics (section 319), and the commissioner of railroads (section 258).

None of those acting as auxiliaries of a court are given power to punish for contempt, except referees in aid of execution, who are given the same power to punish for contempt as justices of the peace. The others can only report the delinquent to court. None of the other bodies or officers are given the power to punish for contempt except the commissioner of railroads, whose power is made the same as that of justices of the peace, and the council and its committees. The latter are given full power to issue and enforce process for attendance, and the production of documents, by section 1686; but another section (1687) confers "such power to compel the giving of testimony by the attending witnesses as is conferred on courts of justice."

We find the legislature, then, giving the power in question in terms to some and not mentioning it at all as to others, although all are given exactly the same power to compel persons to attend as witnesses and put them under oath. We find that the power given to some is the same as that of justices, whose power in this respect is expressly limited to a fine of \$5, to be collected by execution (Rev. Stat., 6542,) while

that given to one is as broad as that of the highest courts. Can it be open to question, then, that the legislature did not understand the power to punish for refusing to answer to be included in the power to compel attendance?

What makes this even plainer is the fact that the legislature has seen fit to limit and provide a mode for the exercise of the power of punishing for contempt even by courts.

In *Lowe v. State*, 9 Ohio St., 338, the commitment of an attorney for contempt was set aside, because this mode was not followed—that is, by filing written charges and giving opportunity to be heard. (See Rev. Stat., secs. 5640-1 and 5246-52).

Besides, if we are to hold that a power is to be implied here, which power shall it be—the limited one which alone has ever been conferred on non-judicial bodies, except only the council, or the broader one conferred on courts of justice? The court would certainly be making law, not declaring it, if it should undertake to decide.

If authority were needed after this disclosure of the state of our legislation on the subject, it is to be found directly in point in *Noyes v. Byxbee*, 45 Conn., 382. It was there decided that “the power of a committee or public officer to commit for a contempt, where authorized by an act of the legislature to summon witnesses and examine them under oath, should not be left to implication, but should clearly appear on the face of the act.” The insurance commissioner had been given exactly the same powers as to witnesses, etc., as our board of revision, except that it was made even broader, by the provision that it should be the same “as is now possessed by the superior court”—the power, that is, to compel attendance, production of documents and administer oaths, nothing being said there, as nothing is here, about power to punish for contempt or refusal to answer. The court held that the power so conferred on the commissioner “does not authorize him to commit for contempt in refusing to be sworn and answer questions,” and released a witness imprisoned by his order.

In answer to the argument made there, as here, based no doubt on the theory that it is useless to bring the horse to the trough if you can't make him drink, the court said “generally moral influence is deemed sufficient to command respect and obedience where the legislature grants authority to a commission to make such examinations”—in effect that it is worth while to bring the horse to the trough because he probably will drink. See also *People ex rel., etc., v. Keeler*, 99 N. Y., 463.

That such influence is generally found sufficient, is a matter of common knowledge. And therefore the provisions for compelling attendance and putting statements of witnesses under the sanction of an oath or the penalties of perjury, has generally been deemed sufficient by our legislature, and was evidently considered so here, the functions of the board of revision being primarily, as its name implies, that of mere revising accountants and business examiners, not of a grand jury or minister of justice.

Such being the law, the prisoner must be discharged.

J. A. Jordan and Jos. W. O'Harra, for petitioner.

F. M. Coppock & J. A. Caldwell, *contra*.

SEWER ASSESSMENTS.

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[Cincinnati Superior Court, Special Term, October, 1886.]

***CINCINNATI (CITY) FOR KIRCHNER V. JOSEPH WEWELL ET AL.**

1. The statutory provisions relating to the construction of sewers, and assessing property to pay for them, have always been distinct from the provisions for the improvement of streets and assessments therefor; and remain distinct though now both are incorporated in the revised statutes.
2. "Cost and expenses of constructing" in sec. 2379, is equivalent to "cost of improvement" in sec. 2284.
3. The provision that not the entire cost of main sewers shall be assessed, but only such portion as would be required to construct a sewer for local drainage of the abutting lots; the provision that the entire amount of assessment shall not exceed two dollars per front foot; the provision that council may exempt from assessment a portion of lots whose front is greater than the depth, and so much of the frontage of corner lots as may seem equitable; the provision that no assessment shall be made on lots which do not need, or already have local drainage, are the provisions which fix the amount and limit of assessment, adjust the regard to be paid to special benefits, and protect property owners in the construction of sewers.
4. Sec. 2271 fixing the limit of assessment, and sec. 2275, as to street intersections, do not apply to sewer assessments.
5. Where by the improvement of a district a sewer is built in the street along the front, and another through the alley along the rear of a lot, which lot has only one improvement on it, and that at the front of the lot, the assessment for the district is not invalidated by the council assessing only the front and exempting the rear of such lot.
6. Lots draining directly into an extensive sewer which runs to the river, and which, though not constructed by the city, has been repaired by the city, and used by it as part of the system of city sewage, are so supplied with local drainage as to be exempt from assessment. Lots drained by a wooden box drain, placed as a temporary expedient in anticipation of regular sewerage, or drained simply by flowage over the surface, are not so supplied.

There are one hundred and twenty-five suits, involving as many pieces of property, involving the validity of the sewer assessments amounting to about \$14,000, for sewers built in the eighth sewer district.

The eighth sewer district, the one served by the sewer in question, is bounded by Race street and Eggleston avenue, and by Third street and the canal, except the territory east of Broadway and south of Sixth street. One feature of the case, that relating to board sheeting, went to the supreme court and was sent back.

Force, J.

There are several questions going to the validity of the assessment. One is about a matter of board sheeting. That has been up in the supreme court, and the supreme court say that by reason of the impracticability of determining with any certainty what amount of board sheeting would be required, the assessment is not invalidated by omitting an estimate for that in the advertisement for bids and in the contract for the work. The evidence which has been offered on this trial, still shows that there can be no certainty beforehand as to the amount that will be required. It seems from the evidence, that while an engineer may happen to hit accurately the amount of board-sheeting that would be required to be left in the ground, yet, at the same time, he may make a mistake of fifty per cent. I, therefore, hold that the omission to advertise for board sheeting was not such an omission as to invalidate the assessment.

The assessment includes the cost of advertising, the pay of superintendent, and other such expenses; and it is claimed that, while in street improvements the assessment is made for the cost of the improvement, in the matter of sewers the assessment is made for the cost of construction. Now, the language of the statute is "the cost and expenses of construction." While the portion of the statute which refers to sewer assessments does not define what the word "expenses" means, as dis-

*This decision was affirmed by the supreme court. see opinion 45 O. S., 407.

The case has usually been known as the city for the use of, etc., v. Joseph Wewell, the Anchor White Lead company and Benjamin Eggleston et al.

tinguished from the words "cost of construction," yet in the other portion of the statute referring to assessments for street improvements, the word "expenses" is used, and a definition is given to it; and the "cost of improvement" includes the cost of construction and the expenses. The cost of construction I take to be the outlay made in building the work; the expenses of the construction are the outlay which is incident to the making of it; and I take it that in the sewer assessment portion of the statute the phrase "cost and expenses of construction" is equivalent to the phrase "cost of the improvement" in that portion of the statute which refers to assessments for making the streets.

Objection is made that the assessment must be invalid, because while the statute says that where the cost is to be paid by assessment on the foot front it shall be upon the foot front of all lots abutting, yet that in making up this assessment quite a number of lots are omitted; that is, one front of quite a number of lots. This objection applies to lots that front on a street and run back to an alley in the rear; the courthouse lot, that is bounded by four streets; lots that front on a street and abut sideways on an alley, and the streets at street intersections.

In this assessment, where a lot fronts upon a street and runs through to an alley in its rear, and there is only one improvement upon that lot, only one assessment is made, and that is on the front of the lot. In cases where a sewer has been made through an alley along the rear of a lot already supplied with drainage by a sewer previously made in the street, in front, I know it has been held in special term, and I don't know there is anything to the contrary, that in such case the lot could not be assessed unless there was an actual drainage into the alley sewer; and the case was left to be provided for by a compensatory charge for sewer connection in case the lot should be improved so as to have an improvement facing on the alley, requiring drainage into the alley sewer. I am not sure that even if the city council had not so determined, it would not be held that a sewer assessment could not properly be made upon the rear of the lot, and also at the same time on the front of the lot, where there is only one improvement upon the lot. The decision of the council to omit the assessment on the rear on alleys of that sort where there is only one improvement, seems to me to be in accordance with the action which the courts have already sanctioned.

In the case of the courthouse, where there are four street fronts, and only two street fronts are assessed, the law provides that in case of street corners the council shall use their judgment in assessing upon the frontage on one or both streets. In this case they have used their judgment. There being four fronts there, they have used their judgment to assess two fronts, and I suppose that is using their discretion in accordance with the statute.

Assessment is made only upon the front of private property, and no assessment is made upon the city for the width of streets across which sewers pass at street intersections. The streets at intersections are not called lots owned by the city, as they are called in the case of street improvements. Section 2275, which requires streets to be treated as city lots for the purpose of assessment, represents sec. 13, p. 147, O. L. Vol., 76, where it is expressly limited to the improvement of streets, alleys and other highways. The next section in the revised statutes, 2276, providing for the assessment of city property, includes assessments for sewers by the language "any improvement authorized by this title." I will consider this in connection with the objection that no regard has been paid to special benefits to the property assessed.

In the matter of the assessment for improvements there appears to be under the head of "sewerage" one code of assessments, and under "street improvements" another code of assessment. The rules of assessment for sewerage have been kept separate and apart from the time at which the law began to provide for the construction of sewers.

Referring to sewerage, the statute makes a distinct class of provisions, providing both for the mode and the amount of assessment, and for the way of adjusting, so far as is necessary and practicable, the matter of special benefits. The provision as to the cost of trunk sewers; the provision that the entire cost of main sewers shall not be levied upon abutting lots, but only such portion as would be required to build a sewer for local drainage for the lots abutting; the provision that the entire amount of assessment shall not exceed two dollars a front foot; the provision that the city council, in case of corner lots, may use their discretion in determining the amount of feet upon one front that shall be taken into account in their assessment; the provision that no assessment shall be made on lots which do not need, or which already have local drainage; all these provisions seem to me provisions which the legislature has adopted in the case of sewers for adjusting the assessment, giving due regard to special benefits, and protecting property owners from excessive assessment, which are entirely different from provisions adopted for the same purpose regarding street assessments. I take it that each class of provisions

applies to each class of improvement, and that the provision that an intersected street shall be called a lot and assessed as a lot owned by the city, does not apply to sewers. I find also that the city council paid regard to special benefits in the mode provided by the statute.

There are some lots where there is a sewer along the street front, and a sewer along the rear by an alley, and a sewer along one side by an alley. There is no assessment made for the sewer in the rear alley, and I have already said all I care to say on that matter. As to the sewer in the alley on the side, an assessment is made for a part, not the whole. The statute speaking of streets and alleys has provided that in case of corner lots the city council may adjust the amount of the tax by determining how many feet front one of the sides shall be assessed. This matter having been delegated to the city council, and council having exercised its discretion, I don't feel that it is the place of a court to interfere, where it is not shown that the discretion has been wantonly used, or has been abused.

As to the matter of local drainage, objection has been made on behalf of a number of owners, showing different conveniences previously existing for getting rid of sewage, which vary very widely. Some are easily disposed of. Take the two extremes. The Anderson lot and the Anchor White Lead Works and other lots were already directly drained by a large sewer which extended to the river—a large and regularly constructed sewer, which the city itself had repaired and used as a part of the city system of sewers. That was such local drainage, I understand, as exempts the lots so supplied from assessment. The same is true of the Fiedeldey lots, which were and are drained by a sewer passing through the lots and emptying directly into the trunk sewer in Eggleston avenue, which connection with the trunk sewer was made in pursuance of a contract between Fiedeldey and the city.

The other extreme is a case on Fifth street, the Prues lot, running from the street back to an alley. The part fronting on the alley has been drained by the sewer fronting on that alley, that is one improvement. The other improvement, fronting on Fifth street, so far as it appears from the evidence, had no drainage under the surface of the ground; and when the statute speaks of local drainage, I don't think it means flowage over the surface, but it means some sort of sewerage. That is a case where I cannot hold there was any such local drainage as would exempt the lot from assessment.

The intermediate cases are cases where there have been some wooden box drains used for the water along the streets in the place of sewers. If I understand the construction of these wooden box drains, they seem to me a temporary expedient, put in by the city until it should make sewers, rather than what is meant by the statute as local drainage, and I shall so hold.

There are two points of which I have said nothing, and upon which I will say very little. One is, that while the recommendation to sewer was a recommendation to sewer the entire district, there was a portion of two streets for which no contract was made, and in which the sewers were not built; and hence the improvement as actually made does not accurately correspond with the improvement which recommended by the board and declared necessary by council. The other point is that no estimate was sent to the council either with the recommendation to improve, or with the ordinance to construct. I can not think that anything which the statute contemplates as an estimate was sent in to council, either with the recommendation to improve, or with the ordinance to construct; and the question, therefore, I think, is whether or not that is required in the case of sewers as well as in the case of street improvements, and whether it goes to the jurisdiction and the right to recover in any form. Upon these two questions I shall be very glad to hear argument in the general term. I desire to have a judgment made in the special term in such form that a final judgment can be made in the supreme court without the case being sent back again for trial. I will decide against these objections, and have a finding as to the facts, and upon such findings of the fact and such findings of law and such judgment, the judgment can be affirmed in whole or in part, or a judgment be given for the defendant in the supreme court. Judgment for the assessment of two dollars per front foot for the lots, except those lots found to have been supplied with local drainage.

Drusin Wulsin and William Warrington, for the contractors.

James H. Perkins, Paxton & Warrington, Gross & Cohen, Lloyd & Taft, A. J. Pruden, W. C. Fieldelley, R. W. Carroll and H. J. Harrop, for the property owners.

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MUNICIPAL CONTRACTS.

[Cincinnati Superior Court, 1886.]

WILLIAM H. BRISTOL V. WILLIAM HUSSEY ET AL.

The city, by its board of public works, contracted with defendant for the paving of a street with granite blocks, the specifications requiring the blocks to be "equal to standard Richmond granite" in quality, the city engineer to decide by examining the blocks as the work progressed. An examination by the engineer, five months before bids were received, of specimens from various quarries, and his report to the board that some of them were up to the said standard, and the approval of such report by the board at that time, cannot be shown to modify such contract which in no way referred to such facts, or to dispense with the engineer's duty of inspecting and passing upon the quality of blocks actually used in the work, and rejecting any found not equal in quality to "standard Richmond."

HARMON, J.

Defendant is a contractor for paving Third street with granite blocks. The plaintiff owns property on the part of the street, to be so improved, and seeks to enjoin the defendant from using certain blocks in that work.

These cases are becoming so common, and there seems to be such a looseness of thought or expression on the subject of the questions involved, that it will be well in the beginning to look at the relations between the defendant and the city, because the plaintiff's right must depend upon the right of the city. The city and the defendant entered into a written contract. There is no complaint that there was any mistake in the contract, nor is there any complaint of ambiguity in its terms. On the contrary, all the features of the work are plainly described in the specifications upon which bids were received, and which by reference are made part of the contract. Now the relations of the city and of the defendant are in no respect whatever different from the relations between any other persons who enter into a written contract. Their rights depend upon what they have seen fit to put in writing, nothing else, and when a question arises between them it can only depend upon the construction of the language which they have deliberately chosen.

By this contract the size of the blocks to be used is definitely stated, and in two ways their quality is indicated. First, by a provision that the quality shall be equal to what is known as "standard Richmond granite," and it is not contended that there is any difficulty in ascertaining with reasonable certainty what that standard is. The use of the term indicates that such granite was recognized as a standard by persons engaged in that business. Second, by reference to a specimen to be filed with each bid, stating the name of the quarry and so on; and it has been held by this court in another case that when a specimen is so filed with the bid, examined by the city and approved, and then referred to in the contract by adopting the specifications, such specimen becomes a part of the contract—an expression by object. In this case the allegation of the petition is that, although a specimen was filed, it was rejected, therefore there is no specimen in this case, and all that the parties have contracted for is granite blocks equal to "standard Richmond," and there cannot be anything else.

The contract further provides that the engineer's opinion as to the quality of the granite, whether it comes up to the contract and specifica-

tions, shall be final as between the parties. It is not alleged in this petition that the blocks which the defendant proposes to use are inferior to "standard Richmond granite," nor is it stated whether the engineer has examined them or not. The only averment is that the board of public affairs, has ordered the defendant not to lay them. From what I have just said, it is manifest that neither one of the parties to the contract can by his mere dictum change its terms. The defendant can not arbitrarily say: "I am going to lay this kind of blocks," nor can the board of public affairs arbitrarily say: "The contractor shall not lay this kind of blocks." Why? Because neither party to a contract, without the consent of the other, can change its terms; and they have selected a person whose judgment is to decide when a conflict arises. That person is the engineer.

It is further averred that some months before this contract was made, prospective bidders, desiring in advance some information as to what the board would regard as proper granite to be laid, caused the board to make an examination into different kinds of granite; that it thereupon had the engineer examine various sorts of granite, including granite from the quarries in Georgia, from which the blocks come which the plaintiff says the defendant is about to use on this work, with a number of others, and he reported that they would be up to the standard required, and the board adopted the report. Now I am unable to see how that cuts any figure in this case. When the parties came to make the contract, they said nothing about any specimen except one filed with the bid, which was from Pennsylvania, and that specimen being rejected, disappears. They then simply contracted that the granite should be equal to "standard Richmond". Certainly no engineer could say generally in advance that all the blocks which might come from a particular state or quarry would be equal to that standard, and if he did attempt to say so it certainly would be of no effect, because while no time is stated in which he shall act under the contract, yet his action under the contract must by its very terms be during the progress of the work; it could not be at any other time. The provisions are, that "no material shall be used until it has been examined and approved by the engineer;" that means the particular materials that are to be used in the street, not some other material that came from the same neighborhood. And by another provision "the blocks will be carefully inspected upon delivery, either upon the cars, upon the street, or both, by the engineer or his agents, and all blocks which do not conform to the foregoing specifications in size or quality must be immediately removed by the contractor at his expense." Consequently, any previous general information given by the engineer or by the board, not referred to in the contract, would be only in the nature of general advice; it could not be of a contractual nature, because of the well known rule that all prior statements, etc., not mentioned in the writing are held to have been abandoned by the parties. Nor could the engineer, if he had expressly attempted to bargain away in advance the judgment which he was required to use as the work progressed, have lawfully done so.

With this general view, it seeming to me to depend upon elementary principles understood by everybody, what am I asked to act upon in this case? Not upon an averment that these blocks are not up to the required standard as matter of fact. Not upon an averment that the engineer, having examined them, has so decided. I am asked to act upon this question, and decide whether the defendant is entitled to use these blocks,

simply upon the allegation that the board of public affairs, has ordered him not to use them. As I have said, while it has general police power over the streets, it has no right by its dictum to say whether these blocks are good, bad or indifferent.

I am asked here to decide this question upon an utterly immaterial fact, and there is no fact alleged which goes to the merits of this controversy at all, so that I cannot say whether the defendant, Hussey, ought to be permitted to use these blocks on the street or not. Consequently, while I, of course, refuse to issue any injunction, I at the same time disclaim the intention of having that decision construed as passing upon the merits of this question one way or another, because it manifestly does not.

The demurrer to the petition is sustained, and the applications for an injunction refused.

C. C. Cook, for plaintiff.

J. A. Jordan, for defendant.

291**MARRIED WOMEN.**

[Hamilton Common Pleas.]

DUNKHAM & WOOSTER V. WALTER B. BRUCE, EFFIE M. BRUCE ET AL.

A married woman, under sec. 3109 Rev. Stat., as amended in 1884, (81 O. L., 65 and 209), may be sued at law upon her indorsement of her husband's note, made since that date.

*Contra, see *Drake v. Birdsall*, 18 B. 243, supra.

On motion of defendant to strike out part of the petition.

HUSTON, J.

This is an action to recover a personal judgment on a promissory note, dated February 28, 1885, for \$1,500, made by Bruce & Co., and indorsed by Effie M. Bruce, who is the wife of Walter B. Bruce, and M. Bruce, who is the wife of Walter B. Bruce, and also in a second count to subject certain real estate, alleged to be the separate property of said Effie M. Bruce, to payment of said note. The petition avers that she, by her indorsing said note, charged the payment of same upon her separate property, and asks for sale, etc.

It does not appear that she owned this property at the time she indorsed the note. She moves to strike from the petition substantially all of the second count—all about the property—so as to leave the action for a personal judgment alone.

The motion may be considered as equivalent to a general demurrer to the second count of the petition.

The question raised is as to the nature and extent of the remedy against a married woman under the acts of March 20 and April 14, 1884, (O. L., vol. 81, pp. 65 and 209), amending sections 4996 and 5319, 3108 to 3112 of the Revised Statutes of Ohio.

Has the creditor of a married woman, in addition to his remedy at law, the right to proceed in equity and subject her estate to the payment of the debt on the theory that by creating the liability she charged her estate with such payment? Has he both remedies?

Prior to the amendments of 1884, a married woman could contract with reference to her separate estate, and the same could be enforced in equity against such estate; and the supreme court of Ohio (in case of *Williams v. Urmston*, 35 O. S., 96) went so far as to hold, not only that a married woman, having a separate estate, might charge the same, in equity, by the execution of a promissory note, but that in such a case a just inference arose that she thereby intended to charge her separate estate with the payment of the note, and that a court of equity would carry such intention into effect by subjecting such estate to the payment of the debt, in the mode prescribed by the statute.

The manifest effect of the law as it stands now, by virtue of the amendments of 1884, is to remove all restrictions upon the power of a married woman to contract, as if single. She may, in her own name, make contracts and bind herself to the same extent and in the same manner as if she were unmarried. She shall sue and be sued as if sole—and like proceedings shall be had and judgment rendered and enforced as if she were sole. In such suit it is not necessary to aver or prove that she is *femme covert*, or the owner of a separate estate, or that she contracted the debt or obligation with reference to her separate estate, or for its benefit.

The difference in the language of section 5319, as amended, and before, is significant, as bearing on the intention of the legislature. The word "separate" is omitted, so that all her property and estate, except such as is exempted, is liable for the judgment against the married woman. Also, the language is positive—"like proceedings shall be had and judgment rendered and enforced," etc. In the old provision: "Judgment may be rendered and enforced," etc.

It follows that the remedy against a married woman now, upon a promissory note, or indorsement by her, since the amendment of the statutes, must be by an action at law, the same as if she were unmarried.

To give the creditors an additional remedy by proceeding in equity to subject her estate, would be on the theory that by the mere act of signing or indorsing the note she created a lien or charge upon her property, which is inconsistent with the letter and spirit of the statute. Prior to the acts of 1884 there was good reason for the application of this equitable doctrine, for then a married woman could not contract so as to bind her unless she had a separate estate.

But now, a married woman being placed upon equal footing with a man or a single woman, as to owning and controlling property, and as to contracts and liability, it would be unjust to permit more remedies against her than against a man or a single woman. This construction of the law is but the logical result of recent rulings of this court, the superior court of Cincinnati, and the circuit court.

The reason for the former ruling and practice having ceased, the practice and rule should cease. See *Koch v. Seifert*, 13 W. L. B., 15; *Stagge v. Nichols*, March 7, 1886; Circuit Court, 1st Circuit Court Rep., 408; *City National Bank v. Holden*, 14 W. L. B., 399.

Motion granted.

Thornton M. Hinkle, for the motion.

John W. Herron, *contra*.

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BANK DEPOSITS.

[Cincinnati Superior Court, General Term, October 26, 1886.]

Force, Harmon and Peck, JJ.

C. K. SKUNK, ASSIGNEE, V. MERCHANTS' NATIONAL BANK.

When a depositor in a bank becomes insolvent, the bank holding notes not yet due, which it had discounted for him, and the proceeds of which notes had gone into his deposit account, the bank can withhold enough of the deposits to protect such notes, as against the insolvent or his general assignee, though not against bona fide holders of checks for value.

Force, J.

This is a petition in error to reverse a judgment rendered in special term. This case was brought upon an agreed statement of facts, without pleadings, under the provision of the code.

The agreed statement of facts is as follows: On November 3, 1883, Theodore Fagin, doing business in Cincinnati under the name of Lewis Fagin's Sons, assigned the assets of said business, for the benefit of his creditors, to plaintiff. At 11 o'clock A. M., said deed of assignment was filed in the Probate Court of Hamilton county, Ohio, and plaintiff was thereupon qualified and is now acting as such assignee. That of said assignment said bank was notified by plaintiff before 1 o'clock P. M., of said day. When said deed was thus filed, said Fagin had the sum of \$214.31 to his credit on deposit with said bank. Said sum was the balance of Fagin's deposit account with said bank, which account embraced not only his usual money deposits, but the proceeds of all paper discounted for him by said bank, including the promissory note for \$2,000, hereinafter copied, and that said discounts were made because said Fagin was a depositor with said bank. At the same time, Fagin was indebted to said bank upon the promissory note for \$2,000, which has been mentioned.

The questions submitted are as follows:

Is it the right of the assignee, the plaintiff, to recover said sum from said bank, the defendant? or

Is it the right of the bank to retain and apply said sum as a credit on said note?

It was found that the bank had the right to retain such sum as credit on said note, and judgment was given accordingly. The three days grace expired, and the note became entirely due on the same day on which the assignment was made and was filed in the probate court. It was filed in the probate court and took effect at 11 o'clock in the morning, and of course business hours expire at 3 o'clock in the afternoon.

This does not present a case of legal set-off. It does present the case as to the equitable rights of the parties—the equitable rights between the bank and the customer, where the customer becomes insolvent, or where the bank becomes insolvent, the right of one to set-off claims against the other.

An assignment for the benefit of creditors does not put the assignee in a better position than the party who assigns. This is well illustrated, in the case of the First National Bank of Cincinnati v. Coates, 3 McCreary's Reports, p. 9, Justice Miller of the supreme court giving the opinion. In the national courts a check drawn upon a bank does not operate as an assignment of a part of the fund, nor does it give the holder of the check any right to bring an action against the bank.

Now in this case an insolvent made an assignment having at that time considerable funds in bank. After the assignment was complete, persons holding checks presented them to the bank, and it was held that while they had no legal right against the bank, yet being the holders of these checks before the assignment, and presenting them to the bank, although after the assignment, yet before the money had left the possession of the bank, the holders of those checks had an equitable right superior to the assignee, and that they should have the money, and not the assignee, in a contest between the two.

There is a well-considered case by the court of appeals of Virginia, which applies that rule to the point we have now in hand, the case of *Ford's Administrator v. Thornton*, 3 Leigh, 695. It was there held that where a customer has had notes discounted by a bank, and the money obtained by the discount has formed a part of his deposit account, then in case of the depositor becoming insolvent before those discounted notes fall due, the bank has an equitable right to withhold and retain enough of the fund on deposit to protect the notes which it has so discounted. That decision covers the point involved in this case. There has been no express ruling in Ohio upon this point. But so far as cases have been submitted to the supreme court which approach this point, the supreme court have held in the same way.

In the case of *Fuller v. Steiglitz, assignee*, 27 O. S., 357, which was cited here on behalf of the assignee, it was held that there was no set-off on behalf of a debtor to an insolvent who had assigned as against the assignee, because in that case there had been no mutual dealings; but the supreme court said that if it were a case of mutual dealings, then there were strong equitable considerations for finding principles of compensation; and the context shows that it meant applying the principles of compensation by setting off against a note now due, a note about to become due.

In the case of *Bank v. Hemingray*, 34 O. S., 381, the question was presented with the parties reversed. There an insolvent bank had assigned, holding notes against one who was a depositor and had a deposit in bank, some of the notes being due at the time of the assignment, and others being not yet due, and the court held that this depositor could apply the fund which he had in bank on deposit, that is, the debt of the bank to him, as a credit not only upon the notes which were due, but also upon the notes which were not yet due.

We hold, therefore, that where one becomes insolvent, having a deposit account to his credit in a bank, which holds notes discounted by it for him, the proceeds of which notes form part of the deposit account, the bank has a right to retain and withhold enough of the deposit account to protect such notes when they shall mature, as against the depositor and his general assignee, though not as against the holder of checks for value.

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PARTITION—LEASE.

[Cincinnati Superior Court, General Term, October, 1886.]

Force, Harmon and Peck, JJ.

C. WERNER V. P. GLASS ET AL.

The existence of an ordinary lease for years, under which the tenant is in possession paying rent to the owners of the fee, is no obstacle to partition among such owners.

Harmon, J.

The parties are the owners, as heirs of their father, of an improved city lot. To this action for partition thereof some of them answer that their father had leased the premises for a term of three years, which has not yet expired, with the privilege of a further term of two years, at a monthly rental, under which lease the tenant is in possession. Plaintiff demurs.

Our statute, Rev. Stat., 5764, et seq., gives the right of partition in general terms to all "tenants in common and coparceners of any estate in land," etc., but it has been decided that the right does not exist where such estate is a remainder or reversion after an estate for life. *Tabler v. Wiseman*, 2 Ohio St., 207. It is contended that the principle of that case is decisive of this.

While some of the possible inconveniences or inequalities referred to by the court, among other reasons for its conclusion, might exist in cases of property leased, especially if for long terms, the principle of the decision was that as partition deals with possession only, it cannot be had unless the parties praying partition have the possession. It is conceded that actual possession is not necessary; an estate which gives the right to possession will suffice.

It is evident, therefore, that the term possession is used as opposed to expectancy—as defining the nature of the estate rather than referring to its physical occupation.

The estate of the parties here is not one in expectancy, but in possession, because from the days of the feudal system until now the possession of a tenant has been considered the possession of the landlord, except so far as concerns rights dependent upon actual physical occupation, such as the action of trespass.

"A tenant for years is never said to be seized of the lands leased; nor does the delivery of a lease thereof for years vest in him any estate therein. He thereby acquires a right of entry upon the land, and when he shall have entered he is said to be possessed, not of the land, but of a term for years, while the seizin of the freehold remains in the lessor, and the lessee's possession is the possession of him who has the freehold. 1 Washb. Real Prop. (4th ed.) p.p. 72-442; 2 Id., p. 740; Tiedeman Real Prop., sec. 693.

The rights of the plaintiffs are exactly the same as their father's. *Blantin v. Whitaker*, 11 Hump., 313. And the severance of the reversion having been by operation of law, the obligation to pay rent is also apportioned, and each heir becomes entitled to collect his aliquot part. 1 Washb. Real Prop., p. 519; *Taylor on Land. & Ten.*, sec. 385.

Upon partition being made as prayed, therefore, each of the parties would have in present actual enjoyment in severalty, his portion of the common estate, which result could not follow a decree for partition in case

of an independent intervening estate as in *Tabler v. Wiseman*, and, in substance by reason of the reduction of rent at the lessor's death, in *Burbeck v. Spollen*, 6 Dec. Re. 1118.

The practice in Ohio certainly has been to decree partition in cases like this. See *Black v. George*, 26 Ohio St., 629; and the inconveniences to result are so great that we are loth to reverse it, unless clearly convinced that it is wrong. See as to effect of settled practice *Mannix v. Com's*, 43 O. S., 210.

Hunnewell v. Taylor, 6 Cush., 474, is certainly adverse, but it was based upon the very different language of the Massachusetts statute, and is opposed to the weight of authority. *Freeman on Co-tenancy*, etc., sec. 446.

Demurrer sustained.

Force and Peck, JJ., concur.

W. B. Morrow, for plaintiff.

Herman Muller, contra.

ATTACHMENT.

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[Cincinnati Superior Court, General Term, October, 1886.]

Force, Harmon and Peck, JJ.

JAMES BULLOCK v. JOHN A. MITCHELL, ET AL.

1. A finding that at the time the debt sued on was incurred, the debtor represented that he owed by \$800 for borrowed money, whereas, in fact, he owed \$1,400, is not sufficient to sustain an attachment for fraudulently incurring the debt, where there is no finding that the debtor knew the statement to be false, or knew, or had reason to know, that the creditor would rely upon it.
2. Nor can these findings be supplied by intendment; like a special verdict, omitted facts cannot be inserted by presumption, nor will a general finding that the debt was fraudulently contracted help the special finding. Such general finding is not a substantive finding, but is a mere summary of, or, inference from, the detailed finding.

Force, J.

This is a petition to reverse a final order. An attachment was obtained upon the ground that the debt had been fraudulently contracted. A motion to discharge the attachment was heard upon affidavits, and counsel requested that the court should find separately the conclusions of fact and conclusions of law. In the conclusions of fact it is found that as to the sum of \$197.12 said debt was contracted by defendant upon a statement of his resources, made at that date to the plaintiffs, in which among other things he stated that he owed no debt for borrowed money except about \$300, and the court finds that in fact he owed at that time about \$1,400 for borrowed money, on which statements the plaintiffs relied in giving subsequent credit, and that as to said part of said indebtedness so contracted after June 17, 1885, to-wit, the sum of \$197.12, the same was fraudulently contracted by the defendant.

The question upon the sufficiency of the finding is, whether or not the general finding, that the debt was fraudulently contracted by the defendant, is a separate substantive finding of fact, or whether it is a resume of the detailed statement which precedes it. If that were a separate substantive statement of fact, the detailed statement would be wholly unnecessary.

The true reading appears to be that, first there is the statement of what was actually found; and then a general finding made in such, form that it is equivalent to stating that "thereby the debt was contracted" fraudulently. The question is, is that sufficient? It was held in one case by the supreme court, when construing an affidavit for attachment, that where a general allegation in the language of the statute, that the debt was fraudulently contracted, was followed by allegation that it was "substantially contracted by fraud in the following manner, and the following manner was insufficient to make out a case of fraud, the court said that in as much as the affiant stated that the details given were only a substantial statement of the manner in which the fraud was committed, it did not purport to be a complete statement; and therefore, not being complete, and not purporting to be complete, it did not invalidate the previous general statement that it had been fraudulently contracted. The inference is left, that if the statement of particulars had been intended as a complete statement of the manner, in which the fraud had been effected, it would, if insufficient, invalidate the previous general statement of fraud."

Now in this case it is found that the defendant stated he had no debt of borrowed money except about \$300, and they find he had at that time about \$1,400 borrowed money, on which statement the plaintiffs relied in giving subsequent credit. There is no finding that he knew that statement was false, or that he understood or believed the parties would be induced by the statement to grant the credit, or that he understood or believed, or had reason to believe, that the other parties would rely upon the statement, so that this detailed finding is not a finding of facts which are sufficient to constitute a finding of fraud. The detailed finding then not being sufficient, it is not helped out by a general finding, which is a summary of that detailed statement. We find therefore that the fraud, which was the alleged basis of the attachment, is not sufficiently found.

Now it may be said that the omitted ingredients, which are requisite to constitute a statement of fraud, can be presumed or can be made out by intentment; but the finding of a court upon an issue of fact, like a special verdict found by a jury upon an issue of fact, if incomplete, can not be helped out by intentment or presumption to insert findings which are omitted.

We find, therefore, that in the conclusion of facts there is not sufficient to sustain the order made. The final order will be reversed, and the case remanded for further hearing, on the motion to dissolve.

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STREET RAILWAYS.

[Cincinnati Superior Court, General Term, June 14, 1886.]

Force, Harmon and Peck, JJ.

***J. B. CLEMENT V. CINCINNATI (CITY) ET AL.**

1. A modification of a contract between the city and the owner of a street railroad route, made in good faith, for the better accommodation of the public, is not void by virtue of sec. 2502, Rev. Stats. as a release of the grantee of such route from an obligation, although in consideration of more rapid transportation involving greater expense a higher rate of fare is permitted.
2. An extension of the term of the grant on the same consideration is not invalid because made without competitive bidding.
3. A street railroad does not cease to be such because a grip cable is substituted for horses as the motive power.

*The supreme court refused leave to file a petition in error in this case, January 17, 1888.

Harmon, J.

Plaintiff, as a tax-payer, after the city solicitor refused to sue, sought an injunction against proposed action by various city boards and officers to carry into effect "An ordinance to provide for the construction and operation of a "cable" or "electric" system on Gilbert avenue, "and against the exercise by the owners of a street railroad franchise in said avenue of the rights conferred on them by said ordinance."

On final hearing the relief prayed was refused, and a reversal of that judgment is now sought.

The facts appearing by the pleadings and bill of exceptions are these:

In 1872 street railroad route number ten was duly established by ordinance, and a contract duly made with one Henry Lewis for its construction and operation which contract specified rates of fare, car-licenses, etc., for the entire term of the grant. The road was duly built and was being operated on Gilbert avenue according to such ordinance and contract, when the ordinance complained of was passed. The preamble discloses that "it has been made apparent that the use of horses for the movement of street cars on Gilbert avenue is very unsatisfactory, and to some extent unsafe, and the movement of cars necessarily slow; that much inconvenience has been experienced by the people of that portion of the city reached by this line, and that the owners of said line are willing to construct a cable or electric system on said avenue, whereby cars may be rapidly moved by steam or electricity," and the ordinance grants the owners of such route the privilege of laying the necessary cables or appliances, makes some minor changes in the route, and, in consideration of the improved facilities proposed and the great expense involved in providing them, authorizes an increase in the rates of fare and extends the right to use the street to twenty-five years from the passage of the ordinance.

The principal question is, whether this ordinance is invalid by reason of the clause of sec. 2505, Rev. Stat., which requires that the municipality "shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal."

It is contended for plaintiff that the effect of this ordinance is to release the owner of route number ten from the obligation to carry passengers at the rates provided in the original grant. The position of defendants is that the clause of the statute just quoted was not intended to forbid a modification of the agreement between the city and the grantee of the right to operate a street railroad, but only the voluntary surrender by the city of any of the rights secured to itself or the public thereby.

That the latter was the evil the legislature had in mind we have no doubt, from the knowledge we have, as members of the community, of the history of municipal affairs, which knowledge forms a part of the intelligence which the court must always exercise in such cases. *Gas Co. v. Avondale*, 43 Ohio St., 257, 267. We should be loth to hold, unless such intention had been clearly expressed by the legislature, that the intention was to prevent the city from making any modification whatever of the terms on which or manner in which street railroads are operated, no matter what exigencies might arise during the twenty-five years which the same statute provides as a proper term for such grants.

The progress of invention among a people famous for fertility in that regard, especially with respect to rapid transportation, the growth and change of location of population, and the teachings of experience, are apt

to make such modifications necessary to accomplish what was intended in the creation of agencies of this kind. In the opinion of the council this has happened in this case, and the evidence shows that the public, whose interests are chiefly involved, are of the same opinion.

While a modification of the contract might be merely colorable—a pretext for surrendering some right or releasing the other party from some obligation, in which case the court would promptly interfere, it is not charged that such was the case here, and the contrary, if not admitted, appears very clearly, plaintiff standing simply on the absolute right secured by the statute.

In our opinion the clause of the statute in question was intended to prohibit only the giving away by the city of some right secured to it or the public by the contract under which street railroads are operated. This certainly is the ordinary import of the term "release from liability." It is a mere letting go or relinquishment, and where that is the manifest object of the action of the city it is void, whatever form it be made to assume. But where the manifest object of the city is to discharge its duty to the public, whose trustee it is in this regard, and its action is taken in good faith to that end, and has actually had that effect, the fact that by a strained and unnatural construction it may be said to release a street railroad company from an obligation when it merely changes the terms of the obligation, does not avoid its action. The obligation was to carry passengers by horse power, at a rate of speed necessarily slow, for five cents. It now is to carry them by steam power at a higher rate of speed for six and a quarter cents, to be reduced to five cents after ten years. It is not a release but a modification made in good faith for a sufficient consideration, and does not fall within the prohibition of the statute. See as justifying this construction of the statute, *Woodson v. Murdock*, 22 Wall., 35.

The right of the city to extend the time of its grant to a street railroad company has been settled by the decision in *Haskins v. St. R. R. Co.*, 7 Dec. Re., 713, which we have no disposition to question.

And to the argument that the change in the motive power changes this road from a street to a steam railroad we can not agree, and so it is unnecessary to discuss what the effect of such a change would be. It is the nature of the use, not motive power, which determines whether a road belongs to one class or the other. When a road is laid in a street, on the surface of the street, because it is a street, and to facilitate the use of the street by the public, it is a street railroad, whatever the means used to propel cars over it.

Judgment affirmed.

Force and Peck, JJ., concurred.

A. B. Champion and D. T. Wright, for plaintiff.

L. Maxwell, Jr., contra.

CHATTEL MORTGAGES.

356

[Cuyahoga Common Pleas, 1886.]

STATE OF OHIO EX REL. MCBRIDE V. ALFRED T. ANDERSON,
RECORDER.

1. For filing a chattel mortgage (made to a partnership in the firm name of A. & B.) the recorder, under sec. 1157 Rev. Stat., is entitled to charge for each name in the firm style capable of being indexed.
2. The right to charge for searching a paper does not refer to examining the paper offered for filing, for he must do that in order to index at all, but refers to a charge in looking for, or exhibiting a paper on request.

Hamilton, J.

This is an action for a writ of mandamus. The petition recites that the defendant is the duly elected and acting recorder of the county of Cuyahoga, and was so acting at the time of the grievances complained of.

It further recites that on the 28th of September, 1886, the plaintiffs held a certain mortgage, given to them by one J. M. Wagner, and presented the same to the recorder of this county at his office, and tendered him the sum of eighteen cents, and asked that the same be put on file and properly indexed as a chattel mortgage.

That he refused to so enter it, and refused to receive it except for the sum of twenty-four cents, claimed to be due for his services for that record, and he would not so receive it and so file it, unless that sum was paid, and this proceeding was brought to compel him to so execute his duties as recorder, for the requisite sum of eighteen cents.

A demurrer is filed, and the question to be determined is, as to how much money was due to the recorder on that paper, under the statute of Ohio, for thus receiving and filing chattel mortgages, (I refer to section 1153 of the Revised Statutes relating to the duty of the officer upon filing thereof). The officer receiving any such instrument shall indorse thereon at the time of receiving it, its consecutive number, and enter into a book to be provided by the township trustees, or county recorder as the case may be, the names of all parties thereto; to be alphabetically arranged, with the number of the instrument, its date, the day of filing it, and the amounts secured thereby, which entry shall be repeated alphabetically under the name of each party thereto. He shall deposit the instrument in his office, to be there kept for the inspection of all persons interested, and when such mortgage is refiled, or canceled, the date of such refile, or cancellation shall be entered upon the margin of such record opposite the original entry. Section 1157 provides for the fees of the officers, what the officers are entitled to for the filing and for indexing and for all services rendered under sections 1149 to 1155 inclusive. The officer shall be entitled to receive the following fees: For filing each instrument or copy, six cents; for searching each paper, six cents; for making entries upon the filing of an instrument, six cents; for each party thereto, six cents; for recording such instrument, ten cents per hundred words; for recording an affidavit, credit or statement added to an instrument between the time of its record and refile, twenty-five cents, and like fees for certified copies of such instruments as are allowed by law to county recorders for like services. The relators contend that the recorder is entitled to six cents for filing this chattel mortgage, that he is entitled for making entries of this chattel mortgage in his index, to the sum of six cents for each party, there being two

parties, to wit: McBride & Marcellus and the mortgagor Wagner, thereby aggregating the sum of eighteen cents. The defendant contends that he is entitled to six cents for filing; that he is also entitled to six cents for searching each paper, that is for looking into and examining each paper and ascertaining the name, and ascertaining the dates, and ascertaining the amount of money secured by the chattel mortgage, and placing these together with the date of filing upon his index; that he is also entitled to the sum of eighteen cents for making these entries, there being, as he claims, three parties to the mortgage, to wit: the mortgagor, Wagner, and McBride & Marcellus, there being two persons in that one firm.

Upon this proposition as to searching of each paper, the reading of the statute is a little indefinite and uncertain. Amended section 1157 of the Revised Statutes, which provides for the fees, says the recorder shall receive the following fees: For recording a mortgage, deed, or other instruments of writing, ten cents for every hundred words actually written on the records; ten cents for indexing the same, to be paid on the presentation of such instruments for record; for making and certifying copies from the record, ten cents for every hundred words; for recording the satisfaction or assignment of mortgages, twenty-five cents; for every search of the record without a copy, fifteen cents. It seems to the court, that if a person should come into the office and request him to make an examination of the indexes for such an instrument, or find such a mortgage filed on such a day, where he does this by request and without copy, he is entitled to fifteen cents for every search of record when thus requested; but when he goes on making the entries which must necessarily be made, he looks into it in order to ascertain what the entries are that he is to make, and which he cannot make without thus doing. I do not think that by the requirements of the statute he should be paid an extra sum for doing that which he is required to do to make the filing complete. If a man comes in and wants to file a chattel mortgage, and wants to look at it and examine it, and the recorder goes and looks it up and tells him the contents of it without a copy, according to section 1157, it seems to me he is entitled to the six cents, but not for simply finding and handing out the mortgage if he is requested to do so; therefore I hold the defendants' claim in that regard not well taken. The proposition arises how many parties there are in the firm of McBride & Marcellus; this is more difficult to determine. McBride & Marcellus, it is averred, are persons in partnership and doing business under that name in the state of Ohio. Had they filed this chattel mortgage in the names of A. B. McBride and C. D. Marcellus, partners under the firm name of McBride & Marcellus, we would not doubt but that they would constitute two parties in the purview of this statute. Turning to section 1153 of the Revised Statutes:

"The recorder shall make and keep alphabetical indexes of the names of both parties to all instruments recorded by him, and in all cases where there are several grantors or grantees, mortgagors or mortgagees, or other parties named in any deed, mortgage, or other instruments of writing recorded in the recorder's office of any county in the state, the recorder shall insert, in proper indexes, the name of each of such grantors or grantees, mortgagors or mortgagees, and other parties, and in all cases of deeds, mortgages, and other instruments of writing made by any sheriff, marshal, auditor, executor, administrator, trustee, or other officer, for the sale, conveyance, or incumbrance of any land, tenement, or hereditament, to be recorded in the recorder's office of any county, the recorder of the proper county shall insert in such indexes, under their appropriate letters

respectively, first: The name or names of the person or persons whose lands and tenements are sold, conveyed, or incumbered by the deed, mortgage, or other instruments of writing of any such officer; second, the official designation of the officer by whom such deeds, mortgages, or other instruments of writing are made; third, the individual name or names of the person or persons holding such office, or by whom such deeds, mortgages, or other instruments of writing are made."

Now McBride & Marcellus have taken this mortgage as partners, under the firm name of McBride & Marcellus; yet it seems to me that there are three parties to that mortgage, to wit: two individuals composing the firm, and Wagner, the mortgagor. Does it make any difference how we use the firm's name? A partnership, as I apprehend, is not a fictitious person created by law like a corporation. A corporation is an entity created as a fictitious person, but according to the statute, a partnership is an association of individuals. *Haskins v. Alcott*, 13 Ohio State, p. 210. Under the common law, a firm could not sue in its firm name, but it must sue in the individual names of the partners. It is only by the statute that a partnership can sue in the partnership name. You may sue in a firm name, and a judgment may be obtained in the firm's name, and if individual members of the firm are made parties to the judgment it must be by the action of the firm. I am inclined to think that under the common law and in the meaning of the statute, these members are to be recorded as individuals collected as an association, and they do not make an entity. I see no reason, either in law or principle, why these names should not be indexed both ways. Why may you not say McBride and Marcellus and McBride, see McBride and Marcellus indicating both ways. Where the names are known, any one knowing one name may find out whether he is interested in the instrument in the true firm name. Now take Taylor & Son, for instance; there may be, perhaps, a dozen parties, but not parties to the instrument, because the names are not designated. I am inclined to think the recorder may well index, and is required by law to index the firm's name in both ways, and give the name of both parties. There is a case in the 16th Ohio State, which holds that if he makes a mistake in indexing, or does not index it all, through negligence, he is responsible in damages. I think the recorder is entitled to receive twenty-four cents. The demurrer will be sustained and the writ refused.

Carr & Goff for relators.

F. M. Chandler, for respondent.

LANDLORD AND TENANT.

366

[Cincinnati Superior Court, General Term, October 25, 1886.]

Force, Harmon and Peck, JJ.

*CHRISTOPHER H. KUHN V. THERESA REMMLER, ADMX.

Kuhn, owning a two-story brick house which had a shallow foundation and no cellar, let to a tenant a room which comprised the greater portion of the ground floor, and retained possession of all the rest of the building.

The owner of the adjoining lot, after giving due notice to Kuhn, began excavating a cellar which extended a few feet below the foundation of Kuhn's house, but less than nine feet below the surface of the ground.

*The supreme court reversed this decision on authority of *Burdick v. Cheadle*, 26 O. S., 393. February 18, 1890.

Kuhn employed a man to prop up his house so as to prevent its falling, but by reason of the negligence of such contractor, the building fell and killed R., who was at the time rightfully in the prosecution of his business in the tenant's room. Held, Kuhn is liable in damages for such death.

Force, J.

This is a petition in error. The action was brought by the administratrix of the intestate for damages alleged to have been sustained by reason of the wrongful death of the intestate.

The case was of this character: Kuhn, the defendant to the action below, was the owner of improved premises in the city. On the front part was a substantial building; in the rear part was a two-story brick building, the foundation of which went only two feet or four feet under ground, the walls of which were dilapidated, and the under story was rented to a person who had a broom factory. The upper story was retained by Mr. Kuhn; the foundation was in his possession; he was in possession and occupation of all the premises except the lower story room, which he had rented out. The deceased, the intestate, a person dealing in brooms, was in the lower room, upon his business, rightfully there, when the premises fell in and he was killed.

The falling in of the premises was caused in this way: The owner of the adjoining premises, intending to build, made an excavation for a cellar. The excavation was more than four feet deep; that is, it was made below the foundation of Kuhn's rear building; it was less than nine feet deep, and was within the statutory limit of responsibility. That being the character of this excavation, the responsibility in law was upon Kuhn to take care that his building should not fall by reason of the excavation. He had been notified that the excavation was to be made, and that he was required to look after his premises. He did employ a person to see about propping up. The question being submitted to the jury, the jury found the person so employed was guilty of negligence, and by reason of that negligence this building fell. The foundation giving way, the upper floors were precipitated, and three walls of the house fell in upon and killed the deceased.

It is claimed that the landlord can not be held liable under the decision of *Burdick v. Cheadle*, 26 O. S., 393, 396. In that case, and many similar cases in the United States and in England, it is held that where premises are leased, and a part of the leased premises, which the tenant is obliged to keep in repair, falls and causes injury, tenant is liable and not the landlord, if the damages are caused by the non-repair of leased premises. And in that case it was also held, as has been held in some English cases, that where the landlord agrees with the tenant that the landlord will keep the leased premises in repair, that is a contract which creates a right and liability between the parties to the contract, but gives no right to third parties to claim for a violation by the landlord of that contract.

Now in this case there was a tenant, but there was a tenant only of the lower room; the owner of the building was himself in use and occupation of all the building except that one room. The foundation, the part which caused the injury by giving way, was in his possession. So the case of *Burdick v. Cheadle* has no application.

The main question is one which has just been disposed of in the case of *The City v. The Elevator Company*. Mr. Kuhn employed a person to see to it that the wall should not fall. It was Mr. Kuhn's business to keep the premises from falling so as to hurt persons who were lawfully wherever they were. Where the law imposes a duty upon a person, he can not exempt himself from his duty by asking or employing somebody else to perform the duty for him. If Kuhn did employ another man, an independent contractor, to do his duty for him and see that the walls should not fall, such contractor would be liable if some obstructions which he was carelessly lifting, should fall upon a person, or if some obstructions which he had negligently laid on the street, should be the cause of a person falling in the night and being injured. But where the neglect is a neglect to do the thing which Mr. Kuhn himself was liable to do, Mr. Kuhn cannot shield himself from that responsibility and liability by employing an independent contractor to do it.

Motion to set aside the verdict is overruled and judgment will be entered upon it.

RAILWAYS IN STREETS.

367

[Cincinnati Superior Court, General Term, October, 1886.]

Force, Harmon and Peck, JJ.

*P. C. & ST. L. R. R. CO. V. CINCINNATI (CITY).

1. A municipal corporation has power to consent to the laying of a branch railroad track up a manufacturing street for the convenience of shippers, and branches therefrom to their private property. This is not for travel on the company's general line, but rather in the nature of street purposes, to transfer as a dray or wagon would do.
2. An ordinance under which a branch railroad track is laid upon an unfinished street (Eggleston avenue in Cincinnati) being ambiguous, as capable of two constructions, one that it was laid only to assist in making the street, the other that it was for the general use of the railroad, is not necessarily to be construed strictly as against the grant of a franchise, but the rule of construction by conduct applies to municipal contracts, and, as other and later ordinances and joint resolutions, though some of them were adopted without the necessary recommendation of the board of public works, recognize the track as one for general use and not a revocable license that fixes the construction of the ordinance.
3. The track and such branches having been laid, such consent is not revocable. But the right to regulate its use continues.
*This judgment was affirmed by the supreme court, without report, November 17, 1890.

Harmon, J.

Plaintiff, as lessee of the Little Miami Railroad Company, has a track along Eggleston avenue, from Pearl to Court streets, which, by joint resolution of November 7, 1884, the council ordered the proper city officers to remove. This action is to enjoin such removal. It is reserved on bill of evidence, which gives in full the history of the track.

December 18, 1863, permission was granted the C. & I. and L. M. Railroad Companies to lay along various streets what is known as "the connection track" for the transfer of cars across the city between the depots of said companies. The terms and conditions, times and manner of use were specified in detail. Merrill's ordinances, p. 391. The track was laid and used accordingly.

October 20, 1865 (Merrill, p. 359), said companies were, on payment of \$12,000, released from the obligation of keeping in repair the entire streets through which such track passed, which the first ordinance had imposed.

November 15, 1867, "a resolution to perfect our present railroad facilities and promote a southern railroad connection" was passed (Merrill, p. 358), about the proper meaning and intention of which the present controversy has arisen. The city thereby agreed "to the following modifications of" the rights granted said companies by the former ordinances:

First—The right to transfer cars in day-time by horse power was added to that of doing so by steam at night, to which the original permission was limited.

Second—The privilege of laying side-tracks to adjacent private property under the supervision of the engineer and board of improvements was given, which had not before existed.

Third—The sections of the original ordinance limiting the right to a period of fifteen years, with provisions for renewal, and requiring payment to the city of \$4,000 yearly for the first five and \$5,000 for the last ten years, were repealed, and the grant made perpetual.

It was then provided that the O. & M. and the Storrs Township, New Richmond and Central Union Depot Junction R. R. Co. should have the right to use said connection track upon paying a proper proportion of its cost, with the right to make certain extensions to perfect their connections therewith, "And as it may be convenient for the city to use a railroad track on Eggleston avenue connecting with the L. M. R. R. in filling said avenue to its proper grade, whenever the city shall decide to fill said avenue, the L. M. R. R. Co., or the Storrs Township, etc., R. R. Co., as they may agree between them, shall build said track and allow the same to be used for that purpose without cost to the city."

It is plain from the mere reading of this clause that it presents one of the instances with which courts are so familiar, of the careless use of language. We are bound to presume that those who used it meant something. The puzzle is to discover what it was. It is not expressly said that the track when built shall be used and considered as part of or appurtenant to the connection track, although the well-known rules of construction from context and subject-matter would lead us to think that the meaning intended. Nor is the language just what would be expected if the meaning were that the track was to be built merely for the use of the city in filling the avenue. The phrase, "allow the same to be used for that purpose," suggests a track in the general use and control of the company building it, rather than one built for the city's use only, in a specific work. And if the latter meaning was intended, it is strange that nothing was said about removing the track or whose property it should be if not removed. One argument for this limited construction is that the building of this track for the city's use was in consideration of the concessions made by the city in the ordinance. But the mere right to use the track without charge answers the purpose of this argument as well as the exclusive right to use it, and the consideration for the concessions would naturally be expected from all the companies to which they were granted, not from two of them alone.

In short, we think it may be fairly said that the language is capable of either construction, and that judging from the language alone it is doubtful which is the true one.

By the terms of the ordinance it was to be formally accepted by the various companies, and become thereby a contract between them and the city, which was done. If it were between private parties it is conceded that we might look at their subsequent conduct for the construction they themselves put upon it to aid in ascertaining their meaning. But it is contended that this may not be done here, because this ordinance, being the grant of a franchise by a public authority, must be strictly construed, and the grant found in unequivocal terms or held not to have been made, which is the rule enforced in *Charles River Bridge v. Warren Bridge*, 11 Pet., and *State ex rel. v. Central Railroad Company*, 37 O. S., 157.

We know of no authority, however, for applying this rigid rule to such acts of mere municipal corporations. They differ in this respect from the state or sovereign power. Time runs against them, though not against the state. *Cincinnati v. Evans*, 5 O. S., 594. They are liable for negligence with respect to their streets and other property. The state and its minor agencies are not.

The rule of construction by conduct has been repeatedly applied to them. In *Chicago v. Seldan*, 9 Wall., 54, relating to the city's contract with a railroad company concerning the occupation of a street, the court said: "In cases where the language of the parties to the contract is in-

definite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties is entitled to great if not controlling influence."

In *Gas Company v. St. Louis*, 46 Mo., 121, the court said: "But the continuous conduct of the parties for a series of years may make their understanding as clear as by the greatest precision of language," and give effect to such construction in preference to that which the court admitted it would have reached from the language alone.

While in *Township of Pembroke v. Can. Cent. R. R.* 14, A. & E. R. R. Cas., 117, a case very much like this, where, however, a railroad had laid a track along a street without any authority whatever, a subsequent ordinance by the municipality in control of the street regulating the ditches along the track, etc., was held to be equivalent to original consent.

Here, although the filling of the avenue was completed in 1875, without a track, the board of improvements, by resolution of March 6, 1876, after reciting the terms of the ordinance in question, resolved "that in pursuance thereof, and of the terms and conditions therein expressed, the said companies be and are hereby required to construct a railroad track connecting with the Little Miami railroad on Eggleston avenue aforesaid, and extending from said connection on and along said Eggleston avenue and Lockport avenue to Lockport basin," the same to be done within sixty days, under the direction of the city engineer.

The track was built accordingly by the Little Miami railroad.

December 13, 1876, by joint resolution council granted to the company permission to construct, maintain and use a "side-track or switch from its connection track on Eggleston avenue, into and along Sixth street, a distance of 468 feet, and across the sidewalk," into property of J. V. Lewis & Co., manufacturers, to be done under the supervision of the engineer of the board of public works. This track was so built and has ever since been used, and from time to time similar switches have been built under the supervision of said board and engineer to other manufactories along the line of Eggleston avenue, which have ever since been in use. Action by council was had in the case of the Lewis & Co. switch because it was necessary to occupy part of Sixth street. And we think it immaterial whether the recommendation of the board of public works was required under the Statutes or not. The resolution is offered here only in so far as it reveals the city's position with respect to the track now in question and its effect in this regard is the same whether the resolution as to the track in Sixth street was valid or invalid.

We think this conduct on the part of both the legislative and executive departments of the city government—the only agencies through which it exercises its control over streets—continued as it was for so many years, is capable of but one interpretation, viz.: that they understood as well as the railroad company and abutting owners that the filling of the avenue was only an incident to the building of this track, and that it was to remain in use as a part of the system of connection tracks. What its extension along Lockport avenue to Lockport basin had to do with the matter we are not advised, nor whether the city had use for it there after filling Eggleston avenue; but the demand for its construction after the filling of Eggleston avenue was completed and compliance by the company, both with express reference to the ordinance of 1867, certainly put upon that ordinance the construction just mentioned, and the subsequent action by council, which must be held to have been with full knowledge, in the absence of any suggestion to the contrary, had the same effect.

The passage cited from *State v. Gas Co.*, 18 O. S., 296, that certain statutes which, it was argued, had recognized the contract in question there without disapproval, were to be considered as recognizing merely the existence of the contract, not its validity, does not apply here. There the contract was one which the court had held absolutely invalid without express legislative authority. Here the contract was one merely open to two equally lawful constructions.

But, we are told, it is unreasonable to suppose that the council intended to permit such occupation of the avenue without charge or regulation.

As to regulations, we think those specified for the connection track generally were intended to apply to this track, even if it be not expressly included in the clause on page 360, making said extensions subject to them. But if this were not so, the city could not deprive itself of the right to exercise its power to make reasonable regulations concerning the use of its streets by all entitled to use them, and did not attempt to do so here.

As to charging for such use, we find the city first commuting the obligation to keep in repair the streets through which the connection track ran, and then releasing the right to annual payments when the right to run switches into private property was conferred. It was merely following the same line in exacting no charge for this track.

The motives and conduct of municipal bodies are often the subject of unflattering remark, and sometimes perhaps justly so, but we think the course of the city authorities with respect to these connection tracks quite consistent with sound policy.

These tracks do not bear the same relation to the streets they occupy as ordinary tracks do which form part of the main line of a railway. The latter are carriers of nothing but inconvenience, annoyance and detriment to the public which travels the streets and citizens who occupy adjoining property. Any general advantage from them as part of a line could be enjoyed as well or better if they were not in the street. The former are purely for local convenience. They perform the same office usually left to wagon and dray. They are built in the street because it is a street and could accomplish their purpose nowhere else, while under proper regulations they cause little obstruction to ordinary travel.

This was especially true of Eggleston avenue. The connection track proper, in so far as it is used for the transfer of through freight from one depot to another, is of no local advantage except in saving the streets from the wear of heavy hauling. The Eggleston avenue track was intended to be and is used only for the convenience of establishments on or near that street in shipping and receiving freight.

Consider, too, the history of that avenue. It was formerly part of the canal. The water-power from the many locks, by which the waters descended to the river, had caused the erection there of many mills and factories. By the grant from the state, under which the city holds the avenue, it was required to preserve this power, and has done so. The facilities afforded by this track have attracted to that locality other large manufacturing, so that it is now almost entirely devoted to that branch of industry. Its topography makes it undesirable for dwellings. It leads also to the foot of navigation in the canal. No owner of abutting property appears to have ever objected. On the contrary, some appeared as witnesses, and others by volunteer counsel against the city at the trial, and proof was tendered that they unanimously protest against the removal of the tracks.

We see nothing so unreasonable that we must presume that it was not intended, in the grant of permission to lay a four-foot track in the middle of such a street a hundred feet wide, for the accommodation of business interests, which contribute so largely to its prosperity, by a city which was then, as the title of this ordinance discloses, beginning to consider an enterprise in which it soon after expended eighteen million dollars to reach a market for the wares of its citizens; nor anything so unreasonable as to require such presumption in its failure to exact payment for what was in a large degree the privilege of facilitating the efforts of citizens to increase its tax duplicate. It may sometimes be only penny wisdom for the city to set toll-gates in her streets. Their primary object is not revenue, but public convenience. And it will be time enough to say that this use of the street is only for the convenience of the few, when some one who desires connection with this track or to load a car opposite his own premises, is refused the privilege.

R. S., 3355 has no application to this case.

We think, therefore, that the city has by her proper authorities assented to the laying and present use of this track. And two questions only remain. Had the city authority to give such assent, and is it, when given, revokable at will?

While authorities conflict as to the right of a city, by virtue of its general power and control over its streets, to permit to be laid therein the track of an ordinary steam railroad, which rule has generally, if not always, been derived from the imposition upon owners of abutting property of an additional burden, it is given such authority in Ohio by statute, R. S., 3283. The "location of any part of a railroad" in a street, etc., by agreement with the municipal corporation having charge thereof, authorized by that section refers to all necessary side tracks, etc., mentioned in section 3281.

State ex rel. Central Railroad Company, 37 O. S., 157; and it is beyond question that the necessity is not limited to the time of the original location of a railway. If this track be considered as a mere side-track of the plaintiff's railway, the authority of the city council to consent to its being laid clearly existed under this statute. But if we consider it not so much a track required by plaintiff in the discharge of its general duty, of carrying freight brought to it for shipment over its line, as one intended primarily to facilitate the delivery of freight by shippers to the carrier—as part of or appurtenant to the connection-track system, which we regard as the true construction of the ordinance contract—then we think the city had, under its general powers over its streets, authority to permit it to be laid. So considered, this track bears more resemblance to a street railway than to an ordinary steam railway. It is not a new use, but the old use in a different form. The cars which pass over it are merely the dray and the transfer wagon of a progressive age, just as the horse or cable or electric cars are its omnibus and coach. That power to permit such use is among the ordinary powers of a city is well-settled, *Clement v. Cincinnati*, ante p.688; *Haskins v. Cincinnati Street Railway*, 7 Dec. Re., 713; 2 Dill. Municipal Corporation, section 704.

And if special authority were needed, it was held that section 12 of the general railway law (new Revised Statutes, section 3283) applied to street railroads, and they were originally laid under that law.

See cases cited in *Haskins v. Cincinnati Street Railroad Company*, supra, and *Railroad Company v. Railroad Company*, 89 O. S., 239. Also *Sargent v. O. & M. R. R.*, 2 Handy, 52.

their stead, notes of the Hugh McKenzie Manufacturing Co., which notes he, pretending to act on behalf of the bank, caused the agent of the bank to sign. The notes so received by the defendants without any consideration, and obtained with such intent, purported on their face to be given for material purchased for the use of the bank, and to be such notes as the bank held itself liable for. That the defendants, knowing the notes were without consideration, and that the bank was not liable for them, but knowing also that the bank believed them to be given for goods purchased for its use, and to be notes for which it was liable, fraudulently presented them to the bank as they respectively matured, and obtained payment of them. It is not alleged that the agent was a party to the conspiracy in the issue of the notes; on the contrary, the implication is that he was imposed on and was so induced to sign them. Further, the presentation of the notes and their payment, was a transaction directly between the defendants and the banks and with which the agent was not connected. The allegations amount to an averment of wilful imposition constituting fraud.

Final order affirmed.

Harmon and Peck, JJ., concur.

Kittredge & Wilby, for plaintiff in error.

M. B. Hagans, for defendant in error.

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PLEADING.

[Cincinnati Superior Court, General Term, October, 1886.]

Force, Harmon and Peck, JJ.

***FIRST NATIONAL BANK v. C. N. B. & T. P. Ry. Co.**

- 1 When the same transaction will give rise to one cause of action or another according to the existence or non-existence of a fact primarily within the knowledge of the defendant, the plaintiff may set out the same in separate causes of action and recover on either.
- 2 In such case plaintiff will not be required to elect when by direct averment, or from the nature of the case, it is apparent that he can not safely determine before the development of the trial which will prove to have been the true nature of the transaction on the defendant's part.
- 3 The statement of matters of inducement are within the discretion of the court, and when germane will not be stricken out unless it appear that they will prejudice the opposing party or materially encumber the record. Hence, in suing a corporation for relief to transfer stock into the name of a buyer of a certificate, it is not proper to set out copies of the certificate and power of attorney indorsed to transfer it, and they will be struck out on motion.

Harmon, J.

The petition sets out two causes of action. The first is for the refusal of the defendant, on proper demand, to transfer to plaintiff and pay to it the dividends on certain shares of its capital stock owned by one Geo. F. Doughty, and by him duly transferred to plaintiff to secure a loan, together with the power of attorney for the transfer thereof on defendant's books.

It is averred that by defendant's by-laws it was the duty of the president and secretary to issue certificates of stock over their signatures and its seal, of which the latter officer was custodian. And a certificate for

*See also Ry. v. Bank, 1 Circ. Dec. 109.

said shares, so attested, was, it is alleged, so issued and delivered to said Doughty, who was himself such secretary, and was by him endorsed and transferred to plaintiff.

The second cause of action makes the same averments concerning the same stock and certificate with this besides: That defendant alleges (as a reason for its refusal to recognize plaintiff's rights) that the shares mentioned in said certificate are in excess of the capital stock it was authorized by law to issue under its charter, and that the certificate was therefore issued by its president and secretary illegally, and is wholly void; that plaintiff has no knowledge of such alleged over-issue, except from the statements of the defendant and its officers; that if the same were in fact an over-issue, and so illegal and void, then the said certificate therefor was negligently and fraudulently issued by defendant, and by its president and secretary, and the statements therein were falsely and fraudulently made to plaintiff, who, in good faith, and in the usual course of business, relied thereon in making said loan.

By various motions to strike out and compel plaintiff to elect, which are reserved from special term, the question is raised whether under the code of civil procedure plaintiff has the right to plead in this way, the sufficiency of the facts in each cause of action not being challenged by the motions.

It is manifest that what plaintiff has done here is not merely to arbitrarily state in different forms the same cause of action as in the various counts in common law declarations. *Sturges v. Burton*, 8 O. S., 215, and *Ferguson v. Gilbert*, 16 O. S., 88, show unsuccessful attempts to do that, and no one now contends anywhere for such a right. While the two causes of action here relate to the issuance by defendant's officers of the same certificate of stock, its transfer to plaintiff, and defendant's refusal to recognize plaintiff's rights by virtue thereof, they differ in this that the first rests on the charge that defendant has by such refusal deprived plaintiff of its rights as pledgee of real shares of stock, and the second rests on the allegation not found in the first that defendant by fraudulently and negligently issuing the certificate deceived plaintiff to its injury. And while judgment is asked for the same amount in each, the recovery would not necessarily be the same. In the first it would be for the entire value of the stock at the time of such refusal, plaintiff accounting to the pledgor for any balance; in the second only for the amount lost by plaintiff, which might be less than such value.

In fact, it was conceded in argument that if the action were on either alone, plaintiff, if defeated, might sue on the other, which is unquestionably true. It follows then, of course, that he might have his action on each pending at the same time. If in the same court, they might on motion of the defendant be consolidated if they could have been joined. *R. S.*, 5120. As they are between the same parties, and do not require different places of trial, and relate "to the same transaction or transactions connected with the same subject of action," they can be joined (*R. S.*, 5019-20), unless some principle of law not expressed in the code prevents. The only rules which it is contended have such effect are those which require consistency and certainty in all pleadings. We shall consider them together.

If the damages to be recovered were exactly the same on each cause of action, and there could be a recovery on but one, the mere fact that plaintiff alleges two distinct grounds for the same recovery would not sustain a motion to require him to elect.

R. R. Co. v. Hedges, 41 O. S., 233, was an action for the value of a horse killed by defendant's cars. Plaintiff counted on two distinct grounds: insufficient fencing of the track under a contract, and negligent running of the train.

In approving the overruling of a motion to elect, the court said the doctrine of election applies "where one wrongful act is charged and plaintiff is entitled to treat it as having one of two natures." Here the wrongful act charged in one case is refusal to recognize a valid certificate, and in the other the negligent issuing of an invalid one. And the question with plaintiff is not what it chooses to call the transaction, as with an injured passenger about to sue his carrier in tort or on contract (see R. R. Co. v. Peoples, 31 O. S., 537), but what it really was.

It is settled that the only limitation upon the right of a defendant to "set forth in his answer as many grounds of defense, etc.," R. S., 5071, is that imposed by the requirement of verification, that they need not be technically consistent, but there must be such "irreconcilable repugnancy" between them that the verification of one is of necessity the falsification of the other, as where one pleads that he did not sign the note or has paid it. See Citizens' Bank v. Closson, 29 O. S., 78, where in answer to an action on a note defendant was permitted to plead, first, that he did not sign it, and second, that if he did, his signature was obtained by fraud. Said the court: "It certainly is not consistent with the spirit and intention of the code that a party having one or the other of two good defenses without the means of knowing, otherwise than from the developments to be made upon the trial, which of the two in fact or in law is his true defense, shall at his peril be compelled to elect in advance on which he will rely to the exclusion of the other."

Defendant did not aver in his answer in that case, as plaintiff does in this petition, that he had no knowledge sufficient to enable him to decide in advance, nor was it true there as here that such knowledge was peculiarly, if not exclusively, in possession of the opposite party. And the verification of the petition here involves no contradiction any more than that of the answer there, while the second defense in that case, like the second cause of action here, is expressly hypothetical—"if he did sign the note," "if the shares were an over-issue."

The object of an answer is exactly the same as that of a petition, viz.: to advise the opposite party to what points the evidence to be offered at the trial will be directed. Unless, therefore, it was the intention of the code to distinguish between the plaintiff and the defendant in this respect, the reasoning of the court in the case just cited is equally applicable to a plaintiff having two good grounds of recovery, without means of knowing before the development of the trial which will turn out to be the true one.

We certainly cannot presume that a distinction so manifestly unjust was intended by the framers of a code whose professed object was to facilitate the administration of justice between man and man. Is any such distinction expressed? It is contended that it is in the permission of sec. 5071 that a defendant may set up as many grounds of defense as he has. But this applies in terms to any grounds of set-off and counter-claim he may have as well as to mere defenses. As to them he is a plaintiff, because, although plaintiff dismiss, the action proceeds thereon, (sec. 5314). This argument certainly proves nothing, or proves too much.

This permission to defendant was merely intended as the correlative of that given plaintiff by sec. 5019 to unite several causes of action in the same petition. Causes of action do not necessarily mean grounds for sep-

arate, independent recoveries. The term is certainly broad enough to include different grounds for the same recovery—the opposite of grounds of defense. See *Pomeroy on Rem. Rights*, secs. 452 et seq, 578-9. And it might well be argued that a plaintiff is bound to set up all the grounds on which he means to rely as well as a defendant to plead all his defenses. And if this be not so where the recoveries sought are different, although there can be but one, what possible good could result from requiring separate or successive actions on the different grounds when the trial of each involves inquiry into exactly the same transaction. It is a cardinal principle of the law to avoid multiplicity of actions, while the code is the avowed enemy of useless form and circuitry. Abolishing all forms and fictions it simply requires that the petition shall “contain a statement of the facts constituting the cause of action (or causes, read in connection with sec. 5019) in ordinary and concise language, (sec. 5060). And where the plaintiff states exactly what took place, and then states that he does not know, or it is apparent from the nature of the case that he cannot know with certainty whether or not a fact existed upon which depends, not whether one transaction or another is to be the subject of enquiry at the trial, but what the nature of his right will prove to be, and that fact too is one necessarily known to the defendant, upon what principle is he to be told that he has violated either the letter or the spirit of the code or any rule of law underlying it? His ignorance of the exact nature of the transaction on the part of the defendant is just as much one of the facts of his case as that he dealt with the defendant at all. Why is he to be forbidden to state it if he does state under oath that he believes it to have been what it apparently was, but if it prove not so, then it was another, when in either case defendant is liable?

The law requires nothing vain or unreasonable. It is only with the satirist of the law that,

“Right too rigid hardens into wrong.”

Its rules bend and relax as the reason of them requires. For instance that relating to the production of papers when the paper is in possession of the opposite party. *R. R. v. Cronin*, 38 O. S., 122; and that exempting a party calling a witness whom he is compelled by law to call as a witness to an instrument, from the strict rule as to cross-examination of his own witness. 1 *Wharton, Ev.*, sec. 550. And many other instances might be given.

So election implies ability to intelligently and freely choose, and the certainty the law requires is simply such as the nature of the case permits. When a defendant moves to require a plaintiff to elect, or what amounts to the same thing in such a case, state with greater certainty, he is merely insisting on the plaintiff's being compelled to guess, and the chance of his guessing wrong, and that too on the very subject the plaintiff is appealing to the court to examine and decide; in this case on the very matter it knows all about. This is certainly less in accordance with the spirit of the code than with that of the highly artificial system it was intended to abolish.

In our opinion no distinction was made or intended between petition and answer in this regard, and the principle of *Bank v. Closson*, *supra*, applies equally to both. Although this exact question has never arisen in our supreme court as to a petition, it often has elsewhere, and the authorities almost without exception sustain this view of it.

See cases in *Indiana*, *Wisconsin* and *Iowa* cited in *Citizens' Bank v. R. R.*, 9 B., 355, and the following:

The language of the California code as to petitions is exactly the same as that of ours, and it was held that "the plaintiff may set out the facts in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one only." *Wilson v. Smith*, 61 Cal. 209.

In *Veile v. Ins. Co.*, 65 How. Pr., 1, the subject is fully examined and some decisions of inferior courts overruled. Said the court: "A defendant may present as many defenses as he has, though on the face of the answer they seem inconsistent, and no good reason can be given why a plaintiff may not present by his complaint as many distinct lines of fact as he has or supposes he has." "He may when there is some uncertainty as to one exact ground of recovery so frame his complaint as to meet the contingencies of the trial." See *S. C.*, 12 Abb. N. C., 309, and note.

In *Barr v. Shaw*, 10 Hun., 580, a cause of action for false imprisonment was permitted to be added to one for malicious prosecution on the same arrest. The court said that "such a pleading tends to the attainment of justice." See also to the same effect *Longprey v. Yates*, 31 Hun., 432; *Bliss Code Pl.*, secs. 120-2; *Pom. on Rem. Rights.*, sec. 576. Also *Citizens' Bank v. R. R.*, *supra*, for the history of the code and equity practice before its adoption.

A careful search of the reports of other states having codes of procedure discloses no decision to the contrary.

The circuit court has taken the opposite view in one of the same series of cases. *R. R. v. Cincinnati Bank*, 16 W. L. B., 199, and if the question related to mere matter of practice which so far as substantial rights of suitors are concerned might be one way or the other, we should gladly yield to the argument of comity urged upon us, even against our own judgment. But believing, as we do, that a refusal to permit a plaintiff to plead in this way in a proper case might amount to a denial of justice, we cannot yield to the opinion of our neighbors, highly as we esteem their ability and learning.

It is true that pleadings of this kind are not favored; but that is no reason why they should not be permitted in a proper case. The present case is much stronger in this regard than most of those cited, and if it is not a proper one, it is difficult to imagine one which should be.

We do not regard the question of the form of such a pleading as very material, even if defendants intended by their motions to raise it in case the right to so plead in any way should be found to exist. It is certainly more convenient in a case for jury trial to have it in the form of separate causes of action as here, especially where as here the rule of damages might be different according to the finding. And that is the form generally followed.

The motion to strike out the statement that defendant alleges said shares to have been in excess of the capital stock it was authorized to issue, and that plaintiff has no knowledge on the subject, proceeds on the theory that what defendant alleges and plaintiff's knowledge on the subject are not issuable facts. They are not intended to be so, and while the general rule is that such facts only should be alleged, it applies primarily to the facts intended as the basis of recovery. It is not so rigid as to exclude absolutely all matter of inducement as this plainly is. The practice is well settled that a defendant may preface his denial with the statement that he has no knowledge or information except from the averments of the plaintiff. The court will not ordinarily interfere with such matters, unless because of prolixity, utter irrelevancy or tendency from their nature to prejudice the other party. We see nothing of such nature here. On the

contrary it is natural and proper that a party should by such facts preface and explain his resort to an alternative cause of action.

The motions to strike out from the first cause of action the statements that defendant paid interest on the Doughty note, and that plaintiff relied on the certificate, are granted. The former is only evidential and the latter irrelevant to that cause of action. Likewise that to strike from both the copies of the certificate note and power of attorney. None of them belong to the class of instruments which it is proper to so set out in a pleading. Rev. Stats. secs. 5085-6.

Force and Peck, JJ., concur.

E. M. Johnson and Wm. Ramsey, for motions.

E. W. Kittredge, J. W. Warrington, contra.

LOST INSTRUMENT.

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[Cincinnati Superior Court, Special Term.]

Force, Harmon and Peck, JJ.

***EUGENE E. BROWN V. CITIZENS' NATIONAL BANK.**

A petition to recover upon certificate of deposit made "payable to B., or order, on return of this certificate," which avers the certificate to have been lost without having been endorsed, and makes no tender of indemnity to the defendant, is bad on demurrer.

Force, J.

The plaintiff deposited money with the defendant, and received a certificate of deposit payable to his order on return of the certificate. The petition avers that the certificate, not having been endorsed, was lost and remains lost; that payment of the money deposited was demanded and refused, and asks for payment therefor with interest. No indemnity is tendered. Defendant demurs.

Unless the loss of the paper gives a ground of action, the petition, considered as an action at law, does not state a cause of action, because it does not state that the time when payment is to be made has arrived, or that the condition upon which payment is to be made, has happened. Considered as a suit in equity it does not make out a case for relief, because it does not offer indemnity. The general rule in equity is that a plaintiff should by his bill offer to do whatever the court may consider necessary to be done on his part towards making the decree which he seeks, just and equitable with regard to the other parties to the suit. 1 Daniel's Ch. Pl. & Pr., 385. And a demurrer to a bill for want of tender of indemnity was sustained in *Godbolt v. Watts*, 2 Aust., 543.

But it is contended that such a certificate of deposit is like a promissory note or bill of exchange, and comes under the rule as to them which prevails in Ohio and generally in the United States, that, if lost after maturity or unindorsed, an action may be maintained upon them after the date of maturity, at law; that is, without indemnity.

The reason for this rule determines whether or not the rule applies to such a certificate as the one now in suit; and the reason for the rule can be

*For decisions of the district court, reversing this opinion, see ante 8 Dec. Re., 792. See note to that opinion for further references.

made clear by comparing the American rule with that which obtains in England.

In England, by the law merchant, a party to negotiable paper called on to pay it, is entitled to have the paper surrendered to him as a condition of payment. *Davis v. Dodd*, 4 Taunton, 602; *Bevan v. Hill*, 2 Camp., 381; *Hansard v. Robinson*, 7 B. & C., 90. "If the bill or note be negotiable, it follows that a plaintiff alleging it to have been lost, may in fact have assigned it to a third party, against whose claim the court of law cannot indemnify the debtor. For this reason it is held at law that a plaintiff suing on a negotiable instrument shall not recover the amount unless he delivers up the security." *Adams Eq.*, 6 Am. Ed., *348, 168.

Hence, if, when sued, he pleads that the paper is lost and cannot be surrendered, the plea is a good defense. If he fails to so plead, he is held to waive the production of the paper. *Blakie v. Pidding*, 6 C. B., 196; *Charnley v. Grundy*, 14 C. B., 608.

The mere fact of loss is a defense. It is of no consequence whether the loss was before or after endorsement, or before or after maturity. *Champion v. Terry*, 3 B. & B., 295; *Ramuz v. Crowe*, 1 Ex., 167; *Crowe v. Clay*, 9 Ex., 604; *Conflans Quarry Co. v. Parker*, L. R., 3 C. P., 1.

Hence, in England, when such paper is lost, whether endorsed or not, and whether before or after maturity, the plaintiff, being disabled from recovery at law, may sue in equity; and to do equity, he must put the defendant as nearly as practicable in the position in which he would be put by a surrender of the paper; that is, the plaintiff must give indemnity against its re-appearance.

When Parliament gave equity jurisdiction to the common pleas court, jurisdiction was given in this regard as it had been exercised by courts of equity. "— in case of any action founded upon bill of exchange or other negotiable instrument, it shall be lawful for the court or judge to order that the loss of such instrument shall not be set up provided an indemnity is given to the satisfaction of the court, judge, or a master, against the claims of any other person." Common Law Procedure Act of 1854, sec. 87; also *King v. Zimmerman*, L. R., 6, C. P., 466.

Ever since the decision of *Thayer v. King*, 15 O. R., 242, it has been the rule in Ohio that an action at law may be maintained on a bill or note lost after maturity or before endorsement. That is the general rule in the United States. This necessarily holds that the mere loss of the note is no defense to the action and that the surrender of the paper is not a condition precedent to payment.

It is sometimes said in the United States that the action at law must fail whenever the defendant is entitled to indemnity. But a court of law has nothing to do with indemnity. If the plaintiff states and proves a cause of action, he is entitled to payment; if he fails, he cannot have judgment. A court of law has no power to impose conditions. If he fails at law, he may still recover in equity. And if he has recourse to equity, he is subject to the rule that he must do equity. That is, he will get relief only upon making the defendant in as good condition as he would be if the paper were not lost. But in the United States, the loss is no defense unless the paper is lost after indorsement and before maturity. In such case the plaintiff must fail, because, as the paper may have been found and been passed to a bona fide holder, he cannot prove that he is the actual owner of the paper.

The rule is alike in England and the United States, that the plaintiff is required to give indemnity only when he goes into equity: and that he

can go into equity only when he cannot recover at law. The difference is that in England the mere fact of loss disables him from recovering at law; while in the United States he is disabled at law only when the loss happens after indorsement and before maturity. And the reason of this difference is, that surrender of paper is a condition of payment in England and is not in the United States.

When a party agrees to pay upon the surrender to him of a paper, he is by express stipulation put into a position different from that of the maker of a promissory note in the United States, but a position the same as that of such maker in England. The surrender of the paper is expressly made the condition of payment. The parties expressly stipulate and agree to it. The plaintiff cannot state a cause of action upon that agreement, without stating that he has tendered the paper. If the paper has not been tendered and is lost, he is disabled from recovering in an action at law and must proceed in equity. In order to obtain relief in equity, he must offer an equivalent to a surrender of the paper; that is, he must tender indemnity.

In this action the plaintiff sues upon a written agreement of the defendant to pay upon the surrender of the writing. In his petition he also states that the writing is lost; and he fails in his pleading and refuses in court to offer indemnity. He therefore does not state a cause of action at law, or ground of relief in equity, and the demurrer to the petition must be sustained.

Hildebrand, for plaintiff.

Paxton & Warrington, for defendant.

CORPORATION—STOCK—PLEDGE—EVIDENCE.

423

[Cincinnati Superior Court, General Term, November, 1886.]

Force, Harmon and Peck, JJ.

*CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. V. JOSEPH RAWSON & SONS.

1. A pledgee of shares of stock in a corporation, when authorized by a blank power of attorney indorsed on the certificate thereof, and signed by the pledgor, may cause such shares to be transferred on the books of the company into his own name, and upon the refusal of the proper officers of such company to make the transfer when duly requested, the pledgee may maintain an action against the company for damages as for a conversion of the shares to its own use.
2. A witness may testify that he sold shares of stock and delivered the certificates thereof to a person named without producing the certificates for inspection.
3. The books of a corporation are admissible as evidence to show that one is not a stockholder therein who claims to be such.
4. Where the controversy relates to the genuineness of a certificate of stock received by the holder from the secretary of the company whose duty it was to attend to the issue and transfer of stock, and who claimed to be the owner of such certificate at and just prior to the time of its delivery, and which certificate he, as secretary, had issued to himself as an individual, and where such secretary was at that time the owner of valid shares of stock in the company of an equal or greater number than those represented by the certificate in question, it will be presumed, until the contrary is shown, that the secretary sur-

*The supreme court affirmed the judgment in this case, Spear, J., dissenting. February 3, 1891, no report.

rendered certificates for an equal or greater number of shares than those represented by the disputed certificate, at the time the latter was issued.

5. Where a corporation disputes the validity of a certificate of stock issued by the secretary, and bearing the genuine signature of the president and secretary thereof, and the corporate seal, the burden of proving such certificate to be invalid rests upon the corporation.

Error to special term.

The original action, the judgment in which it is sought to reverse, was based upon a certificate dated May 8, 1882, numbered 544, and purporting to represent one hundred shares of the stock of the railway company. The certificate was received by the Rawsons, the plaintiffs below, from one George F. Doughty, then secretary of the company, and bears his genuine official signature, as well as that of the president of the company, and the seal of the corporation. It was pledged by Doughty to the Rawsons as collateral security for the repayment of a loan of \$7,500, which they made to him—as evidenced by his promissory note held by them. On the back of the certificate was a blank power of attorney signed by Doughty, authorizing the pledgees to cause the stock to be transferred to them on the books of the company.

Plaintiffs below brought their action by a petition, stating their claim in two counts, or causes of action. The foregoing facts were set forth in the first count, and the certificate was alleged to be a genuine representation of stock in the company, and that it was duly presented to the proper officers of the company for transfer, which was refused, and damages were therefore claimed as for a conversion of the stock by its officers to the use of the company. In the second count the same facts were stated as in the first, with the addition that when transfer was refused, the officers of the company gave as a reason for such refusal that the certificate did not represent stock in the company but had been fraudulently issued by Doughty without authority, and it was further alleged that if such were the case Doughty had been enabled to commit the fraud by the negligent or fraudulent action of the president and directors of the company with respect to the signing, sealing and issuing of certificates, and that the plaintiffs had in that case been damaged in the amount loaned by them on the faith of the certificate, which had been received by them in good faith and without knowledge of any defect or irregularity affecting its validity.

Defendant below moved to require plaintiffs to elect upon which count of the petition they would proceed, and also demurred generally to the petition, but the motion and demurrer were overruled. The case was tried to a jury, and a verdict was rendered for the plaintiffs upon the first count, the jury specially finding the certificate to be genuine, and for defendant upon the second. Thereupon the company moved for a new trial, and for judgment upon the pleadings, notwithstanding the verdict, which motions were overruled, and judgment entered.

Peck, J.

Many errors are assigned and all have been carefully considered, but it is impracticable to notice all in this opinion. I can only mention those deemed by the court, or by counsel, as indicated by the course of their argument, to be of the greater importance.

As to the motions to compel plaintiffs below to elect and to make definite, the decision will of course be the same as in the cases of *The Third National Bank v. Ry.*, and *German National Bank v. Ry.*, ante, p. 399, wherein the questions raised by them were fully determined upon pleadings the same as in the case before us. For the reasons given by the

learned judge in his opinion in those cases we hold that the motions were properly overruled.

It is claimed that upon the case stated in the first count of the petition the plaintiffs below were not entitled to recover, and that there should have been a judgment thereon for defendant:

1st. Because the Rawsons were only pledgees of the certificate of stock, and because the power of attorney indorsed thereon was signed by Doughty in blank; but the law on both points is settled against the claim of counsel for plaintiffs in error. *Dayton Bank v. Merchants' Bank*, 37 O. S., 208, 215; *Johnson v. Laflin*, 103 U. S., 804.

In the last named case the custom of transferring stock by means of blank powers of attorney is judicially noticed and explained:

2d. Because the action is against the corporation as for a conversion of the shares to its use, and it is claimed that the law does not authorize an action of that sort in a case of refusal to transfer under such circumstances.

Unless we are greatly in error, the case of *Dayton Bank v. Merchants' Bank* also settles this point adversely to the claim of the company. In deciding it, Judge Okey says: "Immediately after the note of February 9, 1874, became due, the pledgee applied to the Dayton National Bank to permit such transfer. On refusal of the request, the right to prosecute this action for the value of the stock accrued to the pledgee." It was further held by the court that as the action had been subsequently changed by consent into an equitable action to subject the stock to the payment of the claims of the respective parties, a judgment for damages as for a conversion was improperly rendered in such action. The case of the *Bank v. R. R. Co.*, 21 O. S., 221, 232, does not militate against the proposition advanced by Judge Okey. It is there held merely that action will not lie where the certificate of stock was not presented for transfer, but was at the time a transfer was asked, outstanding in the hands of a third party claiming to be the owner of it.

On the general proposition that such an action will lie, see *Case v. Bank*, 100 U. S., 446; *Johnson v. Laflin*, *supra*; *Kortright v. Buffalo Bank*, 20 Wend., 90; *Bond v. Mount Hope Co.*, 99 Mass., 506; *Bank v. McNeil*, 10 Bush., 56; *R. R. v. Sewall*, 35 Md., 239; *Bank v. Lainer*, 11 Wall., 369.

An important exception taken by counsel for defendant below was to the admission of certain testimony given by William Fairley, a stock broker, called as a witness on behalf of the company, but who upon cross-examination was permitted to state that during the months of April and May, 1882, and prior to the eighth day of May of that year, he sold to Doughty two hundred shares of the stock of this company, evidenced by certificates which were delivered. The witness had previously testified without objection that he had been at that time frequently handling the certificates of stock of the company, and that he was acquainted with the signatures of the officers upon them and the seal of the company. It is objected that in giving this testimony Fairley was, in substance, stating the contents of written instruments, and that the certificates themselves would have been the best evidence on the subject. That the certificates would have been the best evidence of what was written upon them is clear, but that they would have been the best evidence of the sale is not so clear. Assuming that they were indorsed in the usual manner, the indorsement might assist to show that a transfer had been made, but a transfer does not necessarily indicate a sale. Nor would the indorsement alone suffice to prove a transfer, for there must have been delivery to complete a transfer,

and the indorsement could not prove delivery. It was therefore necessary to resort to parole evidence in order to prove both the sale and the transfer.

As to the witness' statement concerning the subject-matter of the transfer, it was in substance only an assertion that he caused to be transferred to Doughty what he believed to be genuine certificates of stock. We think the court did not err in permitting him so to testify without the production of the certificates. It was a matter collateral to the main issue of the case. The certificates in question did not include the one which formed the basis of the action. In almost any case of sale, the article itself would be the best evidence as to what was the thing sold, yet the rule as to best evidence does not go so far as to require its production, and where the property sold is evidenced by a written instrument of a class daily transferred by mere delivery or by indorsement in blank and delivery, it would seem to come within the reason of the rule as to property, rather than that as to written instruments, especially in a case where it did not furnish the subject-matter of the controversy. If a question should arise as to how a payment had been made, might not a witness testify that it was in national bank notes without producing the notes? The authorities sustain the action of the court in admitting the testimony. *Greenleaf Ev.*, sec. 89; *Holcomb v. State*, 28 Ga., 66; *Emrie v. Gilbert*, 764; *Cecil Bank v. Snively*, 23 Md., 253, 262.

A number of charges were given the jury by the court at the request of counsel for the plaintiffs below. Defendant excepted to each and all, and it is still claimed that there was error in giving them.

One of the objections most strenuously urged applies to several of the charges. No. 1 may be taken as an example. It is as follows:

"The certificate of stock, No. 544, offered in evidence, is admitted to be signed by the president and secretary of the defendant and sealed with its corporate seal, and it is in all respects, so far as it appears upon its face, a genuine certificate of the defendant company. If the jury find that the plaintiff, at the time alleged in the petition, purchased the promissory note from George F. Doughty offered in evidence upon the faith of said certificate of stock as collateral security for said note, in the faith and belief that it was a genuine certificate of stock of the defendant, and without any suspicion or ground for suspicion, that this certificate was not issued by the defendant regularly and in accordance with law, the presumption is, that this certificate of stock is the valid certificate of the defendant, and that the shares of stock therein named were the personal property of the person named as stockholder therein, and they would pass by his transfer accompanying said certificate."

The objection is to that part of the charge which sets forth the doctrine of bona fide purchase, and it was certainly unnecessary in so far as this and similar charges are applicable to the first cause of action. Upon it the only question was whether or not the certificate was a genuine representative of stock. If genuine, plaintiffs below were entitled to recover without regard to the bona fides of their purchase, and if not genuine, they could not recover upon that count, even if they had taken it in good faith and for value. This part of the charge was superfluous, but the question remains whether it worked any injury to the defendant. The plaintiffs might properly have asked the court to charge simply that the certificate was presumed to be genuine, but as they chose to take upon themselves the additional burden of showing that they were bona fide purchasers, it is difficult to perceive why the defendant should object, or how

the company was thereby prejudiced. It is claimed that in some way or other the two causes of action were confused in the minds of the jury, and that they were misled by the unnecessary part of this charge into the belief that although it should be found that the certificate was not genuine, yet if the Rawsons were innocent purchasers for value, there might be a recovery upon the first cause of action. It is to be presumed that the jury-men were of ordinary intelligence, and that they understood the charge of the court. They were plainly told that the only question upon that count was whether or not the certificate was a genuine representative of stock, and they found for defendant on the second cause of action in which the question of good faith in the purchasers was involved. For these reasons we conclude that the defendant was not prejudiced by the unnecessary portion of charge No. 1, and the others to which the same objection is made.

The fourth special charge given at the request of plaintiffs is sharply criticized. The jury were thereby instructed, in substance, that if the stock named in Certificate No. 544 was not an over-issue, the company could not deny its validity. It was agreed that all the stock which the company was authorized by its charter to issue, had been issued prior to the issuing of Certificate No. 544, and it was quite clear that there had been an over issue of certificates purporting to represent stock of the company. Under such circumstances the certificate in question must belong to one class or the other. It was either genuine or spurious, and if spurious, it was an over-issue. The undisputed facts left no room for any other hypothesis, because the power of the company to issue stock had been exhausted before this certificate was issued, and unless it was issued in the place of some of the certificates of genuine stock, it was an over-issue. The alternative was correctly stated in special charge No. 4.

There were other special charges in like manner given to the jury, and nearly all of them are claimed to have been erroneous. Some of them relate only to the second cause of action, and as the verdict was for the company thereon, they could not have been prejudiced by such charges, and after a careful consideration of the remainder, we find no error in them.

So too of the charges asked on behalf of the company and refused by the court. A large part of what was asked was covered by the general charge, and the remainder was properly refused.

It is urged that the verdict is against the weight of the evidence.

The jury found the certificate of shares held by the Rawsons to be genuine, and rendered a verdict in their favor for its value at the time of the conversion. We have carefully examined the testimony and consider the arguments of counsel with reference to this claim, both because of its importance, and because of the zeal and ability with which it has been pressed upon our attention.

It is not disputed that the 650 shares subscribed by Doughty at the organization of the company have all been otherwise accounted for, and that the certificate held by the Rawsons could not have been issued in lieu of certificates of any of those shares. But it is also conceded that Doughty from time to time purchased other shares, and defendant's counsel endeavored to show in like manner that all such shares were disposed of by Doughty at such time and in such manner as to render it impossible that Rawson's certificate, here sued on, could have been issued in lieu of any certificate or certificates of such shares. Defendants' claim on this point was fully and clearly set forth in their special charge, No. 1, which the

court gave to the jury. It recited what was claimed on behalf of the company to be the history of all the valid certificates of stock at any time held by Doughty, and concluded with the instruction to the jury that if they found such recitals to be true, the plaintiffs could not recover upon the first count of the petition. It would be difficult to submit so elaborate a question to a jury more plainly than it was done by that charge, and upon the issue thus submitted, the jury found against the company.

Is the finding so plainly against the weight of the evidence that it becomes our duty to set it aside? The possession of the certificate by the Rawsons made a *prima facie* case on their part, for it is admitted that the certificate bore the genuine signatures of the president and secretary of the company and the corporate seal. This raised the presumption that the holders of the certificate were the owners of the number of shares of the capital stock of the company therein named, and it became necessary for the company to overcome that presumption by the production of evidence sufficient for that purpose. In other words, the burden of proving that Certificate No. 544 was invalid, rested upon defendants below.

To enable them to bear that burden they relied mainly upon the books of the company relating to the issue and transfer of stock, which were offered in evidence. The offer met with strenuous objection on the part of the plaintiffs below, but the objections were overruled and exceptions taken. It is still insisted that they should have been excluded, but we are of opinion that they were rightly admitted. *Turnbull v. Payson*, 95 U. S., 418; *Railroad v. Applegate*, 21 W. Va., 172.

In the former case it was said that "where the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock," and the books of the company were held to have been rightfully admitted for that purpose. A distinction is sought to be drawn between that case and the one at bar, for the reason that there the action was to charge one with liability as stockholder who denied being such, and the books were admitted to prove him to be a stockholder, while here they were offered for the purpose of showing that the Rawsons were not the owners of the stock claimed by them. We perceive no reason why they are not as admissible in the one case as in the other. It is true that one may be a stockholder even if his name does not appear upon the books, but it is equally true that one's name may appear upon the books as a stockholder, when, in fact, he is not such. In either case the entries on the books create only a presumption of fact which may be overcome by other evidence.

The books having been admitted, counsel for the company sought to show by an examination of the entries relating to the stock held by Doughty, that it had all been disposed of at such times and in such manner that it was impossible that he could have been the owner or holder of any such shares as are represented by Certificate No. 544 at the time it was issued. One of the books offered was the book containing the "stubs" from which the certificates issued to the respective stockholders had been detached. On each stub numbered to correspond to the certificate originally attached to it, is a small blank form, on which should be set down the name of the person receiving the certificate, the number of shares, the date and the number of the certificate surrendered. The stub from which Certificate No. 544 was issued is a blank; no entry was ever made upon it. Many other stubs from which the certificates have been detached are in the same condition. No entry appears in any of the books relating to Certificate No. 544. They give us no information as to

when, how, to whom, or in lieu of what it was issued. These facts tend to throw suspicion on this certificate, and, if the books may be fully trusted, would go a long way to show that Certificate No. 544 formed part of the over-issue. But there is a grave doubt as to how much credit should be given to evidence derived from the books. In addition to the irregularities mentioned, numerous incorrect entries are found in them, and some which were apparently made for the purpose of misleading. The irregularities increase as we draw near the end of Doughty's work as secretary. It is plain that at the time this certificate was issued he kept the books in a negligent manner. The present secretary of the company made a list of more than fifty certificates which he asserted were shown to have been irregularly issued, and the number of shares they purported to represent was nearly four thousand. He also estimated that from seven and a half to ten per cent. of the entries in the books were irregular. Whether the secretary was right or wrong in any given instance, there is no doubt that many fraudulent certificates were issued by the person who kept these books. Plainly, it was the duty of the court to say to the jury that it was for them, considering all the testimony on the subject, to say what, if any, weight there was in evidence to be derived from the books. They were so instructed, and if they found that evidence inconclusive, can we say that they were clearly in error?

But add to the evidence derived from the books the testimony of the witnesses produced on behalf of the company, and what have we? Doughty's original stock is all otherwise accounted for, as are some of the shares subsequently purchased by him, but is it shown with any certainty that at the time of the pledge of this certificate to the Rawsons he was not the owner of that amount of stock? If he were such owner, it is presumed, in the absence of evidence to the contrary, that the certificate pledged to defendants in error represents the shares owned by him. That is, he will be presumed to have surrendered the valid certificate if he had one for the same or a greater number of shares. This has been determined by the supreme court of Connecticut in a well considered case. (*Bridgeport Bank v. N. Y. R.*, 30 Conn., 267.)

The question then is resolved into this: Did the defendants below succeed in showing by a fair preponderance of all the testimony on the subject that Doughty was not then (May 8, 1883,) the owner of one hundred shares of the stock of this company, or if he were such owner that he did not surrender the shares so held? The grave doubt cast upon the evidence derived from the books by the manner in which they were kept, and the person who kept them, has been adverted to; but the books furnished much the larger part of the evidence adduced by the company on this point. Discredit them, and there is certainly not sufficient evidence to show Certificate No. 544 to be spurious.

But if the jury accepted the books as true and all the evidence based upon them, with all the inferences which might justly be drawn therefrom, it would be far from conclusive. The books could only show what was recorded in them, and there might be either ownership of shares, or a surrender of certificates without record being made. It would be difficult, if not impossible, to show from the books with absolute certainty that any given person was not the owner of stock at a particular time. They would, if properly kept, show that no transfer of stock had been made to such person, if that were the fact, but they could hardly be made to show that he had not at that moment a certificate in his possession, purchased in the market, but not yet presented for transfer. At most a presumption only

could be raised from the entries in the books however regular, and as against that, there is the presumption arising from the genuineness of the face of the certificate. To balance these presumptions and determine which should prevail, was peculiarly the duty of the jury.

In doing so, they should doubtless have given careful attention to the other evidence to determine from it, if they could, the way in which the scale should turn. On the one hand, there was testimony showing it probable that Doughty had so disposed of all the stock ever transferred to him on the books, as to make it impossible that he should have been the owner of any of that stock at the time this certificate was issued. On the other, there is testimony showing that he was at the time frequently buying stock of this company in the market. One broker, William Fairley, testifies that within a period of about three weeks prior to the date of this certificate he made various sales to Doughty, in all amounting to two hundred shares. For these the books do not account, nor is there any other evidence to show what was done with them. It is suggested that they might have been spurious certificates which were sold, but the presumption would be that they were genuine, as Fairley testifies that the signatures and seal were so, and as the number of genuine shares for which certificates were outstanding was seven or eight times as great as the number which the spurious certificates purported to represent, the probabilities in favor of their genuineness would seem to be in the same proportion. The fact that these purchases were made by Doughty at that time, and that no disposition of them is shown, renders the evidence as to the other shares held by him comparatively unimportant. The attempt of defendant below was to show by a process of exclusion that Doughty could not have held or lawfully transferred one hundred shares on the 8th day of May, 1883. To succeed by that method they were bound to exclude all or at least so many that the number unaccounted for would be less than one hundred. But here we find undisputed testimony showing that within a few days of that time he was the owner of two hundred shares, and there is no evidence excluding them from the ownership at the date mentioned. If he were the owner of such shares at the date named, there is no evidence other than the absence of record in the books to show that he did not surrender certificates for one hundred shares in lieu of Certificate No. 544. Adding Fairley's testimony to the presumption raised by a certificate given under the hands of the president and secretary of the company, and having its corporate seal, they make a case in favor of Rawson & Son so strong that we can not say the verdict is plainly against the weight of the evidence, even if all the entries in the books be taken as true; and if they should not be so taken, then the defense of the company utterly failed.

Judgment affirmed. Force, J., concurs. Harmon, J., did not sit in this case.

Hoadly, Johnson & Colston, Ramsey, Maxwell & Matthews, for plaintiffs in error.

Kittredge & Wilby, Paxton & Warrington, for defendants in error.

ATTORNEY AND CLIENT.

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[Hamilton Common Pleas, Joint Session.]

Johnston, Buchwalter, Maxwell, Mathews, Robertson and Huston JJ.

IN RE ALBERT J. CUNNINGHAM.

When funds of a client are in the hands of the county, and are tied up by claims and liens, but, by mistake of the auditor's clerk, a warrant for the full amount is handed to the attorney, who has knowledge of the liens, and the mistake, but, being threatened by injunction on behalf of the lienholders, promises to hold the fund until their claims could be ascertained and then pay them, but instead, pays the fund to the client, who appropriates it to his own use, he is guilty of unprofessional conduct to be punished by the court, the punishment to be mitigated upon restoration of the money, and in view of the general good character of the attorney.

Robertson, J.

At the last May term of this court complaint was made by some members of this bar to Judge Conner, of this court, that the respondent, an attorney and member of this bar, had been guilty of unprofessional conduct, and in pursuance of the statute in that regard, which directs that "when it in any manner comes to the knowledge of any judge in whose court said attorney practices, that such attorney is probably guilty of any of the causes for suspension or removal mentioned in the statute, the judge is required to cause proceedings to be instituted against such attorney." Judge Conner on a preliminary hearing, finding that there was probability of guilt, in pursuance of the statutory direction, made an order directing charges to be prepared, preferred and prosecuted, and as directed by the court, counsel formulated the charge and specifications, in accordance with the evidence as they received it from the witnesses, and which were filed in this court on October 1, 1886.

The charge is, that the respondent, Albert J. Cunningham, was on or about July 2, 1886, guilty of unprofessional conduct involving moral turpitude—to which charge there are two specifications.

The first specification in substance is, that Mr. Cunningham as the attorney of one Frank Pollock, in a cause in this court, on or about July 1st recovered a judgment for \$1778.36, in favor of Pollock, against the board of county commissioners, upon a contract for materials and labor furnished. But prior to the recovery of that judgment, sub-contractors had filed with the board of county commissioners attested claims, as liens against the amount due Pollock under his contract, amounting to \$1,519.40, of which claims, or liens, Mr. Cunningham had knowledge, and the amount of which claims it was the duty of the auditor to retain in his hands, out of the amount due Pollock.

That Mr. Cunningham as Mr. Pollock's attorney received from the county auditor a warrant upon the county treasurer for \$1,506.63, an amount largely in excess of the amount payable on the judgment if all the claims filed as liens had been deducted. And which warrant for \$1,506.63 was so drawn by mistake of the auditor's clerk, and that Mr. Cunningham, with knowledge of such mistake, drew the amount of the warrant from the county treasurer, and paid it over to his client, who appropriated it to his own use.

The second specification is in substance the same as the first, with the additional allegations, that while the money so drawn was in Mr. C.'s hands, he was advised of the mistake, by the county solicitor, on behalf of

the auditor, treasurer, and board of commissioners, and by the attorneys of the sub-contractors who claimed liens—and advised that proceedings would be at once begun to enjoin him from paying the money to his client, unless he would give his word that he would retain the money in his hands, until the exact amount of the sub-contractor's accounts and liens were ascertained, and would then apply so much of the money in his hands as was necessary to their payment, or pay the money back into the county treasury, which he gave his word to do, notwithstanding which, on the second business day thereafter, without notice to the attorneys, he paid the money over to Pollock, who appropriated it to his own use.

To this charge and specifications the respondent answers, that he is not guilty of unprofessional conduct involving moral turpitude as alleged.

The statute under which these proceedings were instituted provides that (sec. 563, R. S.), the supreme court, district court (now circuit), or court of common pleas, may suspend or remove any attorney at law from office, for either of the following causes: Misconduct in office, conviction of a crime involving moral turpitude, or unprofessional conduct involving moral turpitude.

The charge in this case is confined to the ground last mentioned in the statute, and the questions presented are: 1st, whether the acts and conduct described in either of these specifications amount to unprofessional conduct involving moral turpitude, and if it does, then: 2d, whether the facts therein charged have been established by the evidence with that degree of certainty required by law.

Messrs. Avery and Warrington—in support of the charges—argue that the specifications have been established by the evidence; that unprofessional conduct need not be criminal conduct, but if unprofessional, moral turpitude must be involved; that the word "moral turpitude" implies corruption, baseness: as a metal is base because of the alloy in it; that the standard is that of the profession, and moral turpitude is any want of that integrity in professional relations for which the lawyer pledges himself upon his admission to the bar, and citing:

Brounsall's case, Cowp., 829; Blake's case, 3 Ell. & E., 34; Garland's case, 4 Wall., 378; Percy's case, 36 N. Y., 351; Goodrich's case, 79 Ill., 148; Baker's case, 10 Bush., 592; Leigh's case, 1 Munf., 481; Kimball's case, 64 Me., 140; Hand's case, 9 Ohio, 42; Gates' case, 2 Atl. Rep., 214; Murphy's case, 6 N. E. Rep., 495; Burr's case, 28 N. W. Rep., 261; Eldridge case, 82 N. Y., 161.

Messrs. Ramsey & Morrell, for respondent, argue that Mr. C. proceeded upon the theory and belief that the liens were not valid liens; that he had no exact knowledge of their amount; that the warrant coming into his hands without fault of his, and his client having assured him that he intended to pay all his just debts, his duty to his client under the circumstances permitted his paying the money to him, without involving misconduct; that this is a statutory proceeding; that the statutory grounds for suspension or removal are exclusive, and restrict the discretion of the court as to conduct outside of office, as this is charged to be; that there is no conduct here charged which involves moral turpitude within the meaning of the statute, or if charged, in view of the explanations, proof of acting on advice and his previous good character, is not proved.

Citing: Com'rs v. O'Connor, 86 Ind., 531; In re Blake, 3 El. & Cl., 34; In re Wall, 107 U. S., 265; State v. Foreman, 3 Mo., 412; Ex parte Garland, 4 Wall, 378; 2 Halst. L. Rep. (N. J.), 197; State v. Chapman, 11 Ohio, 430.

Whether the acts and conduct described in the specifications are such as fall within the statutory grounds for removal or suspension from office depends upon what meaning attaches in this connection to the terms "unprofessional" and "moral turpitude." In the learned professions conduct is said to be unprofessional when it is contrary to the established proprieties of the profession. In the legal as well as in the other professions, there are rules and proprieties of the profession the violation of which can not be said to clearly invade the field of morals, or the ethics of the profession; but there are others which as clearly invade the domain of morals, and these are the rules and proprieties to which the expression "moral turpitude" attaches, and where such rules are violated, the act of violation involves moral turpitude. In other words unprofessional conduct involving moral turpitude simply designates one class of irregularities over which the courts are given jurisdiction. For the infringement of any or all of the other rules and proprieties of the profession, whatever they may be, the profession may regulate or discipline, by exclusion from societies, or by failure to consult with, or otherwise, as the matter may require; but for irregularities and wrongs done in the performance of acts connected with or growing out of the profession of the law, where such acts invade the province of morality, the courts are given disciplinary power.

In attempting to fix a standard by which we may measure what conduct falls within and what without the jurisdiction of courts under our statute, we do not aim to enter the field of legal ethics beyond the requirements of the case under consideration. For that purpose we think it will not be questioned that the principles of good faith, honesty and rectitude, in all professional business intercourse, as these principles are ordinarily apprehended by men, are essential rules of moral conduct, and may safely be recognized as controlling rules in the legal profession, and of which the willful violation involves moral turpitude.

The word "turpitude" (from the Latin *turpis*, foul, base) has various significations in its English use. Bouvier says that anything done contrary to justice, honesty, modesty or good morals, is said to be done with turpitude, and such meaning we believe the legislature intended to attach to its use in the present connection.

Measured by this standard, the acts and conduct set out in the specifications fall within the jurisdiction of the courts, and describe a willful violation of those cardinal rules of the profession, viz.: good faith, honesty, and rectitude in professional business intercourse. We find, therefore, that each of the specifications charge unprofessional conduct involving moral turpitude.

It remains, therefore, but to consider whether the specifications have been established by the testimony with that degree of certainty required by law in cases of this character.

Many of the facts relating to the transaction are undisputed. It is not controverted but that Mr. Cunningham was the attorney of Pollock and represented the claim of Pollock before the county commissioners, and on their rejection of the claim brought suit, and with the consent of the county solicitor, recovered a judgment for \$1,778.36; that thereafter he received a letter from the county solicitor to the auditor which Mr. Cunningham delivered in connection with his demand for the warrant—the letter being as follows:

Cincinnati, July 1st, 1886.

Joseph W. Brewster, Esq., Auditor of Hamilton county.

Dear Sir: The judgment in favor of Pollock against the commis-

sioners for \$1,778.36 is final. After deducting the amount due the lienholders whose liens are filed with you the balance can be paid to Pollock or his attorney, Mr. A. J. Cunningham.

Respectfully,

Rufus B. Smith, County Solicitor.

That the auditor drew a warrant upon the treasurer for the full amount of \$1,778.36 and sent a messenger with Mr. Cunningham to the treasurer's office, to bring back to the auditor the sum of \$271.63 the full amount of the liens on file with the auditor as the auditor's clerk then supposed—leaving \$1,506.63 in Mr. Cunningham's hands as the attorney of Pollock. That Mr. Cunningham retained of that sum \$275 for fees and services, and \$25 for some former services to Mr. Pollock's father. That the morning after the receipt of this money by Cunningham the county solicitor and the attorneys for the lienholders, and Mr. Twatchman from the auditor's office, all called upon him in reference to the fact that part of the claims filed as liens at the auditor's office had not been deducted from the amount of the judgment; that on the 5th of July, Mr. Cunningham gave his check to Mr. Pollock for the balance of the amount collected after deducting the \$300 retained by him, and that Mr. Pollock has retained that money, and no part of it has been applied to satisfy the claims of the sub-contractors, which in fact were on file, in the auditor's office, at the time the warrant was drawn and the money received upon it.

Each and all of these facts are admitted by Mr. Cunningham and the only material points controverted by him are, 1st the fact of his knowledge of the amount and validity of the claims filed in the auditor's office at the time he received the warrant to draw the money, and 2d, as to what transpired in the conversations between Twatchman, Smith, Coffey, Ferris and himself in reference to the matter, on the day following the receipt of the money by him.

On these controverted points we find the testimony clear and convincing, that Mr. Cunningham before obtaining the judgment had knowledge of claims made by sub-contractors, and that such claims were filed with the board of county commissioners, as and for liens against the money coming to Pollock under his contract—that he had conversed with some of the attorneys representing such lienholders, and knew substantially their nature, and an approximation of their amount; that a schedule of such claims had been prepared, if not by himself, at least with his full knowledge, in which Mr. Pollock had indicated the exact amount which he admitted being due and owing the sub-contractors, and that at the time he drew the money, he knew that the \$271.63 retained by the auditor out of the \$1,778.36 was not enough to satisfy the claims that were on file.

That subsequently and while the money was yet in his possession, he was fully advised of the claims of the sub-contractors, and fully advised that the amount paid him was largely in excess of what the letter from the county solicitor authorized, and largely in excess of what the auditor would have paid him but for a clear and palpable mistake made by the clerk. That being so advised, he promised the attorneys representing the lienholders that he would not pay the money to his client, but would hold it in his hands subject to the adjustment and payment of their claims against it, or pay it back into the county treasury. Notwithstanding all of which, without notice to the attorneys, he did pay the money to his client, retaining the sum of \$300 as stated. Paying over to Mr. Pollock the sum of \$1,206.63 when he knew that it was a sum largely in excess of what Pollock had admitted would be coming to him after the satisfaction of the

sub-contractors' claims—when he knew or had reason to know that Mr. Pollock was insolvent or financially irresponsible. And moreover, that from Mr. Pollock's persistence and unreasonable haste in demanding the money, in chasing him from his office to his home; from his house to the house of a friend in the country, early and late, on Sunday and week days, at his office in his house, and at the house of friends, everywhere, Pollock was threatening, demanding, and begging the money to be turned over to him—telling him that with the money in his pocket, he could settle his own debts on his own terms.

Such conduct we say, on the part of Pollock, in view of the knowledge Mr. Cunningham had of the sub-contractors' claims, and the pecuniary irresponsibility of his client, should have satisfied his mind that Pollock's purpose was to put the money beyond the reach of his creditors and those who were justly entitled to it.

Instead of retaining the money as we find he had promised to do, he sought legal advice as to his duty towards his client, and on that advice paid the money over. And in seeking such advice it does not appear from the evidence that he stated the whole facts as we find them, but only such facts as are embraced in the first specification, if all of them.

The advice he received was no doubt hastily and inconsiderately given, but whatever be the merits of the advice he received in regard to this matter, he is too old as a practitioner to need to be advised; that no required fealty to client's interest could require, or permit him, to do a wrong to any one, or to act dishonestly. That in this case great wrong was done, requires no fine sense of moral perception to recognize. The sub-contractors had done substantially what the statute directed they should do, to secure the payment of their claims in preference to the payment of Pollock. Their claims were for work and labor and possibly materials furnished the contractor in his contract with the commissioners, and of that class of claims which appeal not only to the protection of law, but to the sympathies of all well-minded persons for their protection. They at least had acquired a right to present their claims against this fund, for the consideration of the courts before Pollock could appropriate it—and it was not for the respondent to say that their liens were invalid—nor would their right be finally determinable by this court; they were entitled to the judgment of the supreme court, if the inferior courts held adversely to them, and if by judgment of the supreme court their liens were held valid, they had acquired the right to obtain the money by speedy process, without being obliged to trust to the result of an execution against either Pollock or the respondent.

That right was destroyed by the respondent's act. And in that connection, the fact that their claims were not set up in the Pollock suit, was, to say the least, attributable in part, to the advice and desire of the respondent.

We find, therefore, that the testimony establishes the truth of the charge and the specifications in every essential particular; and that whatever the rule of law may be, whether the charges must be clearly proven, or proven beyond a reasonable doubt, the court is unanimous that the charge and specifications have been proven beyond reasonable doubt, and that, while the wrong stands unmitigated by full reparation and restitution of the money to the county treasury, that it is in the nature of a continuing wrong, meriting the full penalty of the law—disbarment. But in view of the respondent's long and honorable career at the bar, as the evidence discloses; in view of the offer the respondent made when the matter first

came before Judge Connor, that he would hold himself responsible for any judgment that might be obtained against his client, on account of any or the claimed liens, and in view of all the mitigating circumstances, it is the opinion of the court that, if the full amount of such attested claims as were on file in the auditor's office on the 1st day of July, 1886, against Pollock, and which were deducted from the judgment, is refunded and paid back into the county treasury, within ten days from this date, with interest, that it should be considered in mitigation of punishment, and then that the sentence should be suspension for thirty days and payment of the costs of this proceeding.

TURNPIKES.

30

[Hamilton Common Pleas.]

MADISONVILLE (VILLAGE) V. WALNUT HILLS, MADISON & PLAINVILLE TURNPIKE CO.

The duty to keep in repair that part of a turnpike road which becomes included in the extension of the limits of a municipal corporation devolves upon the municipal corporation, as it becomes a street under sec. 3491 Rev. Stat., and the words, "no toll shall be taken thereon," means no toll therefor or for that part; hence no inspectors can be asked for under sec. 3482, by the municipal corporation to ascertain if such part of the road has been abandoned by reason of non-repair and this is so, although the toll gate has not been removed outside the limits, for the gate was by sufferance and the tolls unlawful.

JOHNSTON, J.

Application has been made under sec. 3482, Rev. Stat., for the appointment of two inspectors, to examine that portion of defendant's road within plaintiff's limits, and if found to be out of repair to make report of that fact to the court under oath in ten days, which being done, said section provides that it shall be declared by the court abandoned.

The application sets out that in January, 1886, plaintiff's council declared by resolution that that portion of defendant's road was out of repairs, served copy on nearest gate keeper to the village, and that defendant failed and refused to make any repairs thereon.

Within ninety days from service of copy of resolution, the application shows that defendant, having removed its toll-gate from within the corporate limits of plaintiff, and located it more than eighty rods outside thereof, commenced an action for compensation for the value of its road within plaintiff's corporate limits.

Plaintiff by way of cross-petition sought in defendant's action for compensation to enforce what is sought in this application. The court, on motion of defendant dismissed that cross-petition. The hearing of defendant's action for compensation awaits the determination by the court, of this application.

Counsel for the Turnpike Company appear and resist the appointment of inspectors:

1. Because sec. 3482 has application only to turnpike companies having a portion of their road within a municipal corporation without a toll gate thereon, within its limits. When plaintiff was incorporated it embraced a toll gate of defendant within its limits.

2. Because by virtue of sec. 3491, Rev. Stat., that portion of defendant's road is and was, when the resolution to repair was passed and

served on the defendant, in law, a public street of the village to be kept in repair by it and not by the Turnpike Company.

3. Because sec. 3482 undertakes to deprive defendants of a valuable part of its road and franchises, without due process of law—without any compensation, and without a trial by jury, and hence is unconstitutional.

Elaborate oral arguments were submitted covering all these grounds. I do not consider it necessary to go over them all, but briefly to say that in my judgment section 9 of the charter of defendant, sec. 3491, Rev. Stat., referred to, and the Supreme Court's construction thereof, in the case of Turnpike Co. v. Kelley, 41 Ohio St., 144, are decisive of the application presented—and the request thereunder for inspectors.

Section 9 of defendant's charter, to be found in vol. 45 Local Laws, p. 125 (1842), provides in substance, "that this turnpike company shall be subject to the provisions of all laws now in force or that might thereafter be enacted for the purpose of governing and operating such companies generally in this state."

That subjected defendant to all the provisions of section 34, S. & C., 295, and its amendments, it now being known in the revision as sec. 3491, (Rev. Stat); 12 Ohio St., 263, Lorain Plank Road Co. v. Cotton.

It is unnecessary to quote the whole section. It now provides, among other things, that "No company shall hereafter erect a toll gate and collect tolls within the limits of any city or village, or within eighty rods of such limits; and when by the creation of a village or the extension of the limits of a city or village, a toll-gate is brought within such limits, or within eighty rods thereof, the company shall remove the toll gate to a point not nearer to such limits than eighty rods, and so much of its road as is included within the limits of such city or village shall become a public street, and be kept in repair, as other public streets, but no toll shall be taken thereon."

In the Kelly case (41 Ohio St., 144) referred to, the question before the court was, whether Kelly and sureties could be held liable on an injunction bond given to indemnify the Turnpike Company against loss, having obtained a temporary injunction restraining the collection of tolls at the gate, on its road, that had become, by the extension of Cincinnati's limits, embraced therein. The injunction was dissolved. In an action on the bond there was a recovery for loss of tolls, pending the injunction.

The court held, in deciding the case:

"1. Section 34, act of May 1, 1852, (S. & C., 295,) made it unlawful 'to keep up' the toll gate, or collect tolls thereat, after the city line included it. Section 600 of the act of May 7, 1869 (66 Ohio L., 251), did not repeal or modify said sec. 34.

"2. Notwithstanding the judgment in the injunction suit, the company cannot recover, as damages, tolls that it could not lawfully have collected if the injunction had not been granted." The decision was rendered in 1884. When Turnpike Co. v. City of Springfield, 27 Ohio St., 584, was decided (1875) sec. 34 did not forbid collection of tolls for the part of the turnpike road inside the corporation at a point eighty rods outside. It did not declare the road inside the corporate limits to be a public street as sec. 3491 has ever since the revision in 1881—nor did this same sec. 34, as it stood amended, when the case of City of Cincinnati v. Scarborough, and this same turnpike, was decided by the Hamilton district court, 6 Dec. Re., 874 (s. c. 8 Am. Law Rec.)

562), (1880), read as it does now, amended and numbered as 3491. Compensation was, by the amendment of April 4, 1878, to be made before the removal of the gate—and there was still no provision for its becoming a street as now provided in sec. 3491.

The court in 41 Ohio St., decided directly that it is unlawful to collect toll at a gate on a turnpike road brought within the municipal limits by the extension thereof beyond it. The gate must be removed eighty rods beyond the municipal limits. The very act of removal—if the legislative act itself did not *eo instanti* do so—makes the portion within such limits a public street of the municipal corporation, "to be kept in repair as other public streets, but no toll shall be taken thereon."

This last expression is equivalent to "no tolls shall be taken therefor—for that part." It could not be taken thereon, for what precedes provides for the removal of the gate therefrom. Having therefore become a public street of the municipal corporation, to be kept in repair as other streets of the corporation, and the forbidding of any toll to be taken for travel thereon, it, to my mind, is clear that there remains no obligation on the Turnpike Co. to repair. The obligation to repair carries with it the right to take tolls. If the right to take tolls ceases, and it certainly does if it becomes unlawful to do so, and it has become a public street of the corporation, the obligation to repair necessarily ceases. They stand or fall together. As sec. 3491 now stands, the collection of tolls at a gate within a municipal corporation, the charter of the Turnpike Co. reading as does sec. 9 of defendant's, is done by mere sufferance. The municipal authorities can at any time proceed to have the compensation assessed, and the gate removed. It being unlawful to collect tolls at such a gate, sec. 3482 cannot be employed to compel repairs within the corporate limits by serving notice upon a gate keeper unlawfully taking tolls at a gate therein.

It is conceded in the application, that the gate no longer exists within the corporate limits. Defendant has complied with sec. 3491 and removed its gate eighty rods beyond. It has brought its action to have the compensation assessed. It would, as I view it, be a vain thing to appoint inspectors to examine a portion of defendant's original road that is not now under its control, and for which it has no right to take toll, and is not incumbent upon it to repair. No legal obligation to repair existed when the council passed its resolution set out in the application. In what cases sec. 3482 applies it is not necessary for the purpose of this opinion to determine. It is a statute very summary in its provisions—seeks to take property without the intervention of a jury, and apparently without the hearing of witnesses; and whatever its application, it should be strictly construed. In my judgment it neither in letter nor spirit applies to that portion of defendant's road in controversy, so the motion to appoint inspectors must be denied, and the application will be dismissed.

Paxton & Warrington and Oliver B. Jones, for application.

Edward Colston and Wallace Birch, *contra*.

EXPERT WITNESSES.

62

[Warren Common Pleas.]

STATE OF OHIO EX REL. O'NEALL V. FRANK H. DARBY.

1. A physician who made the post mortem being called as witness in a case of homicide, and having answered all questions as to all questions of fact, refused to testify as to matters of opinion, unless paid an extra compensation as an expert. Held:
2. There is no difference in Ohio as to classes of witnesses. The statute fixes the witness fees arbitrarily, regardless of calling profession, and the witness is punishable for contempt for refusing to answer.

Before O'NEALL, J.

Timothy Green was on trial for manslaughter. Dr. F. H. Darby, subpoenaed as a witness, on being requested to be sworn, handed to the clerk the following which he desired to be added to the oath: "I will as to all matters of fact for the usual fee, but as to matters of opinion usually known as expert testimony, I will not, unless guaranteed an extra fee of not less than \$25." Three times after the oath was repeated by the clerk, Dr. Darby added the words above quoted; the prosecuting attorney each time insisting that the witness be properly sworn, in the ordinary form. The witness was informed by the court that he would be required to take the ordinary oath; that if any question was asked which he did not deem proper, he would be entitled to the ruling of the court, and would not be required to answer until the court should decide that the question put was proper; whereupon the oath was administered in the usual form and the witness took the witness-chair. After answering a number of questions as to his profession, the length of time he had practiced, and after describing the wounds, etc., (he being one of the physicians who held the post mortem examination), the prosecuting attorney put the following question: "State whether in wounds like this there would be immediate gaping, or would the lips for a time remain in contact, or nearly so?" The witness declined to answer, on the ground that the question put called for an opinion, and not for a fact. Witness stated that he was willing to testify to all matters of fact, without extra compensation; that it was his duty as a good citizen so to do; but that his professional opinion was his stock, or capital in trade, and claimed that he was not bound to give it, even upon the witness stand, without extra compensation; that he was not, in the ordinary sense, a witness, and that he could not be compelled to testify to matters of opinion. i. e., to give expert testimony without extra compensation. The court ruled that the question was proper, and that the witness was bound to answer. After a third refusal, he was committed to the custody of the sheriff, "to be imprisoned in the county jail, there to remain until he submits to testify." An order of commitment under seal of the court, specifying particularly the cause of the commitment, and stating the question asked the witness, was made out and placed in the hands of the sheriff. On the following morning the witness was brought into court and given the opportunity to purge himself of the contempt; again refusing to answer the question put, he was remanded to the custody of the sheriff and remained in confinement until the conclusion of the trial, when he was brought into court, whereupon the prosecuting attorney by order of the court filed charges in writing with the clerk; and an entry

was thereupon made upon the journal. Opportunity was given the accused to be heard by himself or counsel. By agreement the cause was continued until December 27, 1886, the prisoner being discharged upon his own recognizance.

The case coming on to be heard, it was further agreed that the question put to the witness should be treated as a purely expert question.

The court delivered an elaborate opinion, holding that the English decisions cited by defendant's counsel, influenced by the statute of 5th Elizabeth, chap. 9, as they must have been, which provides that ; "The witness must have tendered to him according to his countenance and calling, his reasonable charges," ought not to govern in Ohio, where we have no such statute—where the fees of witnesses are fixed by statute without regard to class, calling, countenance or profession; that for the same reasons the rules laid down by Ordonaux, sec. 114-5, Phil. vol. 2, Amer. ed., p. 823 ; 1st Redf. on Wills, note 44 to page 31, pp. 154-5, cannot be regarded as the law in this state; that these rules depend for their support upon the English cases. The same is true of the statement of Bouvier and Wharton, that the weight of decisions is that experts cannot be compelled to deliver professional opinions, even on the witness stand, without extra compensation. Wharton on Ev., sec. 380.

Reviewing the cases of *In re Roelker*, 1st Sprague's Decisions, 276, where the court held : "The court will not compel the attendance of an interpreter or expert who has neglected to obey a subpoena, unless in case of necessity;" the case of Henry Clark, petitioner, 104 Mass., 537, where the court refused to allow expenses and fees of an expert; and the case of Attorney-General, petitioner (same volume), where the court with the consent of the attorney-general, allowed the fees, the court said that in Massachusetts they have a statutory provision, which allows courts "to receive, examine and allow accounts for services and expenses incidental to trials," and knowing the particular circumstances under which Judge Sprague made his decision in *In re Roelker*, he thought it was very likely that his decision was influenced by the statute just quoted. In neither of the cases was it decided that an expert is entitled to extra compensation. Judge Sprague intimated that he ought to be.

In the opinion of the court the case of *The People v. Montgomery*, 13 Abbott Rep., cited by defendant's counsel, was strongly against the doctrine contended for. The case of *Buchanan v. State*, 25 Amer. Rep., 620; 53 Ind., —, was the only American case cited, where it had been directly decided that an expert could not be compelled to testify without extra compensation. The court was not surprised after careful examination of that case, that Judges Biddle and Niblack dissent from the opinion of the majority.

After a careful examination of all the cases, and the rules found in the text books, the court was of opinion that the law as announced in *Ex parte Dement*, 53 Ala., 389; *The People v. Montgomery*, 13 Abbott's Rep., was correct.

"That the word 'witness' as used in sec. 10 of the Bill of Rights of the constitution of Ohio, and in sec. 1302, of the Rev. Stat. of Ohio, as amended, vol. 81, p. ; 58, is used in its ordinary sense, and applies alike to all who may be summoned to testify, whether experts or non-experts, whether called to testify to matters of fact or to matters of opinion."

"The fees to which a witness is entitled are arbitrarily fixed by statute (sec. 1302, amended, vol. 81, p. 58) without reference to class, countenance, calling or profession."

"That a physician is punishable as for contempt, for refusing to testify as an expert without being paid for his testimony as for his professional opinion."

"That it is contrary to the spirit of our government, and against public policy to prefer one class of citizens to another by a graduation of fees. If experts are to be allowed extra compensation, it will be a matter for the legislature and not for the court."

The prisoner was sentenced to pay a fine of \$25 and costs of prosecution.

J. Kelley O'Neill, Prosecuting Attorney for the state.

Eltzroth & Thompson, for defendant

FRAUDULENT CONVEYANCES.

64

[Ross Common Pleas, January Term, 1887.]

BATES, REED & COOLEY V. BENNETT ET AL.

1. A preferential mortgage by a debtor, on the eve of insolvency, to a trustee, for his wife and infant son, creditors, is not equivalent to an assignment for creditors generally, under sec. 6343 Rev. Stat. It is not so in the case of the wife because he could not have conveyed directly to her. For analogous reasons it is not so in the case of a creditor under other disability, as infancy, lunacy, etc., because to make a security as available to them as an adult creditor a trustee is necessary, they being unable to manage their property.
2. A mortgage to one, as collecting agent of a society, is not necessarily a trust equivalent to an assignment for creditors, the collector being responsible for money in his hands. If he had loaned the money to the mortgagor he is entitled to security for it, though the society is benefited.
3. Inasmuch as the probate court has no jurisdiction to set aside fraudulent conveyances, or to declare transfers to be preferential and for the general benefit, it follows that, the fact of the probate court being engaged in administering an assignment for the benefit of creditors does not prevent the common pleas from having jurisdiction to declare an earlier preferential transfer to be equivalent to an assignment for the general benefit of creditors.

EVANS, J.

The plaintiffs aver that John H. Bennett, on February 16, 1886, he being insolvent, made two chattel mortgages: One to Harry H. Bennett, to secure an indebtedness to him, and to him as trustee, in trust, for Eliza Bennett and Jack Bennett, to secure debts to them; and one to Charles G. Brandle, as trustee for the Scioto Council, Royal Arcanum, to secure a debt to it. They aver that these mortgages are assignments in trust to trustees, made in contemplation of insolvency, with intent to prefer the creditors named, which, under sec. 6343 of the Rev. Stat., of Ohio, inure to the equal benefit of all creditors.

The plaintiff's are creditors to the amount of about \$2,053; and they pray the court to declare that the said mortgages were made in trust, with the intent mentioned, and that the mortgagees hold all the property so conveyed to them, in trust, for the equal benefit of all the creditors of John H. Bennett.

Six other chattel mortgages were executed by said Bennett to creditors: One to Hain was made on the fifteenth of February, which was filed with the recorder on the eighteenth of February, 1886, at 10:26 o'clock A. M.; and the others were made on the sixteenth of February,

and were filed, together with the two mortgages first mentioned, on February 18, 1886, at 10:30 o'clock A. M.

The plaintiffs aver that all the mortgages were given to secure pre-existing debts. They further aver that said John H. Bennett, on the eighteenth of February, 1886, made or attempted to make, an assignment to David M. Massie and Charles G. Brandle for the benefit of all his creditors.

The mortgages are all upon substantially the same property—the stock of dry goods, notes and accounts, owned by the said John H. Bennett.

The plaintiffs claim that the attempted assignment is without force and effect; that the trust mortgages make the other contemporaneous mortgages *nil*, and put it out of the power of Bennett to make any other valid assignment of his property; and they ask that all the chattel mortgages, except the two first mentioned, which are claimed to be in trust, etc., be adjudged to be void; and that Massie and Brandle, assignees, be ordered to deliver the property to a trustee to be appointed.

The objects of the plaintiff in this action is, in substance, to have the two mortgages first described declared to have been made in trust, to trustees, in contemplation of insolvency, with intent to prefer creditors, within the operation of sec. 6343, Rev. Stat., and that they inure to the benefit of all the creditors of the mortgagor.

I. First—As to the Question of Jurisdiction—Massie and Brandle, as assignees, question the jurisdiction of this court in this matter. They aver that before the commencement of this suit they had been duly appointed assignees in insolvency of John H. Bennett; the property had been transferred to them, and they were proceeding to convert it into money under the order and direction of the probate court. Wherefore, they say, "the probate court, before the commencement of the suit, had acquired jurisdiction of the subject matter of said trust exclusive of the jurisdiction of all other courts, and the plaintiffs are without rights to prosecute this action in this court."

The purpose of the plaintiffs in this suit, as has been stated, is to have certain mortgages declared to have been made in trust, to trustees, in contemplation of insolvency, with intent to prefer certain creditors. Section 6344, Revised Statutes, provides that "the probate judge * * after any such transfer * * shall have been declared, by a court of competent jurisdiction, to have been made * * in trust with the intent mentioned in the next preceding section (6343) shall, on the application of a creditor, appoint a trustee who * * shall recover possession of all property * * and administer the same for the benefit of creditors." The transfer in question must first be declared, by a court of competent jurisdiction, to have been made in trust with the intent mentioned, etc. The probate court has not jurisdiction to so find and declare. Although the probate court has jurisdiction to direct and control the settlement of estates and trusts, it has no jurisdiction to set aside fraudulent conveyances, nor to declare transfers to have been made in trust with intent to prefer, etc. That must be done by a court of competent jurisdiction—"of general jurisdiction in matters of law and equity"—before the administrator or trustee, appointed by the probate court, can recover and administer the property so fraudulently transferred.

In the case of *Spoors v. Coen et al.*, decided by the Supreme Court of this state, on December 7, 1886, 44 O. S. 497,, it was held:

"1. Lands that have been conveyed to defraud creditors and that by section 6139 of the Revised Statutes are made assets for the payment of the debts of the deceased grantor, cannot be ordered sold for such purpose until the conveyance has been set aside in a proceeding commenced for that purpose in the court of common pleas, no such jurisdiction having been conferred upon the probate court.

"3. An order made by the probate court for the sale of such lands, upon a judgment of its own, setting aside the conveyance as null and void, is of no validity whatever, and may be impeached in a collateral proceeding to recover the land."

In this matter the probate court has no jurisdiction to declare the mortgages in question to have been made in trust with intent to prefer, etc. That must be done by a court of competent jurisdiction—the common pleas court.

II. The mortgage to Brandle, collector, etc.—The petition avers that a mortgage was executed to Charles G. Brandle, as trustee for the "Scioto Council, etc," with intent to prefer said society.

The answer of Brandle, collector, etc., denies that the mortgage was made to him as trustee for the society. He avers that at the time the note and mortgage were made he held the office of collector for the society; and that the mortgage was made to him to secure an indebtedness from Bennett to him as such collector. The mortgage was put in evidence; it in terms is made to Brandle, as collector, to secure an indebtedness to him as collector. It is not to him as trustee, in trust, to secure an indebtedness from Bennett to the society, to secure which the transfer was made to Brandle as trustee.

Brandle was liable, before the mortgage was made, to the society for all money that had come into his hands as collector. If he had loaned the money to Bennett, he had the right to get security from him for it, by taking a mortgage. The relation of debtor and creditor existed between them. By doing so he was securing himself; and he would not be prevented from taking security for himself, because it might inure to the benefit of the society. *Harkrader, etc., v. Leiby, etc.*, 4 Ohio St., 602.

The mortgage to Brandle, collector, is not a trust mortgage within the letter or spirit of sec. 6343, Rev. Stat.

III. The mortgage to Harry H. Bennett, as trustee, for Eliza Bennett and Jack Bennett, creditors of John H. Bennett, was made in contemplation of insolvency, in trust; with intent to prefer the creditors named.

Eliza Bennett is the wife of John H. Bennett; Jack Bennett is his son, who was at the time a minor.

(a) In the case of *Hitesman v. Donnell*, 40 Ohio St., 287, it was held, that a mortgage of lands executed by an insolvent debtor to a trustee, to secure a *bona fide* indebtedness, to his wife, does not inure to the benefit of all the creditors of the mortgagor.

That is an authority binding this court, and is in point so far as the transfer in trust for Mrs. Bennett is concerned. It makes no difference that Mrs. Bennett's liability, against which she was secured, was that of surety for her husband to Douglass; she had the right to take indemnity against that liability, and adopting the language of the court in *Hitesman v. Donnell*, "She was entitled to security in a form and in effect, as available to her as that taken by any other creditor. * *" The court in that case says, a transfer directly from a husband to his wife would

not be such security, and a transfer may be made to a trustee for her. The fact that the security may benefit or prefer Douglass, does not change the matter. The second section of the syllabus, in the case of *Hardrader, et al. v. Leiby et al.*, *supra*, is: "The act * * does not affect the mortgage given by an insolvent debtor to secure the debt of one of his creditors or to indemnify him against a liability by indorsement or otherwise, assumed for the benefit of the debtor, although it may have the effect to prefer such creditor, and deprive others of the ability to obtain satisfaction of their claims."

(b) The most difficult matter presented for determination is that of the transfer in trust, to secure the indebtedness to the minor sons. Did H. H. Bennett, he being made a trustee for the minor son, become, by force of the statute, a trustee for all the creditors alike?

It cannot be questioned, that so long as the laws of Ohio permit insolvent debtors to make preferences among their creditors, an infant creditor has as much right to preference as any one, and is entitled to security as good, and in effect as available to him as that taken by an adult creditor.

The Supreme Court has said that a mortgage executed by an insolvent debtor to a trustee, to secure an indebtedness to his wife, while within the letter of the law, sec. 6343, does not come within the operation of the law, because a trustee is necessary in order to give her security as good and as available to her as that taken by other creditors; that, the office of the trustee (for the wife) * * was not to hold the security of the mortgage merely for the benefit of creditors, but to hold it for a creditor who could not have taken and held it for herself. *Doherty v. Stimmel*, 40 Ohio St., 294.

Reasoning in a like way in regard to transfers, in trust, to secure the claims of infant creditors: Does a transfer to an infant creditor give him security as good, and as available to him, as that taken by an adult creditor for his debt?

An infant is not possessed of capacity and legal ability to make a sale of property, convert it into money, etc. For these reasons, if the transfer in question had been made to the minor himself, a trustee or guardian for him, to control and dispose of the property for his benefit, would have been proper and necessary, and would have been appointed, in order to secure to him the benefits—the priority intended. Without a trustee or guardian to manage and dispose of the property for him, the security would not have been available or beneficial to him.

It is true an infant can take a legal title by purchase; so can a lunatic. But if a debtor desired to prefer a lunatic creditor, he would hardly make the conveyance directly to him. He might do so and the lunatic would take a legal estate; but as in the case of a minor, the property would have to be managed by his guardian, or by the court.

There seems to be no good reason, as there must be a trustee to manage and dispose of the property transferred to an infant creditor, why the trustee may not be appointed by the deed of conveyance. It can make no difference to the other creditors as far as the trustee is concerned, whether he is appointed by the court, or by the deed transferring the property.

It is hard to find a good reason for drawing the line, in such matter, at the wife of the debtor. The expression of the judge in deciding the case of *Hitesman v. Donnell* (40 Ohio St., 294), that the mortgage would have inured to the benefit of all the creditors of the mortgagor if the

beneficiary had been any one other than his wife—is only a *dictum*. The court was not deciding whether the exception would be made in favor of any other class of persons than wives of the debtors, or not. There is practically but little reason for conveying to a trustee for the wife of a debtor in such a case. That a husband cannot convey directly to his wife, is but little more than a theory. That a wife cannot take a legal title directly from her husband, is of but little consequence. Practically conveyances can be, and are, made directly from husband to wife, and are sustained by the courts.

In the case of a minor, while he can take a legal estate, there are substantial reasons why there should be a trustee for him.

He has neither capacity nor discretion to manage and dispose of property. There must be a trustee or guardian for him. If the conveyance transferring the property does not create one, one will be appointed by the court.

It is proper and usual, when an infant is to be the beneficiary, to transfer the property to a trustee for him. More substantial reasons can be urged for excepting from the operation of the law transfers to trustees, in trust for minor creditors, than can be urged for excepting transfers in trust for wives.

If exceptions are to be made, they should not be made in favor of the wife of the debtor alone, but should be made in favor of all classes of creditors, who are under disabilities, who need to have trustees or guardians, and for whom trustees or guardians are properly and usually appointed. Whenever a trustee is essential in order to make the security available and beneficial to the creditor a transfer of property to a trustee, in trust, to secure an indebtedness to such a creditor, will be held not to inure to the benefit of all the creditors of the mortgagor or grantor.

The mortgage in question having been made in trust to secure the debt of an infant creditor, who, without a trustee, or guardian, could not have made the security available to himself, will be held not to inure to the benefit of all the creditors of John H. Bennett. Adopting the language of the court in the case of *Hitesman v. Donnell*—varying it slightly—the office of H. H. Bennett, trustee under this mortgage was not to hold the security of the mortgage, merely for the benefit of creditors, but to hold it for a creditor who could not have taken and made it available to himself, as an adult might have done.

The petition will be dismissed at the cost of the plaintiffs.

Decree accordingly.

E. L. DeWitt, of Columbus and Mayo & Freeman, for plaintiffs.

E. W. Strong, of Cincinnati and L. T. Neal, for defendants.

SHERIFF'S FEES.

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[Highland Common Pleas.]

HENRY WHITLEY V. THOMAS H. LONG ET AL.

A sheriff can not refuse to serve a writ directed to him in a civil action because his fees are not paid or secured in advance, unless the suit is brought by a non-resident or firm in the firm name.

HUGGINS, J.

This cause was heard upon a general demurrer to the petition. The petition states, in substance, that the defendant Long, at the time the alleged cause of action accrued, was sheriff of Highland county, and that the other defendants were his bondsmen. That the plaintiff, being a resident of Highland county, filed his petition in this court, with the usual precipe attached against certain dependants upon a meritorious cause of action. That a summons was duly issued in said cause by the clerk of this court directed to the sheriff of this county, the defendant Long. That said Long refused to serve the writ unless his fees for so doing were paid or secured in advance. That the plaintiff was poor and unable to pay or secure such fees, and that because of such refusal his suit did not proceed, where'by his cause of action accrued, etc.

The question presented is: Has a sheriff a right to refuse to serve a writ directed to him in a civil cause, in the suit of a resident plaintiff, unless his fees are paid or secured in advance?

The question is not settled by any decision in this state. Its importance is plain. The theory and practice have been in this part of the state that officers of the court could refuse to act in civil causes until their fees were advanced or secured.

(Section 1211 Rev. Stat. provides.)

"Every sheriff shall execute * * * all warrants, writs, and other process to him directed by the proper and lawful authority."

Section 4970 Rev. Stat. provides:

"The sheriff shall execute every summons, order, or other process, return the same as required by law, and exercise the powers conferred and perform the duties enjoined upon him by statute and the common law."

Section 1331. "No sheriff, coroner, or constable shall be entitled to receive, either on mesne or final process, any fees, unless he return upon the process upon which any charge shall have been made, the particular items of such charge."

Sec. 1333. "In all cases when demanded by any person liable to pay any fees or costs to any officer, it shall be the duty of such officer, without charge, to make out, sign, and deliver to such person, an itemized bill of such fees or costs; and no person shall be compelled, after such demand, to pay such fees or costs until said itemized bill is so made and delivered, with a receipt for the fees and costs paid."

It is hard to see, in the light of these statutory provisions, any substance in the question made in this case. Sections 1211 and 4970 are mandatory in terms and are not modified, so far as I am able to find, but in two respects, which is done by sec. 5340, the modification being as to non-resident plaintiffs and firms suing in the firm name. How can a sheriff "return upon the process upon which any charge shall have been made the particular items of such charge," before he serves the process? He is required to make such return by section 1332, before he "is entitled to receive any fees." More than that, how can a sheriff "make out, sign and deliver * * an itemized bill of fees," as required by sec. 1333, before he does the work; before he either serves the writ, or makes his return? How can a sheriff know in advance how much his mileage will be? How will he know in advance that he will be able to make service at all? Unless he can make out and deliver this itemized bill in advance he can not compel payment in advance. I know of no rule of construction which would authorize a court, in the absence of any law restricting sections 1211 and 4970 as they operate upon resident plaintiffs, to make them read thus:

"Every sheriff shall * * execute all warrants, writs and other process to him directed by the proper and lawful authority," if his fees are paid or secured in advance upon demand. "The sheriff shall execute every summons" if his fees are paid or secured in advance.

There are some other statutory provisions which I think bear upon this question.

Section 5340, Rev. Stat., before referred to, provides:

"The plaintiff, if a non-resident of the county in which the action is brought, or a partnership suing by its company name, must furnish security for costs."

This is the only statutory provision, so far as I know, which modifies those before quoted. If the officer could refuse to proceed in any case unless fees were paid or secured in advance, what was the need for sec. 5340? It seems plain enough that the legislature assumed that as the law stood before this section, officers had to proceed even in case of non-resident plaintiffs without security. The legislature changed the law that much, but there the change stopped.

Section 5596 Rev. Stat. provides:

"If an officer fail to execute any summons * * directed to him, or to return the same as required by law, unless he make it appear to the satisfaction of the court that he was prevented by unavoidable accident from so doing, he shall be amerced," etc.

Sections 1211 and 4970 require in plain terms a summons, as well as other writs, to be executed, the only limitations upon such requirement being those of non-resident plaintiffs and firms. If a motion to amerce a sheriff was made upon the ground that he refused to serve a summons in the suit of a resident plaintiff not a firm, it would hardly be a good defense of "unavoidable accident," as meant by section 5596, if he said that such plaintiff refused to pay or secure his fees in advance.

By this same section 5596, a sheriff can be amerced as well for a failure to return the writ as for a failure to serve it, and by sec. 4970 he is required to return as well as to serve the writ. He can not well make his return unless he makes a service. It would hardly be a good return to say: Received this writ. The plaintiff refusing to secure or advance my fees I refused to serve and now return the writ.

It will be of some interest to see how this question stands at common law. Such an inquiry is perhaps directly in point, for by sec. 4970, Rev. Stat., before quoted, a sheriff must "perform the duties enjoined upon him by statute and the common law."

As early as 1st Salkeld's Reports it was held:

"The sheriff can not refuse to execute the writ until his fees are paid." Hescot's Case, 1 Salkeld, 830.

"And it seems that any bond conditioned to pay him his fees, or any promise to pay him at a higher rate, would be void." Atkinson on Sheriffs, 278, citing Raym, 62; Hutton, 52; While v. Haugh, Stra., 1262; Bridge v. Case, Cro. Jac., 103; Allen on Sheriffs, 57.

"The sheriff is the officer of the King's courts, to whom all writs and processes are regularly to be directed, and who is to execute the same without favor, dread, or corruption, to which he is sworn.

"And as this is an employment for the good and convenience of the public, if the sheriff refuse to receive a writ, or to execute it, this is an offense of a public nature, for which he may be fined and imprisoned, and such an injury to the party grieved for which an action on the case lies." Bacon's Abridgment, Am. ed., 1846, p. 689.

"Neither the sheriff nor his officers are to dispute the authority of the court out of which any writ or warrant issues, but are at their peril truly to execute all such writs as are directed to them by King's justices,

according to the command of the said writs, and hereunto they are sworn." *Ib.*, p. 690.

"I will do right, as well as to poor as to rich, in all things belonging to my office. * * * I will truly serve all the King's writs, according to the best of my skill and knowledge." Part of Ancient Oath of Sheriff, Jacob's Law Dictionary.

"In his ministerial capacity the sheriff is bound to execute all process issuing from the King's courts of justice. In the commencement of the civil cause he is to serve the writ, to arrest and to take bail." Tomlin's Law Dictionary, 480.

"The sheriff is also bound:

"1. Truly to accomplish and put in execution all manner of writs * * * directed to him from any of the King's courts. * * * Sewell on the Law of Sheriffs, as found in vol. 48, Law Library, p. 30.

It would seem from these citations, in the absence of any of a contrary tenor, that it cannot be claimed that at common law a sheriff could exact his fees in advance as a condition precedent to his service of a writ, and that, as a duty of his office, he is, at common law, bound to serve all legal writs to him directed. If there was here no direct statute compelling him to do so, it is probable such would be his duty in Ohio by virtue of that part of sec. 4970, which requires him "to perform the duties enjoined upon him by the common law."

Several cases have been cited to support the claim that fees, or security therefor, can be exacted in advance. These cases are: *Naper v. Bowers*, Wright's Rep., 292; *Tilton v. Wright*, 74 Me., 214; 43 Am. Rep., 578; *Preston v. Preston*, 1 Doug. (Mich.), 43 Am. Rep., 580, note; *Johnson v. Ralph*, Tappan's Rep., 165.

In the opinion of each of three of these cases it is said that an officer of the court can make the payment of his fees a condition precedent to the service of a writ. But it appears upon examination, and the fact is singular, that in none of these was the question directly made, and that the opinions, so far as they relate to it, are *obiter*.

In the case in Wright the question was whether an officer could have summary process to collect fees for work already done. The court refused attachment to compel payment of fees due, and gave as one reason for such refusal that the officers could have protected themselves by requiring fees in advance. The question, and the only one, directly passed upon was whether the officers had a right to an attachment for fees already done. It is further to be said that the Supreme Court in a case in which this case in Wright was cited, has not felt bound by it upon this question, and has expressed doubt as to whether the statement in the opinion relating to it is good law. *Abbey v. Fish*, 23 Ohio St., 403, 413.

In the case in 74 Maine the question before the court was whether an attorney was liable for sheriff's fees on writs delivered by the attorney to the sheriff for service. There was no question about fees in advance. The only question was whether the attorney was personally liable to the officer. The court held that the attorney was liable, and in doing so, said that neither the clerk or the sheriff "is obliged to perform the services required without a prepayment of their respective fees."

In the Michigan case the question, and the only question, was the same—that is, whether the attorney was liable to the officer for fees for work already done. The Michigan court holds directly the reverse of the Maine court, that the attorney is not liable, and in doing so says that

the officer "may refuse to perform any of those services until he receives his pay, or a personal promise of the attorney to pay him." In both the Maine case and the Michigan case the statement that officers can not be compelled to perform services until they receive pay is simply thrown in, in the one case as a reason why the attorney is liable, and in the other as a reason why he is not. It will be noticed, too, that the statement in the Michigan case is much qualified by putting in the alternative that the personal promise of the attorney to pay is equally effectual with the payment.

The case in Tappan, does not, it seems to me, support the position taken for the defendant. The case was that of a non-resident plaintiff, in which, then as now, the statute gave the right to security.

I find, however, another case in Tappan which, so far as *obiter* goes, does support the plaintiff in this case. In the case to which I allude it is said in the opinion:

"Numberless cases may happen, where it would be a convenience to the party paying fees, to advance them before the business was done; they could not be demanded as of right, generally." Tappan Rep., 214.

These are all the cases that have been furnished to support the claim made for the sheriff here. No case has been cited, and I have been able to find none, where the question is in the record, that holds that fees can be collected in advance.

In Walker's American Law it is said: "the theory is that each party pays his costs as they accrue, for each particular service rendered; and it would be well to enforce the practice, because much frivolous litigation would be thereby avoided." And in the opinion in Bliss v. Long, 5 Ohio, 276, 278, it is said: "The judgment is that the party recovering shall recover his costs expended, etc. It is his recovery of the costs he is supposed to have paid out as they occur."

How the theory Mr. Walker speaks of could obtain it is not easy to see in the light of the statutes and the common law, so far as I am able to find the common law to be. But assuming such theory to be correct, it does not follow that the claim here made is thereby sustained. It is said that the costs are payable as they accrue, and that they are supposed to be paid as they occur. They hardly accrue or occur before the work is done, and before it can be shown just what they are. The theory here for the sheriff is that the costs are payable as they accrue or occur.

It has been seen that the statutes of Ohio do not require security for costs except in two exceptional cases, and that in terms they require the service of all legal writs by the officer to whom directed. So far as the inquiry has gone it has been found that by the common law an officer had no right to make the payment of his fees in advance condition of his service. The cases cited to support the other view do not, it seems to me, furnish sufficient authority for a judgment that would be in the face of statutory provisions. I reach the conclusion that by the law of Ohio a sheriff can not compel payment of or security for fees in advance, except as the statute specially provides. I have tried to examine the question with care because of its importance and interest, because the result reached might run counter to a long established practice, and because as I progressed in my examination I was surprised to find how little warrant of law such practice had, or seemed to have. But upon reflection I do not see why the law should be otherwise than I have found it to be. If an officer of the court chooses to lock its doors shall the only key be a coin? Our theory is that all men are equal before the

law. To give justice only to such as can pay for it is a poor kind of equality. In the nature of things money has power enough without the power that would come from law that might not allow a suitor with a just cause entrance into court if he came with no money in his hand.

And besides, should it be so that a defendant, forced into court it may be much against his will, can not have process in his behalf so that his side of the cause may be fairly heard, or fairly enforced, if justice has inclined toward him, if he has no money to pay officers in advance? Is the plaintiff who can pay fees to have judgment by default because the defendant cannot pay fees? It is true a defendant must, by our statute, pay witness fees upon demand; but this, like the provision for security for costs in the case of non-residents and firms is an exception. It is also true that a defendant can serve his own witnesses. But it may be impossible for him to do so, and is likely to be if he is so poor that he can not advance fees. It is not infrequent, too, that process other than that for witnesses becomes necessary for a defendant in the progress of a cause for which the law makes no provision for service except service by the officer.

It is said that it is unjust to compel the officer to work for nothing, and that he should have the right to protect himself. This position is upon the ground that the relation between the officer and the party who seeks the process of the court, is like the relation between employer and employed—is the legal relation of master and servant. Such was not the common law. As before quoted:

"As this is an employment for the good and convenience of the public, if the sheriff refuse to receive a writ, or to execute it, this is an offense of a public nature."

And as another common law authority states it:

"There is not a close analogy between the relation of a sheriff to the public, and still less between that of a sheriff to an execution debtor, and that of a servant to his master. * * * The right of a sheriff is *positivi juris*, not in the nature of a claim for work and labor." Comyn's Digest, Title Viscount, F. 1.

A statutory provision now exists to compensate sheriffs for lost costs. Rev. Stat., 1281. If the compensation now actually received by the sheriffs of the state is too low, and if so much is lost by them because of the insolvency of litigants that a hardship exists, that can be remedied by the legislature increasing the amount now allowed annually for lost costs.

The provisions of the statutes before referred to I think sufficiently show, that as it was at common law, so it is now under the law of Ohio, and that the services of a sheriff are of a public nature, and not in the nature of a claim for work and labor. And this view is consistent with the law in other respects. Court houses are built, judges are paid, and juries, except in small part, are paid by the public, and for the reason that justice is a public matter and not a matter of dollars and cents only. The machinery of public justice is, it must be confessed, clumsy and expensive. Perhaps this is necessarily so. If it is to be looked at merely as a matter of dollars and cents, it is very doubtful whether the results attained justify the means. But the fact that there are courts of justice in which all stand, clothed with the same rights and to which all can appeal, is of the utmost importance in its influence upon the relation of men to each other. It is from this public standpoint that courts, with all their necessary machinery, are rightfully regarded.

Demurrer overruled

PROMISSORY NOTES.

113

[Cincinnati Superior Court, General Term.]

Force, Harmon and Peck, JJ.

JOHN B. KEYS V. FRANK H. BALDWIN.

1. The endorsement of a partial payment on a note by the holder is an executed contract which cancels the note *pro tanto*, unless a contrary intention appear.
2. When such endorsement is voluntarily made, with the intention of discharging in full an obligation of the holder to the maker, which had been discharged by a composition in bankruptcy, the holder can not afterward erase it and sue for the full amount of the note.

HARMON, J.

This case is reserved on the bill of evidence. The plaintiff holds a promissory note made by the defendant, which he obtained from his father, Samuel B. Keys, and the defense raising the issue upon which the reservation was made, is that a certain amount was paid on it.

The facts are that Samuel B. Keys, having been a partner in an old firm, sold out his interest, receiving from his co-partners a large amount of notes in payment therefor. After various changes in the firm which succeeded, the defendant Baldwin and John S. Baker become the persons interested in the firm, liable, by assumption, to pay these notes. Desiring to change the form of the indebtedness, they and Keys made a bargain by which they gave him certain stocks and two new notes, each for about \$22,254.45, Baldwin and Baker endorsing each other's notes, for the exact amount of the old notes, Keys delivering up such amount of the old notes as he had, and undertaking to deliver the rest, which he did with the exception of one for \$11,755, which had been negotiated and was not yet due. He gave a written receipt for the new notes, in which he stated his obligation to take care of and surrender the old notes. These two notes he afterward assigned to the Baker estate as collateral security, and, after said assignment, becoming involved in his business, made a composition with his creditors, in December, 1872. The creditors all signed an agreement to take fifty cents on the dollar in full discharge, by notes payable at three different dates. Among others, defendant signed the paper on account of this transaction, this outstanding note, and took from Keys his note for one-half the amount of the outstanding note less some discount by reason of getting one note instead of three, and gave a receipt in full. The outstanding note was not due until the following January, and when it fell due was, by agreement between the holder and Baldwin, extended to July, when the note which Keys had given in composition, also fell due. When the latter fell due Keys gave his check for the amount of it, which Baldwin took and paid on the outstanding note, he and John S. Baker giving their individual notes for the balance, which they paid when due. Then, on the same day, John S. Baker went to the office of Keys, with a piece of paper on which were the exact figures of the amount of the outstanding note which he and Baldwin had had to pay, by their own notes, taking with him the two \$22,254.45 notes, he being one of the representatives of the Baker estate which held them as collateral, and requested Keys to endorse as paid on each one of the two notes one-half the amount which Baldwin and Baker had so paid to take up the old note, which came to

\$3,203.89 on the note executed by Baldwin, and \$3,203.90 on the note executed by Baker. This Keys did over his own signature. The notes have remained in the possession of the Baker estate from that time, which was July, 1873, until in 1886, when, by some arrangement between Mr. Keys, the payee, the Baker estate and the plaintiff, his son, plaintiff became the owner of the notes, they being returned to the elder Keys in the course of the transaction, who erased the credits, and this suit is brought ignoring the credit on the note of Baldwin.

So, the defendant having paid all the note except that credit since the hearing below, the question is, whether, under those circumstances, Mr. Keys had a right to ignore the credit and confer upon plaintiff the right to sue for the entire amount.

The first question is one of fact. What was the arrangement which led to this endorsement of payment? Mr. Keys and Mr. Baker were the only actors. Mr. Baker is dead. Mr. Keys' account is that Mr. Baker represented to him that he and Baldwin intended to pay to the Baker estate, which held these notes as collateral, an amount of money equal to the amount which they had had to pay to the holder of the outstanding \$11,755 note, and that thereupon he made this credit; that they did not pay any money to the Baker estate, and, therefore, in substance, the charge is that this endorsement of credit was obtained by fraud upon the part of John S. Baker. Mr. Baldwin's account is, that at the time he entered into the composition it was understood that any amount above the note which he had received, which had to be paid by him or Baker to take up the outstanding note, should be a credit on the new notes held by the Baker estate. Mr. Keys denies that there was any such arrangement or agreement, and denies that it was to carry out any such purpose, whether agreed to beforehand or not, that these endorsements were made.

We have no reason to suppose that either of these two gentlemen has done other than to honestly lay bare to the court his recollection of the facts. But nearly fourteen years had elapsed between the event and the trial, and the infirmities of human memory are somewhat emphasized by such a lapse of time, in a busy age, to a busy man, and the court always, naturally, therefore, is more influenced, in such cases, by the logic of events themselves which are admitted. Now, while Mr. Baker is dead, his acts yet speak. It hardly needs a witness to tell anybody what it means when a credit of just that amount, at just that time, under just those circumstances, is put on a note. It would take more than one witness, under ordinary circumstances, to over throw the presumption which those circumstances alone would raise, that the party who had compromised had for some reason or other concluded to pay in full, by endorsing credit on the note. In the first place, it was very natural that it should be done. In the second place, it was just that it should be done; because the one note simply stood for the other, and Keys never had had a right to collect both. The relations of the parties, Baker being a brother-in-law of Keys, and being the one selected to go down and procure this to be done, the exact amount of money, and the fact that Keys was asked to make the credit, are facts that have great weight. Why, if an ordinary payment was to be made on the note, the person who held the note, whether as collateral or otherwise, would not naturally take the note and make the credit, or otherwise credit the debtor with that amount, it is difficult to see; and no reason can be imagined why John S. Baker should take that note to Mr. Keys to make the credit instead of making it himself on behalf of the Baker estate, if money was to be paid.

Taking all these circumstances, we can but reach the conclusion that Mr. Keys is for some reason, mistaken about what took place. The fact is, that this credit was made on the note because Baker and Baldwin insisted on having the credit made of the exact amount which they had been required to pay to fulfill Keys' obligation to take up this outstanding note, and Keys assented.

Now the question is, having done it under those circumstances and for that purpose, could he undo it in the way he did, or can he ask the court to undo it for him? It seems strange, at first, that Mr. Baldwin should have joined the other creditors in this composition agreement, because he did not have an ordinary claim against Keys. The obligation of Keys to him was not what is called a "debt." There would be no debt until Baldwin and Baker, by the failure of Keys to take up the note, had been compelled to take it up themselves, but, considering it as in a nature of the debt of Keys, still it was not an independent obligation. Part of the assets of Keys were the \$22,254.45 notes. These other notes standing for the same thing, Keys never could have collected, nor could his assignee in bankruptcy have collected more than the difference between the outstanding notes and the ones he held. There was not a set-off as of independent claims, but the taking of the one note was *ipso facto* a liquidation of the claim on the other. But having gone into it, and both parties having chosen to consider it a debt subject to composition, and having compounded it, let it be so considered.

In the first place, it appears in testimony that the composition agreement was never carried out as to the other creditors, only the first of the three series of notes being paid. There is nothing to show that, in this case, it was the intention of the parties to make the ordinary composition of the debt by the payment of a smaller amount. The general rule is that unless a composition by all creditors is carried out, nobody is bound by the agreement to waive a part of his debt which he made in consideration of the same agreement on the part of all others. But if this were not so, and Baldwin be held bound by the composition agreement, because he, at least, got all that the bankrupt agreed to pay him, his note being payable all at once and being paid, was the subsequent conduct of the parties such that the court can now interfere?

The ordinary rules relating to such matters are well settled. If a person, in the straits of business embarrassment, seeking a composition with his creditors, is required by one of them to pay him more than the others get, to secure his assent to the composition, the payment is under duress and may be recovered back. If the unfortunate debtor gives a promise, in whatever form, under those circumstances, on that consideration, that promise cannot be enforced against him. And, in short, good faith all around is enforced generally by the courts, no matter what form the transaction assumes, both on the ground of fraud on the other creditors, and of duress on the part of the debtor. (See *Crossley v. Moore*, 40 N. J. L., 28; *Bean v. Amsink*, 10 Blakf., 370; *Gilmore v. Thompson*, 40 How. Pr., 198; *Way v. Langley*, 15 O. S., 392.)

At the same time courts recognize the right of a debtor to pay his claims in full, afterwards, if he desires. The moral obligation still remains to pay, after the composition, and the law, in extending this protection to insolvent debtors, does not lose sight of the other great principles which regulate the administration of justice. After the duress has passed away, after the composition has been made, if the debtor see fit to pay off his obligation entered into under duress, at a time when he is perfectly free to

pay or not, the doctrine of voluntary payment applies. *Wilson v. Ray*, 10 A. & E., 82; *Wald's Pollock on Contracts*, 332; *Took v. Juck*, 4 Bing., 224.

So the question is, what was the nature of the act of Keys in making these endorsements on the notes? Was that the actual doing of something, or was it only a promise to do something which, being executory, he may disclaim? There could be no other way of fully executing an agreement to do what these parties wanted done except by making the endorsement. Keys still holding their note, and they having to assume the note for which theirs stood, they demanded of Keys a cancellation of the notes he held, to that amount. If he had said he would do it, it would be executory. But he did it. On the back of the note, the very instrument evidencing his right against them, he wrote, over his signature, a receipt for the money. Now, this seems, in the light of the authorities, to be an executed contract. It is, unless it appear that the intention of the parties was otherwise, a cancellation of that note *pro tanto*. It is exactly equivalent to tearing up the note and giving a new one. What was a note for \$22,254.45, became then, *ipso facto*, a note for \$19,050.56. This seems to be in accordance with the decision in *Morris v. Morris*, 5 Mich., 171; *Leddel's, Ex'r. v. Starr*, 20 N. J. Eq., 283; *Eden v. Smith*, 5 Ves. Jr., 341; *Brinkerhoff v. Lawrence*, 2 Sandf. ch., 411, and with general principles.

The case, therefore, stands as one where a party who had compromised with his creditors, after the compromise had been effected, when he was under no duress, voluntarily performed an act which amounted to paying one of his creditors in full.

It can not be said that this act was still in fraud of the other creditors whose notes were to be paid out of the assets of the estate, because, for the reason already mentioned, this act did not diminish the assets which were available to pay those debts. It was a mere acknowledgment of what still remained true, the fact that the notes which apparently gave Keys the right to \$22,000, only gave him a right to a less sum, by reason of a duplication of the evidences of indebtedness.

We are of opinion therefore, that this act on the part of Keys was an act which he had a right to do, and which he did do, and which therefore, he could not undo, nor ask the court to undo for him; that there was a payment, and that the defendant, having paid all the note except the amount so endorsed upon it, is not entitled to the judgment.

Force and Peck, JJ., concur.

H. C. Hollister and S. B. Keys, for plaintiff in error.

J. R. Sayler and Edward Colston, *contra*.

LIQUOR TAXES.

115

[Cincinnati Superior Court, General Term.]

FORCE, Harmon and Peck, JJ.

†A. SENIOR & SON V. FRANK RATTERMAN, TREASURER.

Buying and selling at wholesale is "traffic" and the Dow law contemplates a tax upon wholesale dealers. Said act is not in conflict with the constitution of the state.

RESERVED from Special Term.

FORCE, J.

This is an action for an injunction to restrain the county treasurer from collecting from the plaintiffs a tax of \$400, imposed upon them under the act of the legislature called the Dow law. The plaintiffs are wholesale dealers in whisky.

First, it is contended that the tax cannot be in any event more than \$200. A tax of \$400 is imposed only in case of a dealer's refusal to answer the printed questions put in pursuance of the statute. The plaintiff did answer that they were wholesale dealers in whisky. This answer made answers to the other questions superfluous and unnecessary, and was complete and sufficient. There is no ground for imposing a greater tax than \$200.

It is further contended that the tax is illegal, because the Dow law does not provide for or contemplate a tax upon wholesale dealers. The statute is an act taxing the traffic in intoxicating liquors. Section 8 declares that the phrase "trafficking in intoxicating liquors," as used in the act, means the buying or procuring and selling of intoxicating liquors * * * but such phrase does not include the manufacturing of intoxicating liquors from the raw material, and the sale thereof by the manufacturer of the same in quantities of one gallon or more at any one time. As the act expressly states that selling at wholesale by the manufacturer is not included, and specifies no other form of traffic as also not included, sec. 8 is a declaration that selling liquor at wholesale by others than the manufacturer, is included in the provisions of the act.

Further it is contended that if the act does tax wholesale dealers, then the act is in violation of the constitution.

First, in violation of sec. 2, art. 12, which requires taxing by uniform rule. But art. 12 contains the provisions relating to finance; it controls taxation for the purpose of revenue. The Dow law stands upon sec. 9 of art. 15 of the constitution, which is a provision for the exercise of police power of the state. And accordingly the Supreme Court in *Anderson v. Brewster* expressly held that the tax imposed by the Dow law is not in conflict with the second section of art. 12 of the constitution.

Next it is said to be in conflict with the constitution because it is not authorized by sec. 9 of art. 15. The section reads: "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by law, provide against evils resulting therefrom."

Traffic is the business or occupation of buying and selling commodities. It can not be said that buying and selling wholesale is not traffic; but it is contended that the evils to be provided against are the evils resulting from the retail sale of intoxicating liquors, and hence any regulations or restrictions or impositions made by the legislature under authority conferred by this section, must be only such as operate directly upon sales as retail.

There is no rule which restricts the exercise of legislative power to laying its hand directly upon the thing which is the subject of legislation; a large part of the exercise consists in promoting by indirect encouragement, and restraining by indirect checks. The ways by which the legislature may provide against the evils resulting from the traffic in intoxicating liquors, are not prescribed; the choice of means is left to the wisdom and discretion of the legislature. Section 9 imposes no restriction upon the exercise of the authority granted by it, and the power so given is plenary, except so far as it may be controlled by other portions of the constitution.

† This judgment was affirmed by the Supreme Court; see opinion, 44 O. S., 661.

Granting that the evils aimed at are the evils resulting from the retail traffic in liquor as a beverage, yet the legislature, so far as not restrained by other portions of the constitution than sec. 9, art. 15, may regulate such retail traffic by prescribing at what places, at what times, for what purposes and to what persons, such sales may be made: may restrain it by imposing tax, assessment or penalties upon it; may prohibit it by direct prohibition of the traffic; or may prevent it by stopping wholesale trade and the manufacturing of liquor. So far as the legislature is disabled from adopting any of these modes, the disability does not come from the sec. 9. And the Supreme Court in *Adler v. Whitbeck*, expressly hold that the legislature may, in providing against evils resulting from the traffic in intoxicating liquors, levy a tax upon such forms of the traffic as in its wisdom may seem best, without infringing sec. 28, art. II; and further that the act called the Dow law, in such respect, that is the forms of traffic taxed, is not in conflict with the constitution of the State, nor of the United States.

Injunction dissolved so far as it prevents the collection of a tax of two hundred dollars, and made perpetual as against the collection of more.

Harmon and Peck, JJ., concur.

Follett, Hyman & Kelley, for plaintiffs.

Rufus B. Smith, W. H. Taft and Edward Barton, for defendant.

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BIDS FOR SEWERS.

[Cincinnati Superior Court, General Term.]

Force, Harmon and Peck, JJ.

† CINCINNATI (CITY) FOR USE OF STEELE V. HUGH KRMPER ET AL.

1. Collusion between city officers and a bidder, by which the latter was falsely made to appear the lowest bidder, and thereby obtained the contract for building a sewer, is a good defense to an action to enforce an assessment therefor.
2. It is error for the trial court to refuse to pass on an issue made by the pleadings as to the existence of such collusion, when evidence is offered tending to prove it.

ERROR to Special Term.

HARMON, J.

To this action to enforce a sewer assessment one of the defenses was, that by collusion between said Steele and employes of the city engineer's office in charge of the estimates for the proposed work, Steele was made to appear the lowest bidder, when he was not, and thereby obtained the contract.

Issue was taken by reply.

The court at special term found that there were irregularities in the receiving of bids and letting of the contract, but refused to find whether they were made by collusion as charged or not, because excluding all the items as to which such irregularities existed the amount which was assessed was less than the amount properly assessable on the property of defendants under Rev. Stat., sec. 2289, as amended 80 Ohio L., 53.

If there was any evidence tending to prove this defense defendant was entitled to have this issue decided, unless, even if decided in his favor, it would not have entitled him to judgment.

The evidence is to be considered in the same way as on the motion for non-suit. Its sufficiency is not for determination here.

† This case was affirmed, the Supreme Court refusing leave to file a petition in error, March 15, 1887.

While the evidence is mostly circumstantial, as evidence of fraud and collusion usually is, we think it did tend to establish the truth of the facts set up in this defense. The estimate fixed the amount of board sheeting which would be required at 550,000 feet. Hectograph slips prepared for the use of bidders stated the amount at 55,000 feet. Steele's bid was \$40 per thousand on this item, twice as much as any other bidder's, although, at about the same time, he bid on other work fixing this item at about \$20. The other items in his bid being lower than those in other bids his appeared the lowest, using the slips in computation, although it was by far the highest using the true amount in the estimate itself. The charge was that he was privately advised by the assistant engineer of this discrepancy between the estimate and the slips. And there were other circumstances tending to support the charge. Was this issue an immaterial one?

In *Hubbard v. Norton*, 28 Ohio St., 116, the opinion, though confessedly *obiter*, state that collusion among bidders preventing fair competition would not be a defense to such an action as this, but stress is laid on the fact that it was not charged that the officers acting for the city acted in bad faith. They are called the agents of the property-owners, and the question of the effect of collusion by them with bidders is expressly saved.

While it seems to have been held in some states that bad faith on the part of city officers will not defeat an assessment because the risk of such conduct is one which the public must take in selecting such agencies (see *Cooley on Taxation*, pp. 468 and 469), it seems to us that such cannot be the law under our statutes and decision which go further than those of the states referred to in protecting owners of property liable to assessment.

It is provided that the amount properly chargeable may be charged whenever there is a "technical" defect invalidating the assessment; still it is also provided that, "The proceedings shall be strictly construed in favor of the owner of the property assessed." Rev. Stat., 2327. The provision for competitive bidding being intended for the protection of the property-owner, has always been held to be pre-emptory. *Upton v. Oviatt*, 24 Ohio St., 232.

We can see no difference between a failure by the city's officers to advertise for and permit competitive bidding, and their making a farce of it by collusion with one of the bidders.

Nor do we think the remedial powers of the court, either special or general, should be employed in the effort to separate the parts of the contract or proceedings tainted with fraud from the others, and so permit a recovery unless the fraud is clearly shown to have directly affected the amount of the assessment. The more salutary rule is, we think, that one who by collusion with the agents of the people obtains a contract by which he is to obtain their money, cannot have the aid of the court to obtain it, even though he have performed his contract, unless the body or officer of ultimate authority on the part of the public see fit, after full knowledge, to waive the fraud and accept the work, which does not appear here.

Judgment reversed, and cause remanded for new trial.

Force and Peck, JJ., concur.

Healy & Brannan, for plaintiffs.

J. H. Perkins, *contra*.

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CANAL LEASES.

[Cincinnati Superior Court, General Term, October, 1886.]

Force, Harmon and Peck, JJ.

† CANAL ELEVATOR & WAREHOUSE CO. v. CINCINNATI (CITY.)

1. A lessee from the state, of surplus water from a canal, has a vested property right in the flow of water therein, and a right of action against any one who interferes with such flow to his damage.
2. The city, in building a sewer under the M. & E. canal by permission of the state authorities, granted on condition that the city protect the canal and the rights of lessees of water power, let the work to an independent contractor by whose negligence the flow of water in the canal was interrupted to the injury of plaintiff. The city is liable.

HARMON, J.

The plaintiff, as lessee of the state, had the right for ninety-nine years, renewable forever, to use a certain number gallons of water per day from the Miami and Erie canal, provided there should be a surplus of that amount after the requirement of navigation and the rights of prior lessee, and by that water power was engaged in operating its mill. The city, desiring to build a sewer in Fourteenth street, obtained permission from the Board of Public Works of the State to tunnel under the canal, the consent being given on condition that the city should indemnify the lessees of water power and otherwise protect their rights. The city let the contract for the work, and the tunnel was built, resulting in a stoppage of the flow of water for five days during the building. When the water was turned into the canal after the sewer was completed, it gave way, and the water was stopped an additional period of eighteen days in consequence. The suit is to recover damages for the loss of the water power. By consent of parties, special interrogatories were submitted to the jury, and an entry made that the case should be decided as the law upon the answers made by the jury and the evidence in the case, should make proper, and the case is reserved.

The first question relates to the relation of the plaintiff to the water power, and the connection of the acts of the city with the injury, it being contended for the city that the plaintiff had no right which was directly invaded by the city, and that the principle involved is that of *Dale v. Grant*, 34 N. J. L., 142, in which a person who had contracted for all the product of a mill, was held not entitled to sue a person who had interfered with the mill's machinery so as to prevent its producing anything. *Anthony v. Slade*, 11 Metc., 290, in which one who had contracted to support the paupers of a town, was held not entitled to sue a person who, by beating a pauper, had increased the cost of supporting him; and *Insurance Co. v. Boscher*, 39 Me., 253, in which it was held that an insurance company could not maintain a suit against a person who set fire to a house which it had insured.

If the right of the plaintiff were one resting merely on an executory contract, by which the state undertook to supply it daily with so many gallons of water, then the act of the city in interfering with the state's ability to carry out its contract would not give rise to this action. But as

† In this case motion for leave to file petition in error was filed and argued in the Supreme Court, and by that court overruled, thus affirming the judgment of the superior court.—[ED. BULL.]

we read the lease, and understand the principles of law applicable to it, the rights of the plaintiff were not of that character. The state did not agree to furnish water to the defendant. Here was an artificial water course, flowing, and which had flowed for many years, and might continue to flow forever, and the state, not by an executory contract, but by a grant, conferred upon plaintiff an interest in the flow of water. It is true, as suggested, that the surplus of water might never come; but the right to draw water from a natural watercourse is subject to the same contingencies; the stream may go dry by natural causes; it may change its bed; the water may never come; but there may be a right in a chance as well as in a certainty. And that such was the nature of plaintiff's right, we think is clearly established by various cases in which a similar right in artificial water-courses was asserted. *Shepardson v. Perkins*, 46 N. H., 354; *Murchie v. Gates*, by the Supreme Court of Maine, 4 Atlantic Reporter, 698; and especially *French v. Gapen*, 105 U. S., 509, in which a similar right asserted in a canal in Indiana was held to be a property right, and protected as such. And the fact that in that case the right had been acquired by the surrender of damages caused by the destruction of natural water power in the building of the canal, whereas in this case the consideration is the payment of stipulated rent, can make no difference; the consideration upon which a right arises, in no manner affects the right, as stated in the opinion of the court.

Plaintiff, then, having a right to the flow of water, it seems to us, might maintain an action against anybody who wrongfully interrupts the flow, even if there had been no saving of the rights of the lessee, by the State in granting its consent to the work. If this were not so, the right to sue could probably be maintained under the principle, well-established in Ohio, that agreements made for the benefit of a third person may be sued on by him, although not a party to them. And the distance from the point at which the water is taken by the plaintiff, to the point of interruption by the defendant, in feet or miles can make no difference; it is propinquity in the sense of cause and effect, and not by linear measure, at which the law looks.

The second defense is, that having made a contract for this work, and the jury having found in answer to one of the interrogatories that the breaking of the sewer after its completion was the result of carelessness on the part of the contractor, and not due to any fault of the city in the adoption of the plans and specifications for the work, the city is not liable, but the remedy is against the contractor only. If this injury had been one resulting in the course of the work from some act of the contractor, which, being an independent contractor, who was to produce a result without any supervision on the part of the city, he might or might not do, then by a well-known rule, the doctrine of *respondeat superior* would not apply. But we think it very plain that such was not the case here. The limitations of the rule as to independent contractors are well stated in a number of recent cases in Ohio and elsewhere. In *Tiffin v. McCormick*, 34 Ohio St., 638, it was held that the rule did not apply where the danger was one necessarily inherent in the work. There blasting, which caused the damage, was the mode specified for doing the work. In *Circleville v. Neuding*, 41 Ohio St., 465, it was held that the rule did not apply where it was the duty of the employer to have a street in a certain condition, and that it could not shield itself from responsibility by showing that it employed a contractor who was negligent in doing it. In *Sturges v. The Society, etc.*, 130 Mass., 415, in which a

plumber was employed to connect premises with a sewer, the doing of which required the piercing of a barrier erected against tide-water, it was held that the employer was liable for the negligence of the plumber in not making tight the orifice which he made in this barrier, although he was an independent contractor.

We think, therefore, that the duty rested on the city, when it put its tunnel under the sewer, to uphold the sewer, and that that duty was not to be shifted off upon anybody else.

These being the only questions in the case, plaintiff is entitled to a judgment for the amount of damages found by the jury, which was nothing as to the five day's interruption during the work, it appearing that the plaintiff, having notice of that interruption was able to guard against loss, and \$305.58 by virtue of the eighteen days' interruption; and the finding being merely the ascertainment of the amount of damage, the plaintiff will be allowed interest on the amount from the time of the injury.

Force and Peck, JJ., concur.

S. M. Johnson and Wallace Burch, for plaintiff.

Coppock, Cox & Gallagher, *contra*.

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BOHEMIAN OAT NOTES.

[Hardin Common Pleas, January Term, 1887.]

† AARON C. WILLIAMS v. GEORGE W. KEEL.

1. A Bohemian oats note is wholly void, regardless of the guilt or innocence of the holder, or want of notice of defects to any purchaser.
2. Such a note is on a gambling consideration and the maker of the note having to pay it to a purchaser in good faith and without notice of its defects, may recover from the payee.

MOTION for new trial.

STATEMENT OF FACTS.

This suit was brought to recover money lost in a Bohemian oats transaction.

Early in 1884, Keel, who was a farmer, contracted with one Clark, as the agent of a Bohemian oats association, for five bushels of the oats, at \$10 per bushel, to be paid for at a future day named. Keel was to sow the oats, and raise a crop; and the association was to sell for him ten bushels at \$10 per bushel—less \$2.50 per bushel commission to the association; the net proceeds to go to Keel. The crop was raised, and on Sept. 12, Keel had eighty bushels thereof in sacks in his barn. Keel heard that plaintiff, who is a farmer, would like to have some of his oats to sow, and on that day, Keel and Clark went to Williams' house, to try and sell some of Keels' crop to him. Williams said he was in debt for his farm, and hesitated; Keel said he had made money himself, and believed that Williams could, because Clark was performing the contracts as the association agreed, and that he was making more money out of his

† A contrary decision may be found in *Shirey v. Ulsh*, 1 Circ., Dec., 554; in *Stewart v. Simpson*, 1 Circ. Dec., 562, and *Kitchen v. Loudenback*, 2 Cir. Dec., 129, 131.

oat crop than out of all the rest of his farm. Williams was persuaded to make the contract, and to take fifteen bushels of the Keel oats at \$10 per bushel, to be delivered by Keel the following spring. A note of the following form was given by plaintiff:

"\$150.

PLEASANT TP., HARDIN CO., O.,
September 12, 1884.

"On or before February 1, 1886, I promise to pay to G. W. Keel, or bearer, one hundred and fifty dollars, value received, at 6 per cent. interest. Payable at—

"A. C. WILLIAMS,
"JOHN W. WILLIAMS."

John W. Williams signed as surety.

As part of the transaction, and upon which plaintiff most relied, the following instrument was filled out by Clark, and there given him—Buckley's name having been previously signed in blank:

"A bond from the Northwestern and Central Ohio Bohemian Oats Association to be signed by our superintendent, M. H. Buckley, Pleasant Township, Hardin county, State of Ohio, September 12, 1884. We do hereby agree to sell thirty bushels of Bohemian oats for Mr. A. C. Williams, at ten dollars per bushel, less commissions, on or before the first day of January, 1886. The note given by Mr. A. C. Williams to Mr. C. W. Keel, due February 1, 1886, will not be called for until the above amount is sold at ten dollars per bushel.

"M. H. BUCKLEY, Supt."

At the time these papers were delivered, it was agreed that Williams should sow the oats, and from the crop furnish the thirty bushel to be sold for him; the association to get a commission of \$2.50 per bushel on such sale, and that said note was to be held by said Keel and Clark until the thirty bushels were sold. Clark and Keel soon after settled between themselves and Keel took this note, and Oct. 7, 1885, sold it without plaintiff's knowledge or consent for value, to one Martin, who was a purchaser in good faith without notice of defects. Keel guaranteed the note as follows: "Oct. 7, 1886. I guarantee the payment of the within note Geo. W. Keel."

Williams at the agreed time shipped the thirty bushels of oats to the association, but they refused to receive them, and they came back to him at his expense. He voluntarily paid the note to Martin soon after maturity. The fair market value of Bohemian oats during the period covered by the contract was from thirty to forty cents per bushel, which was well known to the parties at the time. The parties all knew that the contracts of the association to sell were only made at the fictitious price of \$10 per bushel; and that the business of the association was to sell Bohemian oats for its members, and only at highly fictitious prices.

The plaintiff was satisfied with his contract until the association made default. After he paid the note to Martin, he demanded payment of defendant, and was refused. He then, on March 6, 1886, brought this suit to recover what he lost, less the market value of the oats he got. After argument the court charged the jury, that if, by a fair preponderance of the evidence, they found said fifteen bushels of oats, and said so-called bond, to be the agreed consideration for said note, and that if said note and so-called bond, were parts of an entire oats contract entered into by the parties at the same time; and that if the purpose and intent of the parties thereby, was merely to speculate in Bohemian oats at known and agreed fictitious prices, twenty or thirty times the usual market value; and that if the parties to the transaction at the time, had no intention to regard market values and had no reasonable expectation that the value in the market, would at any time come up to \$10 per bushel, considering the state of the markets, and the sources of supply and demand for the oats, and that if the prices named in the contract were fictitious and

speculative merely, and that if the performance of the contract depended upon the contingency of the association being able in the future to keep up and continue its fictitious prices until after the performance of the contract on its part; then upon such state of facts being made to appear, by a fair preponderance of the evidence, the jury should treat such contract as having all the elements of a wagering and gambling contracts, and void by sec. 4269 of the Rev. Stat.

That in case the transaction is found to be a wagering agreement, the plaintiff is entitled to recover, under sec. 4270 of the Rev. Stat., the amount he lost on the wager, not exceeding the amount claimed in the petition. And that in case the transaction is not shown by a fair preponderance of the evidence to be a wagering agreement, the verdict must be for defendant. The verdict was for plaintiff. On motion for new trial:

PENDLETON, J.

The jury was warranted in finding the transaction to be a wagering agreement and void by statute.

Section 4269 provides that: "All promises, agreements, notes, bills, bonds, or other contracts, mortgages or other securities, when the whole or any part of the consideration of such promise, agreement, conveyance, or security is for money or other valuable thing whatsoever, won or lost, laid, staked or betted at, or upon, any game of any kind, or under any denomination or name whatsoever, or upon any horse race or cock fight, sport or pastime, or on any wager, or for the repayment of money lent or advanced at the time of any game, play, bet or wager, for the purpose of being laid, betted, staked, or wagered, shall be absolutely void, and of no effect."

Section 4270 provides for a recovery of the money or thing lost. See also sec. 6934a; 79 Ohio L., 118; 83 Ohio L., 162.

This statute is broad, and far reaching in its application. Whether the transaction is a bet upon the result of a game, sport, pastime, horse race, or dog fight; or is a wager staked upon an election; or upon the future selling price of Bohemian oats at extravagantly fictitious values assumed in advance—it is a gambling transaction within the statute; and is against public policy and void. The plaintiff with full knowledge of the facts, and of the peculiar manner in which the business of the association was transacted with customers only of its own selection, so as to keep up its fictitious prices, by its voluntary performance of its obligations, engaged in the venture and took his chances on the ability, or disposition of the association, to continue to perpetuate the fraud, which he must have known, and understood at the time, could only be done by it, upon the contingency, and fallacious assumption, that it would be able to continue to find victims and make like contracts at the same fictitious price, with a series of like customers, willing in turn to buy at \$10 per bushel, all the Bohemian oats previously contracted from time to time, to be sold by it.

He knew that the duration of the fictitious bubble, must be but transitory, and solely dependent upon the voluntary performance of the obligation of the so-called bonds. He is *pari delicto* himself, and only began to complain when no one could be found to buy his own oats at the agreed fictitious price of \$10 per bushel. And knowing all the facts he voluntarily paid his note.

The wagering character of the contract is manifest. In legal effect, and in fact, it was a wager staked, of the amount of the note, less the then market value of 15 bushels of Bohemian oats, that on or before Jan. 1.

1886, the association could either sell in the open market thirty bushels of Bohemian oats at \$10 per bushel, (a highly improbable contingency); or that it could find an individual purchaser, whom it could induce to pay \$10 per bushel for said 30 bushel, regardless of market values; and that it could use its like fictitious, swindling obligation, to repay such purchaser, and then would turn the proceeds over to said Williams.

In either aspect the transaction is alike nefarious. The association could only expect to find victims, by appealing to their avarice and cupidity. Each victim in turn was interested in assisting the association to find a like customer, so that he could thereby market his own crop of oats, at the same fictitious price, and get his own pay out of the bond he held. Each victim in turn, became an active partisan of the association, in procuring customers, up to the time the whole scheme collapsed. This ingenious feature of the fraud, and the coupling of it with an agricultural pursuit, gave it an impetus it could have attained.

Another feature of the scheme is, that the litigation resulting from the fraudulent practices of the association is transmitted to, and among its customers, and the purchasers of their notes.

In classifying this as a gambling transaction, within the inhibition of the statute, I do not overlook the fact that a large class of speculative and contingent contracts are legalized through necessity.

The trader who takes a contract to-day, to furnish commodities at a future day and distant place, at an agreed price, takes his chances on the rise and fall of the market, as well as upon the contingencies of production and transportation. The other party to the contract may be collecting the commodities for export; or for his factory; or to supply the department of the government; or for resale in the market; or for other purposes—all alike legitimate, though in a certain sense speculative and contingent.

It may be that fortunes are thus made or lost in a single venture but because this may be so, it does not necessarily bring such transactions within the statute. Great judgment, experience and forecast may in some cases not be sufficient to prevent loss and failure; while a venture at random may be exceedingly profitable.

Where there exists no intention to deliver the commodities, but to merely deal and speculate in them by pretended and symbolical purchases and sales at market prices, such as "options" or "futures;" or where the real transaction, though valid in form, is in fact fictitious and iniquitous in its consequences, under whatever form or guise made, or paraded for legal recognition, the courts have set their seal of condemnation upon them as gambling transactions and void.

Barnard v. Backhaus, 52 Wis., 593, approved and the law declared settled; 55 *id.*, 354; Cobb v. Prell, U. S. C. C., Kas., 22 Am. Law Reg., 611; Norton v. Blinn, 39 Ohio St., 145; Harper v. Crain, 36 Ohio St., 338; Waterman v. Buckland, 1 Mo. App., 45; Rouke v. Short, 34 Eng. Law & Eq., 219; Rumsey v. Berry, 65 Me., 570; Pickering v. Cease, 79 Ill., 328; Story v. Salomon, 71 N. Y., 420; Kirkpatrick v. Bonsall, 72 Pa. St., 155; Gregory v. Wendell, 39 Mich., 337; Eldred v. Malloy, 2 Colo., 320; S. C., 25 Am. R., 752; Cunningham v. Bank, 71 Ga., 400; S. C., 51 Am. R., 266; Whitesides v. Hunt, 97 Ind., 191; S. C., 49 Am. R., 441, and cases cited in these by the courts; Benjamin on Sales, secs. 541, 542.

And the better view, as to the proper construction of this statute is: that the note expressly made "absolutely void, and of no effect," was

even void in the hands of an innocent purchaser; for the statute declares it void, regardless of the guilt or innocence of the holder, or of want of notice of defects to any purchaser.

Cunningham v. Bank, 71 Ga., 400; S. C., 51 Am. R., 266; 1 Dan. Neg. Inst., secs. 197, 807; and the cases cited by the author under these sections; *Pickaway Co. Bank v. Prather*, 12 Ohio St., 497, at pages 505, 509.

While covert and latent defects, and defenses based thereon, as against negotiable instruments, are not to be encouraged, a positive law of the legislature, within its constitutional powers, cannot be abrogated or nullified by the application of any mere rule of commercial usage, though previously crystallized into law by express judicial sanction.

Instruments void by express statutory interception, should be relegated to the status of forged and non-contractual instruments, void in their interception.

I write my name on the fly-leaf of my new book for the purpose of identification and reclamation in case it be lost. In so doing I may not be chargeable in any degree with negligence, or even imprudence; and yet if some scamp detach the leaf, and skillfully produce and negotiate what purports to be my note, free from suspicion on its face, some one relying upon the genuineness of my signature, may in good faith buy it; and yet by well settled rule of law, it would be absolutely void in his hands, although he be deceived thereby. *Decamp v. Hamma*, 29 Ohio St., 467; *id.*, *Ross v. Doland*, 473; *id.*, *Winchell v. Crider*, 480; *Butler v. Carns*, 37 Wis., 61; 29 *id.*, 194.

Had the note been void because made so by statute, the purchaser would be in like situation; and the duty imposed upon him to inform himself as to the validity of the note would be no more onerous in the one case than in the other. In neither case could the paper have life, because dead in its inception, and once dead—always dead, is its appropriate epitaph. Though Martin may have held the note subject to defenses, it does not follow, as argued, that the remedy is against him instead of Keel.

The proceeds of the wagering transaction are by the defendants' acts and agreements in his hands, and plaintiff's remedy is properly against him as the "winner thereof."

The motion for a new trial is overruled and judgment entered upon the verdict.

Shillings & Allen, for plaintiff.

John Smick, for defendant.

LIBEL.

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[Cincinnati Superior Court, General Term.]

Force, Harmon and Peck, JJ.

† GEORGE CRIST V. BRADSTREET CO.

When words claimed to be libellous are a privileged communication made by a commercial agency, it is not error for the court to refuse to charge that the defendant is liable if careless and negligent in collecting the information, or to charge that the question is one of good faith, and that, unless the negligence was so reckless as to be equivalent to want of good faith, or to amount to evidence of want of good faith, the defendant is not liable.

FORCE, J.

This case comes upon a petition in error. The errors assigned are errors claimed to have been made in giving and in refusing special charges. These charges all bear upon one point, presented in various shapes, and the determination of that point determines the case.

The action is one for libel. Mr. Crist complains that the defendant below falsely and maliciously made statements concerning his solvency that injured him in his business as a dealer in lumber. It was pleaded, and was shown in evidence, that this Bradstreet Company was a company formed for the purpose of collecting and giving information to their customers, and it is claimed that they, in good faith, with the belief in the truth of the same, collected information and gave it, in confidence, to their customers, and to none others. It is claimed that this came under the head of a privileged communication. And, to meet that, the plaintiff offered evidence for the purpose of showing actual malice. The plaintiff claimed that the jury ought to be charged that the defendant, the Bradstreet Company, was liable if careless and negligent in the collection of the information. The court declined to give the charge, but did charge that the question was one of good faith, and that unless the negligence was so reckless as to be equivalent to want of good faith, or amount to evidence of a want of good faith, it was not a matter which would affect the question of liability.

This being an action for libel, that is, an action for maliciously publishing false statements, if the statements charged appear to be of such character and made under such circumstances as to be a privileged communication, they are not presumed to be malicious, but in order to make such statements actionable, actual malice must be proved.

Malice is the intent to do an unlawful injury. Negligence in some degree might be evidence of malice, but it is not itself malice. The written words in this case having been imparted to a person who had a right to the information, they were not malicious if they were imparted in good faith. Even if negligence in gathering information which is imparted in good faith, under privilege to another, be ground for some action, it is no ground for this action which is for maliciously publishing injuriously false statements.

Judgment affirmed.

Harmon and Peck, JJ., concur.

J. J. Glidden and I. M. Jordan, for plaintiff.

Wilby & Wald, *contra*.

† For charge to jury in this case, in special term, see *ante*, 618. A motion for leave to file a petition in error was overruled in the Supreme Court, and the above judgment thus affirmed, without report, January 29, 1889.

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I ' COMMERCIAL DRAFTS.

[Cincinnati Superior Court, General Term.]

J. R. SAYLER, (ASSIGNEE), V. MERCHANTS' NATIONAL BANK.

1. A draft for the exact balance remaining in the hands of the drawee to the credit of the drawer, constitutes an equitable assignment of such fund to the party in whose favor the draft is drawn.
2. A draft, drawn by a consignor upon the consignee of goods for the exact balance expected to arise from the sale of the goods, accompanied by a letter from the consignor directing the consignee to account to and settle with the holder of the draft for the proceeds of such sale, when made and delivered to the holder in payment of pre-existing indebtedness, constitutes an equitable assignment of the claim of the consignor against the consignee for the proceeds of the goods.

PECK, J.

This action was reserved to the general term upon the pleadings and a certified bill of evidence. The petition sets up more than twenty causes of action, each one founded on a claim to the proceeds of a draft or bill of exchange drawn by The Simpson & Gault Mfg. Co. in favor of the Merchants' National Bank. The drafts were made and delivered to the bank in payment of the indebtedness of the company to it a day or two before an assignment for the benefit of creditors was made by the Simpson & Gault Mfg. Co., and the contest is between the assignee and the bank as to the right to the funds and property in the hands of the parties upon whom the drafts were drawn. None of them had been accepted by the drawees at the time of the assignment. They are in form as follows:

"CINCINNATI, May 22, 1885.

"On demand, after sale of goods, pay to the order of Merchants' National Bank eight hundred and thirty-nine 40-100 dollars.

"To H. P. Gregory.

"THE SIMPSON & GAULT MFG. CO.,
 "By J. C. O'HARA,
 "Treas."

There are one or two of them which omit the words "after sale of goods;" being simply orders to pay certain specified sums of money to the bank; but nearly all of them are of the form of the one of which I have read.

At the time that the drafts were delivered to the bank there was a circular letter prepared by the treasurer of the Simpson & Gault Company, to accompany each one of the drafts, which letters were sent by the bank to the respective drawees. One of the letters is set forth in the bill of evidence, and is as follows:

"MR. T. L. DILLE, Tyler, Texas:

"DEAR SIR: We to-day make draft on you in favor of the Merchants' National Bank of this city for \$221.25, to cover the amount of our stock in your hands, making same payable on demand after sale of goods in your hands. You will recognize this as merely a transfer of our account, reporting and settling with the bank for any sales effected since the last settlement with us, sending us a duplicate report of such sale. We request no advance of money until you are prepared to settle in the usual manner, and only for such stock as you have on hand. We hope that you will comply with our request to accept the same.

"Your friends,

"THE SIMPSON & GAULT MFG. CO.
 "J. C. O'HARA,
 "Treas."

In most cases the drawees were the holders of goods which had been consigned to them by the Simpson & Gault Mfg. Co., the consignees to make sale of the goods, and having the right to sell them for any sum that they could get over the minimum fixed by The Simpson & Gault Co., and being required to account to The Simpson & Gault Mfg. Co. for that amount after a sale was made.

An entry was made in the books of The Simpson & Gault Co. at the time the goods were shipped, charging the consignee with the amount so fixed as the minimum for which they would be required to account; and it appears that in each instance where the drafts were not against money, they were drawn for the amount so standing upon the books of The Simpson & Gault Mfg. Co.; that is, the drafts were for the whole amount charged to the parties, and for which the parties were expected to account to The Simpson & Gault Mfg. Co. And the question is whether those drafts accompanied by the letters constituted an equitable assignment to the bank of the property in the hands of the consignees at the time these drafts and letters were delivered to the bank, or whether the property still remained in the Simpson & Gault Mfg. Co., so that it passed to the assignee under the general assignment for the benefit of creditors.

The general rule is that where a draft is drawn upon a particular fund, and for the exact amount of that fund, it constitutes an assignment of the fund in the hands of the drawee; (see 2d Leading Cases in Equity, pt. 2, p. 1643) and there are one or two of these drafts coming within that rule, the goods having been sold and the drafts specifying the exact sum of the money in the hands of the drawees.

The principle question, however, is as to those which were drawn against the proceeds of the goods which had not yet been sold, and which were by their terms payable after the sale of the goods.

The drafts themselves might not constitute an assignment, but we think that when taken in connection with the accompanying letters directing the consignees to account and settle with the bank for the proceeds of the goods on hand, they amounted to an assignment to the bank of all the interests that The Simpson & Gault Mfg. Co. had in the goods at that time; that they were virtually orders upon the consignees transferring to the bank all the rights and the interests that the consignors had in the property. It is true that the property had not been sold and the proceeds had not been realized, and the drafts were not payable until sale could be made; but that did not stand in the way of an equitable assignment. There are numerous cases holding that a man may in advance assign his salary to be earned, or the proceeds of goods to be sold. *St. John v. Charles*, 105 Mass., 262; *Burns v. Carvalho*, 4 Mylne & Craig, 690; *Nesmith v. Drum*, 8 W. & S., 9. And we think that the general principles which decide this case, are to be found in the case of *Gardner v. National City Bank*, 39 O. S., 600. It is true there was not such a case of draft against goods, but the case, in many of its aspects, is parallel to the case at bar.

One of these drafts which I have not mentioned, was drawn for the balance of goods in the hands of the parties. A draft had been delivered to another bank for the amount of money in the hands of the consignee of the goods sold, and then the draft was delivered to the Merchants' Bank for the balance of the goods which remained unsold. We do not think that state of affairs makes any difference. The entire balance remain-

ing in the hands of the consignee was covered by the draft, and it is within the rule already mentioned.

The judgment will be for the defendant.

Force and Harnos, JJ., concur.

Sayler & Sayler, J. C. Harper, and Jos. Wilby, for plaintiff.

J. W. Herron, for defendant.

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LIMITATIONS OF ACTION.

[Hamilton Common Pleas, Filed October 11, 1886.]

ESTHER M. CAMERON V. CINCINNATI (CITY) ET AL.

Where a street has been used by a railway company belonging to the city, and the abutting property thereby injured in value by injury to the access, but the taking was lawful and not a usurpation, a right of action by a mortgagee of the abutting property for injury to his mortgage security is, as is also the owner's right of action, an injury to the rights of plaintiff not arising in contract under sec. 4982 Rev. Stat., and is barred in four years.

HUSTON, J.

Action to recover \$2,000 damages to mortgage security by wrongful acts of city in occupying and using McLean avenue, in front of the lot mortgaged, with tracks, etc., of Cincinnati Southern Railway. Mortgage dated March 27, 1875. Avenue taken by city for railroad purposes January 11, 1877.

City demurs:

Question: Is the claim barred by statute of limitations—4 years? Unless barred, the action is maintainable. 15 Ohio, 726; 35 Ohio St., 317.

Counsel for plaintiff assumes that this is a real action—the occupation of the avenue by railway, a disseisin—an adverse possession, and that therefore the 21 years limitation applies.

We think this assumption erroneous.

This is not an action to recover possession of land, or rights appurtenant to land—not an ejectment—not an action to enforce mortgage lien—in which the 21 years limitation applies.

But it is an action to recover damages for injury to property rights, for injury to the access, thereby diminishing the mortgage security, not against the owner, but a third intervening party.

If action were brought by owner of fee for damages from same cause, the nature of the action would require the same kind of evidence to sustain it practically as this case, only the measure of damage would be different; the mortgagee could only recover her actual loss of security, the unpaid balance, after sale of fee, at most. The owner would not be so limited.

But to that kind of an action the same statute of limitations would apply, to owner and mortgagee.

It is clear to us that this action comes within sec. 4982 Rev. Stat. limiting "an action for an injury to the rights of the plaintiff, not arising on contract," etc., to four years after cause of action accrued. The cause of action accrued in this case when the avenue was taken for railroad purposes, January 11, 1877.

It is immaterial that at that time it was not known how much the lot, thus damaged, would fall short of paying the mortgage debt. The damages would be a matter of evidence adapted to the peculiar circumstances of this case. It might have been necessary, if action had been brought within the four years, to postpone final disposition until after foreclosure.

The view we take of this question is supported by the opinion of the Supreme Court in the case of *Carpenter v. Canal Co.*, 35 Ohio St., 307, 317: "Doubtless a mortgagee could maintain an action at law for injury to his rights. * * * Plainly such an action would be barred in four years, and the statute would begin to run at time of the injury."

True the court say that the *gravamen* of that action was alleged fraud; but the other element entered into complaint as ground for relief, so as to call for an expression from the court.

But plaintiff relies on the case of *Railroad Co. v. Hambleton*, 40 Ohio St., 496, and claims that her injury is analagous to that where the wrongful acts amount to a permanent destruction or appropriation of the owner's easement in the street, for which his right of action would not be barred until 21 years had perfected the prescriptive right.

That was a case where the injury complained of was from a change of grade.

The court on page on 502 say:

"This additional use of the street, by laying the new track and raising the grade from that at which was first laid, is the ground of liability of the defendants. These new uses of the street, *in the absence of any agreement with the adjacent land-owner or of an appropriation of the right to so use the street, by a proceeding for that purpose*, could not become complete until the same had been so used for the period of twenty-one years." (Our underlining).

In that case there had been no agreement nor any appropriation by legal proceedings—a clear case of usurpation.

Very different this case. The city took the avenue for railroad purposes by virtue of a special act of the legislature, passed subsequently to the acts complained of in the case in 40 Ohio St., and therefore could not be called a usurper. It acted by authority of law. It's right to the street did not, does not require 21 years to perfect it. But the city was not protected against damages to abutting lot owners by that legislation.

We do not see that the case of *Railroad Co. v. Hambleton* is authority for the case.

The court cannot protect the plaintiff against the legal consequences of her own laches, her claim being clearly barred.

Demurrer sustained. (Jan. 17, 1887.)

Miles Johnston, for plaintiff.

Coppock, Cox & Gallagher, for defendants.

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SERVICE—INJUNCTION.

[Hamilton Common Pleas, February 7, 1837.]

CINCINNATI, HAMILTON & DAYTON R. R. CO. v. THOMAS EMERY
AND JOHN J. EMERY.

1. The laws of New York authorize a suit to be brought in that state by a non-resident against a foreign corporation when the cause of action arose in that state, and authorize service to be made upon the president of the foreign corporation.
2. A judgment obtained by default in New York by a resident of Ohio against an Ohio corporation, upon a cause of action arising in New York, where the service was made in New York upon the president of the corporation, will be valid in Ohio, irrespective of whether the corporation was doing business in New York, and whether its president when served with a summons, was in New York upon business of the corporation.
3. The C., H. & D. R. R. Co., an Ohio corporation, guaranteed the payment of the principal and interest coupons of certain bonds of the C., H. & I. R. R. Co., which by their terms were payable in New York. E, a resident of Ohio, held certain of these coupons, the payment of which had been demanded and refused at the designated place of payment in New York, and brought an action in New York against the guarantor upon its guaranty, and service was had upon the president of the guarantor in New York. The guarantor permitted judgment to be taken against it by default, and afterwards brought an action in Ohio, to restrain E from issuing execution upon the judgment, claiming that it was not doing business in New York and that its president was not there upon its business, at the time when he was served with process. A temporary injunction was granted, without notice, and E moved to vacate the same. *Held*: That the injunction could not be sustained. That the judgment is valid in New York, and must be respected accordingly in this state.

The facts in the case, sufficient for a proper understanding of the decision, are as follows: The Cincinnati, Hamilton & Indianapolis Railroad Company, an Ohio corporation, issued its mortgage bonds with interest coupons attached, payable at the office of Winslow, Lanier & Co., in the city of New York, and the payment of the same was guaranteed by the plaintiff. The defendant, John J. Emery, held certain of these coupons which had matured, the payment of which had been demanded and refused at the place of payment in New York City. In 1882, he brought an action in the Supreme Court of the state of New York, for the city and county of New York, against the plaintiff upon its guaranty of the payment of these coupons. Service of summons and a copy of the complaint was made upon Hugh J. Jewett, the president of the plaintiff in the city of New York. The plaintiff permitted judgment to be taken against it by default in December, 1882, for the sum of \$121,238.15 and costs.

In October last the plaintiff filed its petition in this court, averring, among other things, that the defendant caused the said suit to be brought and judgment to be obtained in New York in the name of John J. Emery; that the plaintiff and the defendants are citizens of Ohio; that plaintiff had its principal office in Cincinnati, Ohio; that it transacted no business in the state of New York at the date of the commencement of said suit, and had no office in said state, or agent or officers there for the transaction of any business, and that the said Hugh J. Jewett was not in New York at the time of the service upon him, upon business of the plaintiff; that the judgment is wholly void; that defendants have at sundry times caused execution to be issued upon the judgment and to be levied upon cars of the plaintiff in the state of New York, and threatens to again cause such

execution to issue and to again seize the cars of the plaintiff which may be passing into, through and from the state of New York in the prosecution of the plaintiff's business as a common carrier, to its injury and detriment, and prayed that the defendant might be enjoined from issuing executions upon said judgment, etc. Upon the filing of the petition, a preliminary injunction was granted without notice, and the defendants filed their motion to vacate the same.

HUSTON, J.

On the hearing of the motion, a number of questions were discussed by counsel, orally and in briefs submitted; but a somewhat careful consideration of the case has impressed us, that one of these questions is decisive of the controversy as affecting the right of injunction, and we, therefore, confined our opinion to that one question, which may be stated as follows:

Is the judgment in New York such a judgment as the court, in this case, is bound to hold as valid? It would be superfluous—to the counsel interested,—in our treatment of this question, to mention all propositions more or less pertinent. Some are taken for granted.

1. Is the judgment valid in the state of New York? 1. The presumption of law is in favor of its validity;—it having been rendered in a court of general jurisdiction. *Ram on Judg.*, 19; *Camp v. Bostwick*, 20 Ohio, 337, 344.

2. But the judgment is impeachable in this state for want of jurisdiction in the court rendering it. No other ground is claimed.

To successfully attack the judgment, it must appear from the record that the court had not jurisdiction over either the subject-matter or the person.

The cause of action arose in the state of New York—where the coupons were payable and default was made; and, therefore, the right of action accrued there, by virtue of the statute of that state (sec. 1780, Rev. Stat., vol. 4). This is not disputed.

3. Did the court have jurisdiction of the person—that is, of the C. H. & D. R. R. Co.?

This depends upon the sufficiency and legality of the service of process in the case; and here is involved the vital point, whether determined according to New York or Federal law.

Section 482 of the New York code, then in force, provides that:

“Personal service of a summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:”

“To the president, treasurer or secretary; or if the corporation lacks either of these officers, to the officer performing corresponding functions under another name.”

The service in question was made by the proper officer delivering a copy of the summons (and also of the complaint) in the city of New York to Hugh J. Jewett the president of the said railroad company.

The Court of Appeals of the state of New York, in a number of cases, has sustained this kind of service, under the same law, and held it to be binding on the corporation. *Hiller v. B. & M. R. R. Co.*, 70 N. Y., 223, (1877); *Bank v. Lacombe*, 84 N. Y. 367, (1881); *Pope v. Terre Haute Car and Mfg. Co.*, 87 N. Y., 137, (1882).

In the last case, the court say:

"It is for the legislature to determine what shall be a sufficient service of process for the commencement of an action, subject only to the limitation that the service must be such as may reasonably be expected to give the party proceeded against notice."

"It appears that the defendant, being a foreign corporation, had no place of business and transacted no business and had no property within this state, and that at the time its president was served he was temporarily within the state for purposes of his own, on his way to a sea-side resort, and not in his official capacity or upon any business of the defendant. The claim is, therefore, made, that he in no way represented the defendant, and that service upon him could not bind the defendant."

"In order to make such service effectual it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation."

"The object of all service of process for the commencement of a suit or other legal proceeding, is to give notice to the party proceeded against, and any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law (*Gibbs v. Queen's Ins. Co.*, 63 New York, 114)."

"Although the officer served in this case, was not then engaged in the business of the defendant, it became his duty as its officer to take notice of the commencement of the suit, or to convey such notice in some proper way to the defendant; and that he would do so could reasonably be presumed and expected."

"A judgment to be rendered in an action thus commenced against foreign corporation will be valid for every purpose within this state, and can be enforced against any property at any time found within this state. Its effects elsewhere need not now be determined."

We quote thus fully from the decision of the court of appeals, because directly applicable to the sufficiency of the service and the validity of the judgment in New York in controversy here, and sustaining both. But the facts presented in this case make a stronger showing than in that case, as to business transacted by the Railroad Company in the state of New York and the presence of the president of the company there in connection with such business; which, however, seems to be immaterial.

II. The judgment being valid in New York, the question remains, as to its validity in this state, and how it must be regarded by this court for the purposes of this action?

1. It is claimed on behalf of the plaintiff, that the question here is one arising under the Federal Constitution, art. 4, sec. 1, and the Act of Congress of May 26, 1790, 1 Stat., at L. 122,—in the absence of which, the record of said judgment would have no force in Ohio.

Article 4 sec. 1, Const. requires that:

"Full faith and credit shall be given in each state to the public acts, records, and the judicial proceedings of every other state."

The Act of Congress 1790 provides for the authentication of such acts, records and judicial proceedings, and that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Now, is this such a judgment as is covered by these provisions of the Federal Constitution and Law? Of course, for an answer, we must appeal to the decisions of the Supreme Court of the United States.

2. It is further claimed that these decisions are explicit upon two propositions:

"1. That judgment, without personal service, or its equivalent, is void."

"2. That service upon the agent of a foreign corporation,—not doing business in the state, is null and void, so that there is no judgment."

In support of the second proposition—which is the one pertinent here—reference is made to *Morawitz*, sec. 980; 95 U. S., 714; 106 U. S., 351; 110 U. S., 151. The section 980 refers to service of process on foreign corporations at common law, and does not apply.

The Supreme Court decision cited involved the construction of state statutes, other than those of New York, as to service, and essentially different from those of New York, and, therefore, are not fairly applicable to this case.

The case of *St. Clair v. Cox*, 106 U. S., 351, seems to be mainly relied upon. This case does support the proposition of counsel, where the state statute as to service on a foreign corporation implies that it must be doing business in the state. The court construes the words, "agent of such corporation within this state" as not to "sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there." But the court interprets this statute, which related to corporations generally, in accordance with the construction put upon it by the Supreme Court of Michigan, where the case arose, in 19 Mich., 336.

This decision, strictly considered, is in harmony with the expression of that court in numerous cases, to the effect—that the interpretation of the statute laws of a state by its own courts becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature; and the Supreme Court is bound to accept such interpretation, so far as it comports with the constitution of the United States, although it may involve that court "in seeming inconsistencies—as where states have adopted the same statutes, and their courts differ in the construction, *Hampton v. McConnel*, 3 Wheat., 234; *Shelby v. Guy*, 11 Wheat., 367; *Jackson v. Lamphire*, 3 Pet., 280; *Bank v. Buckingham*, 5 How., 317; *Jeter v. Hewitt*, 22 How., 473; *Christy v. Pridgeon*, 4 Wall., 196; *Nichols v. Levy*, 5 Wall., 433.

In the last case the court say:

"Being a local law and involving a rule of property, we adopt the construction which has been given to it by the highest judicial tribunal of the state."

The latest announcement of the Supreme Court on this subject that we have found (and which seems to have escaped the notice of counsel), is in the case of *Burgess v. Seligman*, 107 U. S., 20, (1882).

The question in the case arose upon the construction of a statute in Missouri, and the parties were citizens of different states.

The court say (pp. 34-35):

Syllabus 3. "The courts of the United States, in the administration of state laws in cases between citizens of different states, have an independent jurisdiction co-ordinate with that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

Syllabus 4. "Where, however, by the course of the decisions of the state courts, certain rules are established, which become rules of

property and action in the state, and have all the effect of law especially with regard to the law of real estate, and the construction of the state constitutions and statutes, the courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment: as they always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions of the state tribunals, or where there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the state courts after such rights have accrued."

And in their opinion the court conclude:

"As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions, that may arise from language and expressions used in previous decisions."

It was manifestly the purpose of the court, in making this definite statement, to have clearly understood the proper functions of that court in that class of cases which lay along the dividing line of jurisdiction between the state and federal courts, prominent among which are the cases involving the construction of state statutes. See, also, *Sipes v. Whitney*, 30 Ohio St., 69; *Pennywit v. Foote*, 27 Ohio St., 600.

The conclusion we must arrive at is, that the service upon the president of the plaintiff in New York in conformity with the statute of that state, bound the corporation, and the judgment based thereon is valid.

The sufficiency of such a service having been declared by the highest court of New York, and the parties not being citizens of different states, the Supreme Court, of the United States, if this question of service were properly before it, would adopt the construction of the New York court, however much it might differ from that court in its opinion of the propriety of such construction.

It follows, that the defendant, John J. Emery, has a right to issue and enforce an execution upon his said judgment in New York against property of the plaintiff in that state. The judgment being valid, unreversed and unsatisfied, the petition does not state facts to warrant the intervention of this court as prayed for. While this court has no power to stay proceedings in the New York court, it does have the power, in a proper case, to act *in personam* upon the parties, who are residents within the territorial limits of its jurisdiction, and enjoin them from further proceedings in such suit. A proper case would probably be, where execution was levied upon property of the judgment debtor in the foreign state, which is exempt from execution by the law of this state. *Snook v. Snetzer*, 25 Ohio St., 516.

True, the enforcement of the judgment in New York by seizure of plaintiff's cars may seriously inconvenience and injure the company in the prosecution of its business; but would not the same result have attended a judgment in Ohio? The railroad company might well complain of the laches of its chief officer, in not advising the company when served with process, or in failing to defend the suit if there was any ground for it; but it made its obligations to be performed in the city of New York, presumably with knowledge of the remedial laws of that state, and its own default gave to the defendant, Emery, a right of action there; and now it

asks this court to relieve it against the legal consequences of its own negligence and default.

We cannot see any good reason for equitable interference.

Motion to vacate injunction granted.

Wm. M. Ramsey and Edgar M. Johnson, for plaintiff.

Herbert Jenney, for defendants.

PUBLIC OFFICERS.

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[Clark Common Pleas.]

STATE OF OHIO V. HENRY C. WILLIAMSON.

STATE OF OHIO V. WM. DAVIDSON.

1. A township trustee is "an officer under the constitution and laws of this state" within the meaning of sec. 6909 Rev. Stat.
2. Said sec. 6909 read in connection with secs. 1530 and 1497, Rev. Stat., define three essentially distinct offenses, which may be committed by such "officer" in exacting compensation from the township treasury, to-wit: 1st, For services not performed; 2d, at a rate greater than one dollar and fifty cents per day; 3d, in the aggregate exceeding one hundred and fifty dollars per year.
3. An indictment against such officer under said sec. 6909, which, as the only description of the offense, avers that the defendant charged and received "a fee more and greater" than allowed by law for doing his official duty, is essentially insufficient; and is not within sec. 7215, Rev. Stat.

MOTION to quash indictments found by grand jury against Trustees of Springfield Township for misconduct in drawing more salary than the amount fixed by law.

WHITE, J.

The indictment, in each of the above entitled cases, contains two counts, in each of which the defendant, being a public officer, a township trustee, is charged with the crime of extortion.

Motion to quash the indictments have been filed in both cases, and, as they raise the same questions, will be considered together.

In each case the defendant therein, by the first count is accused of having "charged," and in the second count of having "received" unlawfully and knowingly "a fee" more and greater than was then and there allowed to him by the laws of the state of Ohio for executing and doing his official duty in attending to the business enjoined on him by law as such township trustee, to-wit: The sum and fee of "three hundred and thirty-nine dollars" in one case, and "three hundred and fifty-eight dollars and fifty cents" in the other.

The indictment is laid under sec. 6909 of the Rev. Stat., which in substance, so far as applicable, enacts:

"An officer under the constitution and laws of this state who knowingly asks, demands, or receives any fee or reward, other than is allowed by law, to execute or do his official duty, or knowingly charges, asks, demands or receives any more or greater fees or costs than are allowed by law for such official duty * * * shall suffer the penalty therein named."

A township trustee is an officer "under the constitution or laws of this state," within the meaning of said sec. 6909.

To determine when such "officer" has violated this section of the statutes, it must be read in connection with sec. 1530 of the Rev. Stat., which, so far as pertinent to the issue here made, is as follows:

"Each trustee shall be entitled to * * * one dollar and fifty cents for each day's service in the business of the township, to be paid out of the township treasury; but in no township shall the compensation of any trustee exceed one hundred and fifty dollars, to be paid out of the treasury, including services in connection with the poor, for any one year."

The "services in connection with the poor" therein referred to are compensated under sec. 1497 which, so far as relates to the present subject, provides:

"The trustee shall keep accurate accounts of all expenses incurred for the support of the poor within their respective townships, * * * together with an account of their own service rendered, which account shall be adjusted and settled semi-annually on the first Monday of March and the first Monday of September," in the manner therein described.

It seems that under these several sections a township trustee may offend against the law contained in sec. 6909 in either of three respects:

1. In exacting compensation from the township treasury for services not performed.

2. In exacting compensation from the township treasury more or greater than one dollar and fifty cents for each day's service. •

3. In exacting compensation from the township treasury within any one year in the aggregate exceeding one hundred and fifty dollars.

It is claimed, in support of the motion to quash, that the indictment does not inform the defendant, in either case, in which of these regards he is charged with having offended; nor how much, if any, of the \$358.50 or \$339.00 respectively charged and received by the defendant was lawfully due to him at the time of the alleged misconduct; nor that the same was charged and received by the defendant in his official capacity, or under color of his office.

"It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged. It should set forth the facts constituting the offense, so that the accused may have notice of what he is to meet, and so that the court applying the law to the facts charged against him, may see that a crime has been committed. *Lamberton v. The State*, 11 Ohio 282, 284. As to the degree of certainty which is requisite, the indictment must state the facts of the crime with as much certainty as the nature of the case will admit. In a criminal charge, in the language of Lord Mansfield, there is no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself; 2 Burr, 1127. *The People v. Gates*, 13 Wend., 317. The want of a direct allegation of anything material in the description of the substance, nature or manner of the crime, cannot be supplied by any intendment or implication." *White, J., Redmond v. State*, 35 Ohio St., 82, 83.

The indictment in this case must be read in the light of these principles. The substantive averment thereof, is that the defendant "charged" and "received" "a fee more and greater" than allowed to him by law. This language implies that he had a right to charge something, but he charged a fee more and greater than allowed to him. The offense therefore did not consist in charging for services not performed. Do the words

"a fee" mean that a number of lawful fees were charged in the aggregate exceeding one hundred and fifty dollars? or do they mean that at the semi-annual settlement under the poor laws already quoted his compensation then charged and received as "a fee" for services rendered to that date, were in the aggregate extorsive? or are the words to be confined to their more literal meaning of a single fee of \$1.50 for a single day's service? Again, the allegation is that the defendant charged a fee more and greater than allowed, to-wit: the sum and fee of \$339 or \$358.50 respectively. Does that mean that the whole sum is extorsive and excessive? or that part thereof is justly due and part is extorsive?

These questions are pertinent and indicate the indefiniteness of the charge. The indictment should have charged the facts upon which the grand jury based the accusation, not the conclusions drawn from such facts.

Judge Rex in announcing the opinion in *Ellars v. The State*, 25 Ohio St., 385, 388, states: "It is a well-settled rule of criminal pleading, that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proved, to procure a conviction, and this rule, in our opinion, has not been changed by the code of criminal procedure."

It must be conceded that each count of the indictment here charges either of the two violations already named, to-wit: That the defendant exacted more than \$1.50 per day, or more than \$150 per year, and might be sustained by proof of either charge. These two offenses are essentially distinct, and the defendant is entitled to know from the face of the indictment in which respect he is charged with having violated the law.

It is contended, however, that whatever defects appear upon the indictment, are cured by sec. 7215, Rev. Stat., which provides that an indictment shall not be deemed invalid for certain defects therein named, "nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." "But the defect mentioned," as stated by Judge Okey, in announcing the opinion in *Lane v. The State*, 39 Ohio St., 313, "relate to matters of form, and the words quoted apply only to such matters as are *ejusdem generis* with those comprehended in the preceding part of the section."

And again, still quoting from the same opinion, "Felonies must be prosecuted by indictment (Const., art. 1, sec. 10; *Dillingham v. States*, 5 Ohio St., 280); and while the legislature has the right to prescribe forms and dispense with many formal allegations in indictments, there is a limit to such power, and it is clear there is no authority in the legislature to enact, or in the court to determine, that that shall be a sufficient indictment which fails to inform the accused of the offense with which he is charged."

The motion to quash must therefore be sustained.

DEDICATION OF STREETS.

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[Superior Court of Cincinnati, General Term, June 14, 1886.]

GEORGE W. BOYCE ET AL. V. CINCINNATI (CITY.)

A deed, made by the owner of the property through which a street had been previously laid out by the city "platting commission," referring to the street and calling for it as laid out, constitutes a dedication to the public use by the owner of all his property within the lines of the street, in accordance with the provisions of sec. 2634 of the Rev. Stat.

PECK, J.

This case was reserved to the general term on demurrer to the answer. The action was brought by plaintiffs to enjoin the city from improving a part of Purcell Avenue, on Price Hill, upon premises of which they claim to be the owners. They allege that the portion of the lot so proposed to be improved has never been dedicated, and they ask an injunction against the city to restrain the improvement.

The city answers, admitting the intention to make the improvement, and that the preliminary steps have been taken for that purpose. It is further alleged that Purcell Avenue is one that was laid out by the platting commission, and that the property is held by the plaintiffs as lessees under a lease from Julia H. Sampson who holds under a deed from John Stryker; that John Stryker made this deed to her after the plat had been duly recorded by the platting commission, and that in it Stryker "referred to Purcell Avenue as laid out by said platting commission, and in his description of the lot called for said street as laid out."

There is also a cross-petition on behalf of the city against John Stryker and Peter F. Stryker, alleging that they are owners of the property formerly owned by said John Stryker, covered by Purcell Avenue, but that they claim the property so owned by them has not been dedicated to the public use, and asking that they be enjoined from interfering with the improvement of the avenue as it is averred they threaten to do. The claim to such relief is placed on the ground that the deed by Stryker so made was a recognition or adoption of the plat, and constituted a dedication by him of the portion of the street in controversy.

The statute relating to the platting commission provides that they shall lay off the unplatted portions of the city, and give public notice after having made out their plats; that then time shall be given for the hearing by property-owners, of objections and suggestions; that thereafter the plat, as finally adopted by the commission, shall be recorded, and that no money shall be expended by the city in any improvement of any street not shown upon the plats of the platting commission, the purpose apparently being to provide for the growth of the city in systematic manner. The statute, sec. 2634, further provides that "the owners of any portion of the ground so platted may, at any time, by a declaration of their intention so to do, properly acknowledged and recorded in the county recorder's office, accept such plan so far as it concerns their property, and such acceptance or the selling of lots referring to the plan or the streets and alleys therein laid out, shall be a statutory dedication of the streets and alleys in the property described in the acceptance, or of the streets or alleys called for in the description of the lots so sold, so far as the grantor has a right to dedicate the same."

This statute goes, perhaps, a shade further than the common law on the subject of dedications. At common law it is necessary, in order to show a dedication, that the intention of the owner to dedicate shall be shown in some way. It may be shown by record, by acts in *pais*, by deeds recognizing the street, by the owner's plat with reference to which he has sold lots, by his deed referring to a plat upon which the street is delineated. (Washburn on Easements, *133.) If the intention to dedicate be shown, and also an acceptance by or on behalf of the public, then the dedication is proved.

Now, this statute reverses the order of things. The acceptance of the city is indicated in advance, that is, the wish of the public authorities that there shall be a street in a particular place is first

officially indicated, and after that the only point remaining is to show the acceptance or consent by the owner. And the statute provides the method by which it shall be shown, either by his declaration acknowledged and recorded, or by his deed calling for the plan or for the streets and alleys shown on it.

In this case the allegation is that after the plan was made, Mr. Stryker made this deed to Mrs. Sampson, under which the plaintiffs claim, calling for Purcell avenue.

So far as the property which is covered by the deed, itself, is concerned, either at common law or under this statute, that would be a sufficient indication of his intention to dedicate that portion of the street. And the only question that remains is as to the effect of this deed upon portions of property owned by Stryker at other points on the street.

Now, it has been held—two cases in New York, *Matter of Twenty-ninth St.*, 1 Hill, 189; *Thirty-second St.*, 18 Wend., 128—that the recognition of a street by the owner of a single lot will operate as a dedication of all the property that he may own upon that street, at least to the next intersecting street on each side. This statute seems to go, as I have said, a shade further than that, for it says that the recognition by the deed shall be a statutory dedication of the streets and alleys called for in the description, so far as the grantor has a right to dedicate the same. And it seems to contemplate that it shall operate as a dedication by the owner, so far as it could affect any property owned by him on the street.

Such being the statute, and Stryker having made his deed after the adoption, publication and recording of the plan, he comes within the provisions of it, and his act amounts to a dedication to public use of the property owned by him, abutting on Purcell avenue.

The demurrer to the answer and cross-petition is overruled.

Force and Harmon, JJ., concur.

Boyce, for plaintiffs.

Coppock, Cox & Gallagher, for defendant.

COUNTY DITCHES.

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[Clark Common Pleas.]

DAVID NEFF V. SULLIVAN ET AL.

1. Section 4449 Rev. Stat., providing that no ditch improvement shall be made unless a sufficient outlet is provided, would seem to be violated by a proposed straightening, etc., of water courses, the effect of which would be to create back-water above, or overflow upon lower proprietors.
2. The persons entitled to personal service of notice of a proposed ditch improvement because "affected" thereby (Rev. Stat., 4457; 81 O. L., 211) are not merely those who are to be assessed, but include those lower proprietors whose lands may be flooded. And the personal knowledge of such persons is not equivalent to notice where they have not created an estoppel by not objecting to expensive improvements.
3. County commissioners may be enjoined from improving water courses or ditches in such a way as to increase the body of water which overflows a lower proprietor in freshets, until he has been heard and his rights ascertained and settled, for this is an unlawful appropriation of private property.

WHITE, J.

This action is prosecuted to restrain the defendants, by injunction, from proceeding, under the laws relating to county ditches, to establish the deepening, widening and straightening of Mud creek, a natural water course, and several lateral or spur ditches thereto.

Mud creek, a natural stream of water about six miles long, located in Miami and Clark counties, flows from its source in the former county with a sluggish current by a meandering southerly course, over lands, part of which are wet or marshy, for about five miles into and through the lands of plaintiff, and soon thereafter receives the water of Dry run, after which it continues in the same general direction about one mile, with a fall of only 278 feet in 100 feet, until it slowly empties itself into Mad river.

Dry run is an ephemeral stream, about five miles long, conveying into Mud creek from the east large quantities of water with rapid current in a short time during wet seasons, but practically without water during dry weather. Mad river, a large and turbulent stream, is subject, at times, to sudden and extreme rise and overflow. In the spring and fall of each year, especially during wet seasons, as the testimony shows, Dry run fills and empties in Mud creek with such rapidity and force that together with the rise in Mad river, occasioned by the same general causes, the waters of Mud creek are naturally blocked and forced backward in such quantities as to overflow the adjacent lands. Such inundation extends over from three to five acres of land, all of which is arable, and during its continuance renders that portion thereof unfit for cultivation or use.

Three large ponds, covering in the aggregate about five acres of ground, having no natural outlet, and containing considerable water at all seasons, are located near the source of Mud creek, in Miami county, on the lands of three of the five petitioners for the proposed improvement. The contemplated improvement consists in deepening, widening and straightening Mud creek, from its source to a point on the lands of Merrit H. Tatman, about two hundred rods north of plaintiff's land, a distance of about five miles, and in locating and establishing several spur ditches; and is intended, as claimed by the petitioners therefor, to drain the ponds already mentioned, and the territory contiguous to and along Mud creek, it being necessary, in the opinion of the engineer, to go that distance to obtain sufficient fall to drain such ponds.

The evidence, by a strong preponderance, shows that the effect thereof will be to increase and accelerate the flow of the waters of Mud creek to such a degree that, swelled and retarded by confluence with the swift current from Dry creek, and unable in such quantities to gradually, as now, escape into Mad river, they will by back water, exceed the present overflow on the lands of plaintiff to the extent of from five to ten acres additional, and thus make the same unsuitable for tilage or use during such periods. Plaintiff resides on the lands in question, which he owns in fee.

In proceedings to which plaintiff was not a party, and of which he had no notice, but otherwise regular, the commissioners of Clark and Miami counties, in joint session, established the improvement as contemplated. Pending the hearing of an appeal therefrom, this action was commenced.

Although plaintiff had no formal notice of such proceedings, he had knowledge of each step therein, and contributed money to a common

fund raised among the objectors thereto, which was intended to be, and was in fact, used employing counsel, who, in pursuance thereof, appeared and opposed the petition before the commissioners.

The plaintiff's lands, consisting of about 120 acres, are located on both sides of Mud creek, about 200 rods below the termination of the proposed improvement, and are not contiguous thereto, nor assessed therefor.

Two questions are presented for consideration. Is the plaintiff affected by the proposed improvement? Did the commission as under the circumstances acquire jurisdiction to establish the same?

The solution of these questions involves a consideration of the rights of proprietors of lands adjacent to natural running streams in the waters thereof, and the extent they are entitled to protection therein.

Water naturally flows from the high to the low lands, and is entitled to so flow.

It is the duty of the lower or servient estate to take the natural surface drainage of the dominant or upper lands; but it is still unsettled in Ohio to what extent the proportion of the dominant fee may concentrate the waters naturally accumulating thereon, and so cast them upon the lower estate. He cannot, however, drain his lands of water accustomed to stand or remain thereon in ponds or basins by means of artificial ditches, and thus throw them on the lands of his neighbor. In other words, he cannot compel his neighbor's lands to bear the burdens naturally belonging to his own. *Butler v. Peck*, 16 Ohio St., 343; *Tootle v. Clifton*, 22 O. S., 247.

The length of the ditches, or the proximity or distances of the estates does not alter this inflexible rule of the law of waters.

This right is not modified or abridged by the county ditch laws; but, section 4449 provides against its violation, by declaring that "no improvement shall be located unless a sufficient outlet is provided." The recognition of this right is not the denial of the equally well settled right of every riparian proprietor to drain his lands into a natural water course, which flows by or through his lands, provided he does not thereby increase the flow of the stream beyond its natural capacity and thus overflow and flood lower proprietors. *Gould on Waters*, sec. 274; *Cooper v. Williams*, 5 Ohio, 391 and *Fryor v. Warm*, 29 Wis., 511; *McCormick v. Horan*, 81 N. Y., 86.

And it is reciprocal duty and right of the lower riparian proprietor to receive the waters of a natural water course in its undiminished, undefiled and natural flow and channel. *Brown's Legal Maxims*, 374-5-6; *Gould on Waters*, sec. 204; *Cooper v. Williams*, 4 Ohio, 53, 287; 5 Ohio, 393; *Wood on Nuisances*, sec. 406-7-8; *Butler v. Peck*, 16 Ohio St., 343; *Tootle v. Clifton*, *supra*. Neither the upper nor the lower riparian proprietor owns the water in a natural water course. Each has only the use thereof, and cannot rightfully interfere with the other's proper use thereof. *Gould on Waters*, sec. 205; *Cooper v. Williams*, *supra*, and authorities cited above.

The rights so defined to the flow and use of waters in running streams are proprietary, and belong as an easement or incident to the soil. They are, in fact, part and parcel of, and frequently add or give value to the land itself. The owner of the land can only be deprived thereof without his consent under the power of eminent domain for the public good, after adequate compensation. *Cooper v. Hall*, 5 Ohio, 321, 323-4; *Cooper v. Williams*, *supra*.

"When real estate is actually invaded by backing water upon it by means of a dam, or by any superinduced additions of water, earth, sand or other material, or by having any artificial structure placed upon it, it is a taking for which the land owner is entitled to damages, even in the absence of a constitutional provision that private property shall not be taken for public use without compensation." Gould on Waters, sec. 243.

The rights thus defined may be lawfully appropriated for the purpose named, and in the manner provided by chapter 1, title 6 of the Rev. Stat., and the laws amendatory thereto, commonly known as county ditch laws. *Sessions v. Crunkilton*, 20 Ohio St., 349.

The filing of the petition, the original view by the county commissioners, and the report of the engineer, provided for by such laws, are preliminary steps only in the proceedings thereunder. Jurisdiction is not acquired for final action by the commissioners until service of the notice provided for by sec. 4457 (81 Ohio L., 211) thereof. Such notice must be personally served upon all resident land owners "affected" by the proposed improvement.

Those land owners whose lands are affected by the proposed improvement, are not confined within the meaning of the act to those whose lands are assessed therefor. The term has a broader signification, and includes all whose property rights are thereby appropriated. The extent of the appropriation is not material. If "affected," the landowner is entitled to have his day in court to have his damages assessed.

The effect of establishing the improvements contended for herein, would seem to be, as shown by the evidence, to accelerate and increase the flow of water in Mud creek. In times of dry weather this probably would be inappreciable, but in wet seasons and during freshets, especially when prolonged, the result must be to increase the overflow of plaintiff's lands in the manner already described. The consequences to him, during the continuance thereof, would be as disastrous as if the improvement were located upon his lands, and to the extent of such overflow, were actually occupied and appropriated therefor.

Section 19, of the bill of rights of the constitution of Ohio ordains, "when private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit in money, and such compensation shall be assessed by a jury."

The improvement now contemplated may be and has been declared by the commissioners, to be necessary and for the public health, welfare and convenience; but that fact alone does not authorize the appropriation of plaintiff's land without giving him an opportunity to be heard upon his constitutional rights to claim compensation therefor. No such opportunity has been afforded him.

This is not the case of a landowner standing by and failing to resort to any remedy, legal or equitable, while large and expensive improvements are established and constructed, and who is thereafter, by reason of such neglect, denied relief by injunction from the burdens thereof, as in *Kellogg v. Ely*, 15 Ohio St., 64.

Plaintiff, on the contrary, recommends himself by reason of his vigilance. He has neglected no legal remedy. His rights were ignored in the report of the engineer and by the commissioners. Notwithstanding which he availed himself of the standing others had obtained, by reason of being duly notified, and by uniting his means with theirs, in their names, sought to defeat the petition when it first appeared.

Denied protection at law, he now seeks it as a dernier resort, at the hands of the chancellor.

It is difficult to see, as contended by counsel, why he should be defeated here solely because he was aware of the proceedings before the commissioners, when such knowledge did and could not afford him any relief, or grant him compensation. Knowledge to have such effect must be accompanied by inaction on his part, when a fair regard for the rights of others imperatively demand that he should move.

It is clearly the duty of this court to restrain by injunction the unlawful appropriation of private property.

The court in this action is urged to consider all questions involved in establishing said improvement, and testimony was introduced by both parties, upon the hearing, without objection as to whether the same was necessary and conducive to the public health, convenience and welfare; but I apprehend that if the county commissioners acquired jurisdiction of the proceedings, their determination of these and all questions properly before them is final, and can only be reviewed in error or vacated by appeal, unless authority to do so is especially conferred by the statute regulating such proceedings.

It is further claimed under authority of *Miller v. Graham*, 17 Ohio St., 1, that secs. 4490 and 4491 of the laws relating to county ditches confer such plenary powers; that thereunder it becomes the duty of this court in this action to correct all errors of substance or form, or gross injustice, if any, committed by the commissioners in the proceedings before them. It seems, however, to be unnecessary in this case, to give construction to the sweeping provisions of such sections, as they do not apply when the commissioners assume to act without the statutory notice.

The Supreme Court, in the recent case of *Railroad Co. v. Wagner*, 43 Ohio St., 75, hold that the remedial provisions of said sections 4490 and 4491 do not apply where a resident owner of land has been assessed by personal tax placed upon the duplicate as part of the cost of a county ditch affecting his land, under a proceeding of which he has neither notice or knowledge, and perpetually enjoined the collection of such tax as illegal. (See also *Zimmerman v. Canfield*, 42 Ohio St., 463, 472.) The court in that case, it is true, annex to the lack of notice the want of knowledge of the proceedings as a basis for its decision. But then the improvement had been established and constructed, and the action being to enjoin the collection of the cost thereof, lack of knowledge was essential to escape the principle announced in *Kellogg v. Ely* *supra*, 15 Ohio St., 64. In the case at bar, on the contrary, the improvement has not been constructed. Plaintiff has been guilty of no laches, but has used his knowledge to protect his property.

Personal notice is an essential precedent step to jurisdiction of the proceedings by the commissioners. (Rev. Stat., sec. 4457; *Railroad Co. v. Wagner*, *supra*; *Ferris v. Bramble*, 5 Ohio St., 109; *Sessions v. Crunkilton*, 20 Ohio St., 349.)

Plaintiff's knowledge of the proceedings did not dispense with such notice, and the proceedings as to him are of no effect. Sections 4490 and 4491 do not and cannot, therefore, apply.

There is still another reason to seriously doubt the validity of the proceedings before the commissioners. That body derives its authority for establishing improvements of the character in controversy here, from,

and is limited in the exercise thereof by the statute. One of the inhibitions thereby imposed is that "no improvement shall be established until a sufficient outlet is first obtained." *Quere*: Is such "sufficient outlet obtained," when the effect of straightening, widening and deepening a natural water course is, as here, to create back water and overflow?

The question is jurisdictional and important; but as it was neither made nor argued, and is not essential to this decision, no opinion is now expressed thereon. Judgement will therefore be entered enjoining all further proceedings until the contemplated improvement is legally established.

Bowman & Bowman and Oscar T. Martin, attorneys for plaintiff.
Sullivan & Earnhart and Pringle & Johnson, for defendant.

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ASSIGNMENT FOR CREDITORS—LEASE.

[Superior Court of Cincinnati, General Term.]

MT. MORRIS NATIONAL BANK V. M. WERK ET AL.

1. If an assignment for creditors with preferences of property in Ohio made by a citizen of another state where preferences are legal must yield to an attachment by an unpreferred creditor of Ohio, on the ground that our courts will not aid in the exclusion of their own citizens from equality, yet this is not so where the attaching creditor is a citizen of the state where the assignment was made, and as to him the preferences will not be disregarded.
2. An assignment for creditors, including in general terms all the debtor's land, is sufficient to convey all without particular descriptions.
3. An objection that the deed of assignment must be recorded in the recorder's office to affect third persons, is available only to a purchaser for value, and can not be made by a mere attaching creditor.
4. Where a person gives a lease with privilege of purchase, and then assigns all his property for benefit of creditors, and the lessee elects to purchase, if there is a controversy as to the right to the purchase money between the assignee and attaching creditor of the assignor, the lessee is entitled to pay the money into court and have his title quieted against both, or to try the matter in an adversary suit.

FORCE, J.

A. D. Breed, a resident of New York, being insolvent, made a general assignment in trust for creditors, making large preferences for preferred creditors, leaving little or nothing for those not preferred. The assignment conveyed in general terms all Breed's property, real and personal, wherever situate, and was executed in accordance with the requirements of the law of New York for conveyances of real estate, and recorded as the law of New York requires assignments for creditors to be recorded. Breed owned, among other things, an improved lot in Cincinnati, which was held by Werk under a lease with privilege of purchase. The deed of assignment was duly filed and recorded in the probate court of Hamilton county, but not in the recorder's office.

The Mt. Morris Bank, a New York corporation, and one of the creditors of Breed, brought suit in foreign attachment against Breed, levying an attachment on the aforesaid lot, and in due course of time recovered judgment against him.

Werk, after the beginning of the suit in attachment, elected to purchase the premises, received deeds from Breed and from the assignee, and paid the price to the assignee, reserving enough to pay the claim of the bank if necessary, and brought suit to enjoin the bank from selling the premises under its attachment, and to quiet his title as against the bank as well as against Breed and the assignee. Judgment was rendered in Werk's favor, and the bank brought petition in error to reverse the judgment.

The deeds of Breed and the assignee conveyed whatever they had, and the attachment took whatever Breed had after the attachment. There was nothing to convey, and there was, in any event, nothing to attach, but the fee subject to Werk's right to purchase. Werk, upon paying the money into court, would have been entitled to a judgment quieting his title, leaving the bank and the assignee to contend for the money. But the parties had a right to try the matter all at once as an adversary suit, and they have done so.

It is objected that the deed of assignment is not sufficient to convey any lot of land for want of sufficient description. But the land named in the deed, being all the land owned by Breed, is susceptible of identification by extraneous proof; and nearly similar general words were, on that ground, held sufficient in *Barton v. Morris*, 15 Ohio, 408.

It is contended that as the property is transferred to the assignee without the words "heirs" or "assigns," the assignee took, in any event, only a life estate. But where land is conveyed by words which for the want of the word "heirs" pass only a life estate, yet if the conveyance is to a trustee upon a trust which requires a fee simple for its performance, the estate conveyed is enlarged into a fee simple by the trust. In the United States this rule applies to deeds as well as to devises. *Perry on Trusts*, sec. 320, and cases cited. And while this is ordinarily a rule of courts of equity, the Supreme Court of the United States has applied it also in an action at law. *Neilson v. Lagow*, 12 How., 110. The assignee therefore took a fee simple, such as Breed had.

The objection that the deed was not recorded in the recorder's office, cannot avail the attacking creditor. That objection can be made only by a purchaser for value.

The attachment cannot override the assignment, because it is a foreign assignment, or because it makes preferences among creditors, while the law of Ohio does not permit preferences in such deeds.

The Supreme Court held in *Sortwell v. Jewett et al.*, 9 Ohio, 180, that an assignment by an insolvent debtor residing in another state, executed as a deed in accordance with the law of that state, and conveying land in Ohio, is valid in Ohio and will not be superseded by a subsequent attachment.

There may be a dictum in *Johnson v. Sharp*, 81 Ohio St., 611 (see p. 620), that an assignment in another state, making preferences among creditors, valid by the law of such state, and assigning property in Ohio, must yield to an attachment in Ohio by an unpreferred creditor, a citizen of Ohio. And it has been so held at *nisi prius*, on the ground that the courts of Ohio will not aid another state in excluding a citizen from a participation in the proceeds of the assignment, when such exclusion is against the declared law of Ohio. But it has never been held, so far as we know, that a creditor resident in the state where the assignment was made, and where the preference was valid, could come into Ohio and obtain priority by attaching property in Ohio, on the ground that such

preference is against the law of Ohio. The contrary has been held *nisi prius* in this county.

Judgment affirmed.

Harmon and Peck, JJ., concur.

Gerard & Lampe, for plaintiff in error.

Kittredge & Wilby and Dayton & Warrington, for defendants in error.

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CLOSING SALOONS.

[Hamilton Common Pleas, Filed November 23, 1886.]

†JOHN J. MASSA V. STATE OF OHIO.

A statute requiring all places wherein liquor is sold in a city of the first grade of the first class (82 O. L., 185) to be closed at midnight, being a statute punishing an act which is *malum prohibitum* only, and not *malum in se* is not a violation of the constitution of the state, Art. 2, sec. 26, requiring all laws of a general nature to have a uniform operation throughout the state.

ERROR to the Police Court of Cincinnati.

HUSTON, J.

Massa was arrested for keeping open his saloon at 191 Vine street, in Cincinnati, and selling beer between 12 o'clock P. M. and 6 o'clock A. M., on October 18, 1886—was tried and convicted October 26, 1886, and fined \$5 and costs. The proper steps were taken to prosecute the action in this court to reverse the verdict and judgment of the police court.

The question raised involves the constitutionality of an act passed April 30, 1885, making it unlawful in cities of the first grade of the first class, to barter, sell or dispose of any intoxicating liquors, whether distilled, malt or vinous, on any day or night of the week between the hours of 12 o'clock P. M. and 6 o'clock A. M., except by a regular druggist, on the written prescription of a regular practicing physician, for medical purposes only. It requires all places where such liquors are sold or exposed for sale, except by regular druggists, to be closed between said hours. Any one violating this law, on conviction, shall be fined in any sum not exceeding \$100 and be imprisoned not exceeding 30 days, or both, at discretion of the court (82 Ohio L., 185.)

It is claimed that this act is in conflict with art. 2, sec. 26, of the constitution, which provides that: "All laws, of a general nature, shall have a uniform operation throughout the state."

The act applies at present only to Cincinnati: but it is general in form, and in terms applies to cities of the first grade of the first class now and in the future. It is not impossible, nor improbable, that other cities, besides Cincinnati, will become of that grade in time.

In case of *The State v. Pugh*, 43 Ohio St., 98, 114, the court say: "It is now too late to question the validity of the plan and classification incorporated in our statutes, and which has received the repeated sanction of this court. (*State v. Brewster*, 39 Ohio St., 653; *McGill v. State*, 34 Ohio St., 228; *State v. Powers*, 38 Ohio St., 54; *Bronson v.*

† See *Massa v. State*, 2 Circ. Dec. 6, reversing this case on other grounds.

Oberlin, 41 Ohio St., 476). It is not to be urged against, legislation, general in form, concerning cities of a designated class and grade, that but one city in the state is within the particular classification at the time of its enactment."

There is no doubt that the constitutional provision referring to is mandatory. (Falk *Ex parte*, 42 Ohio St., 638, 640.) The court in that case held that "a statute providing punishment for an act which is *malum in se* wherever committed, is a law of a general nature, and to be valid under the constitution, art. 2, sec. 26, must have a uniform operation throughout the state.

Now in this case before us, the act punishable is merely *malum prohibitum*, and the law (commonly called the midnight closing law) is of a general nature, and has a uniform operation, in the class of cities to which it applies, throughout the state.

Courts adhere strictly and uniformly to "the rule requiring the validity of a statute to be upheld and sustained, unless its repugnancy to the constitution appears beyond a reasonable doubt." McGill v. State, 34 Ohio St., 228, 245.

In the Falk case, 42 Ohio St., 638, 644, the court recognize the same rule in the following language:

"No judge should ever concur in holding a statute to be unconstitutional, unless he is satisfied that he is clearly right in so doing. State v. Hipp, 199, 38 Ohio St., 219. But we do not undertake to lay down any rule, by the application of which it may be determined whether any law is or is not within the inhibition."

Not being satisfied that this "midnight closing law" is clearly within the inhibition, it is our duty to sustain its validity. (February 7, 1887.)

E. G. Hewitt, for plaintiff in error.

Schwartz, for defendant in error.

WATERED STOCKS AND BONDS.

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[Cuyahoga Common Pleas.]

UNION TRUST COMPANY V. NEW YORK, CHICAGO & ST. LOUIS R. R. CO. ET AL.

1. Where a certificate of incorporation is duly approved, accepted by the proper state officers, and admitted to file, and a corporation proceeds to act as a corporation, and the state does not question its existence, the obligations of that corporation cannot be defeated by showing that the corporation was never duly incorporated.
2. The issue and delivery by a railroad corporation of fifty millions of dollars of paid-up stock, and fifteen millions of dollars of bonds secured by a mortgage on the railroad, in consideration of eighteen millions of dollars cash paid to the corporation by a syndicate, of which the directors are members, is unlawful, contrary to public policy and to the statutes of Ohio.
3. By the statutes of Ohio bonds and stocks issued in this manner are absolutely void.
4. Although the bonds may be enforceable by *bona fide* holders of the same, yet the mortgage is not negotiable, and it is void, although owned by a *bona fide* holder.

ACTION to foreclose a mortgage.

JONES, J.

This is an action brought by the plaintiff, the Union Trust Company of New York, against the defendant, the New York, Chicago & St. Louis Railroad Company, mortgagor, and other defendants, to foreclose a mortgage executed and delivered by said company March 1, 1883, to said plaintiff as trustee, to secure its negotiable bonds to the amount of ten millions of dollars. All the other defendants are either creditors or alleged lien-holders on the property of said company, or claim to have some interest connected with the subject-matter of the foreclosure.

One of the defendants, the Central Trust Company of New York, files a cross petition against the said railroad company, defendant, for a foreclosure of a mortgage on said railroad company's property said to have been executed and delivered by said railroad company to it as said trustee on the first day of December, 1881, to secure the negotiable bonds of said company to the amount of fifteen millions of dollars.

The trustees under the Car Trust certificates claim that they as trustees are the owners of all the cars, tenders, locomotives and rolling stock equipment used in operating said road, amounting in value to some four millions of dollars, and that they were all leased to said railroad company by the said car trustees on or about the first day of April, 1882, by an instrument in writing, which they claim, if not simply a lease, is a valid, conditional sale under sec. 3878, of the Rev. Stat. of the state of Ohio, passed March 6, 1882, which statute the trustees claim to have fully complied with. This instrument was deposited with the secretary of state, as required by the provisions of said statute.

The Union Trust Company, plaintiff, claiming as trustee under the second mortgage, challenges the claim of the car trust trustees and the validity of said lease or contract, or whatever it may be called, on several grounds:

1. Because it says that the alleged property, or a large portion of it, had belonged to, and had vested in the New York, Chicago & St. Louis Railroad Company before the creation of said car trust certificates, and that it passed to plaintiff as part of the security embraced and described in its first mortgage.

2. Because said transaction between said car trust trustees and said defendant, the New York, Chicago & St. Louis Railroad Company, was, when stripped of all pretenses, a mere loan of money, with substantially a chattel mortgage to secure the same, and that not being recorded as required by the Chattel Mortgage Act, it is void as against subsequent creditors and mortgagees in good faith.

3. That not being a conditional sale, sec. 3878 does not apply to any of the equipment, and if to any, certainly not to that portion of it which was on the road and was part thereof before the date of the alleged contract for lease.

The right of the defendant Central Trust Company of New York to have a preferred lien, or any lien whatever on said company's property by virtue of its alleged fifteen-million-dollar mortgage given to secure the same amount of bonds, is challenged and denied by several of the various defendants, who claim that said company never, in fact, became a consolidated corporation under the laws of Ohio; that the mortgage is invalid for want of corporate power, in said railroad company to make it under the circumstances; that it was substantially without consideration; that it was given to secure a fraudulent issue of bonds to its directors and the syndicate acting together for a common fraudulent purpose,

and was illegal and void under the express provisions of the statute.

The defendant, the New York, Chicago & St. Louis Railroad Company, makes the above allegations, substantially in its own behalf. The Lake Shore Company also sets up substantially the same allegations against the validity of the mortgage given to the Central Trust Company, its claims being based upon a judgment that it obtained against said railroad company since its affairs passed into the hands of a receiver.

The several defendants, Hollins & Co., H. B. Hollins and other judgment creditors of said road, all join in a similar assault on the validity of said fifteen-million-dollar mortgage.

The voluminous evidence, pleadings and documents in the case, show the origin of the said New York, Chicago & St. Louis Railroad Company; the organization of its constituent company; the alleged consolidation; the purposes for which the scheme was originated, and all the facts in regard to the issuing of the various bonds and mortgages involved in this suit. We have carefully weighed and deliberated upon this voluminous testimony and the documents and pleadings in this case, and considered the exceptionally able arguments and briefs of an array of unusually astute and distinguished counsel, as it was entirely befitting the merits of the cause, for enormous sums of money involved in dispute therein, and the great importance to the commercial world of the principles governing this and similar cases; but in giving our decision on the various points involved, it is not practicable and we shall not attempt, to recite the various documents, transactions or evidence, or to go over the matter with anything like detail; but shall content ourselves with doing little else than to give the results of our deliberations in the case.

1st. It is claimed, and we find it to be true, that the consolidation of the five constituent railroad companies composing the New York, Chicago & St. Louis Railroad Company, was not made in accordance with the authority of sec. 3380, of the Rev. Stat. of the state, in two respects:

1. The several roads attempting to consolidate, had not, at the date of said attempted consolidation, "been built," nor were they then each of them, "in process of construction as required by the statute.

2. The statute only authorized a consolidation with roads in adjoining states, while the consolidation attempted in this case was the Ohio road with two roads in adjoining states, and also with two roads in states that did not adjoin the state of Ohio. But in view of the facts that the consolidation was attempted and apparently completed by colorable proceedings in a formal way; that it was approved by the proper state officers, and the certificate of its incorporation, duly certified, admitted to record in the office of the secretary of state of the state of Ohio, and its rights as such corporation were never challenged by the state; that as such it has acquired and disposed of valuable property, and incurred numerous obligations of various sorts, we hold that under the decision in the Perun case (41 Ohio St., 481), and other similar decisions, it is entitled to be considered at least a corporation *de facto*, with power to mortgage its property.

The consideration which has caused doubt upon this point is the fact that there is no law authorizing just the consolidation that was made, if every form of the statute had been fully complied with. But, notwithstanding this fact, it is clear to us that there is no way to surmount the difficulties involved in the situation but to hold that it is a corporation

de facto, that its acts are binding on lien-holders as well as the defendant which is estopped from disputing it, and that its mortgage is efficacious, if right in other respects to create a preferred lien upon its property.

2d. In the second place, we have come to the deliberate conclusion that the transfer in a lump of fifty millions of dollars of its capital stock as paid-up stock, and fifteen millions of dollars of the bonds of the New York, Chicago & St. Louis Railroad Company, secured by said mortgage to said Central Trust Company, by the directors of said roads, to themselves and to other members of the said syndicate, was in effect, a fraudulent sale of said stocks and bonds in consideration of the sum that had theretofore been advanced or agreed to be advanced by the members of said syndicate for the construction of said road, to-wit, in round numbers about eighteen millions of dollars. We think there are numerous things which not only indicate, but demonstrate, that this was the real nature of the transaction, and that, in fact, it bore no resemblance to the fair purchase of a railroad of the syndicate by the said railroad company for a lump sum in bonds and stocks. And some of these considerations are as follows: The road was built for the New York, Chicago & St. Louis Railroad Company. It was partially, at least, constructed on land which had been condemned by it as a corporation under its power of eminent domain conferred upon it by the state. The road could not have been completed without this kind of aid. The syndicate did not agree to fully construct and equip the road, but only agreed to form a pool to help to pay for constructing it. The bonds of the company were only to be delivered to the subscribers to the fourteen-million-dollar pool as fast as their subscriptions or their assessments were actually paid. The road, when completed by the contractors as far as they had agreed to do it, was to be delivered to the railroad company itself, and not to the syndicate; and in this very fifteen-million-dollar mortgage in controversy, executed December 1, 1881, long before the final settlement, it is fully recited that the said railroad company then owned, and was then in possession of said road, depots, etc., and that it was then indebted for the money advanced—by the syndicate of course—for building said road, constructing depots and other appliances. If the mortgage had recited on its face that it was to enable the company to buy a railroad, the mortgage would then have disclosed upon its face that the company then had no railroad whatever to mortgage. The object of the mortgage was to secure bonds to sell, to repay money advanced to it by the syndicate for building it. And it makes no difference, in our opinion, at all that a little different coloring was attempted to be given to this transaction, in the final so-called settlement, when the road was formally delivered to the syndicate, and by the syndicate to the road. The facts cannot be changed in the least thereby. We think there can be no doubt that the railroad company really in equity owned the road as fast as it was constructed, subject, of course, to any liens or liabilities thereon, and that the only redress the members of the syndicate would have had for the money advanced, if the railroad company had refused to issue the bonds and stocks in question, would have been to have sued the company, or to have asserted, in some way, their lien, if they had any, for the definite sum for which they had a claim. The assertion that the syndicate owned the road at any time, is equivalent to asserting that they perpetrated a gross fraud on the state in condemning land for their own use by fraudulently pretending that it was for the railroad company, in the manner authorized by the statute. There is no

reason for believing that this road was worth any more than it cost. The sum advanced by the syndicate was a definite and determinate sum; the bonds were all made to sell, and the stocks were all to be subscribed for and paid for in money or in money's worth, as prescribed by the statute; and we do not see how anything else can be made out of the transaction than a sale of sixty-five million dollars of bonds and stocks, as an entirety, to the directors and their partners in this scheme, for the sum of eighteen millions of dollars, or thereabouts, advanced by the syndicate.

3d. That this disposition of said stocks and bonds was made by persons assuming to act as directors of said company, but really acting wholly in their own interests and as servants and members of the said syndicate, without a dollar of stock having ever in good faith been subscribed for, or a dollar of it ever paid, either in the consolidated company, or in the five constituent companies of which it was composed, but really in pursuance of an agreement made February 4, 1881, before the said company was ever organized, by which Brown, Howard & Co., members of said syndicate, agreed to procure the incorporation of said company, provide it with officers and directors, a majority of them to be members of the syndicate, to build the road, and to cause its directors to deliver over to said syndicate all the bonds secured by mortgage, and all the capital stock, as provided by said written contract, and its subsequent modifications. In our judgment, the whole scheme was an unlawful one, and made and carried out in disregard and defiance of the public policy of the state of Ohio in regard to railroad corporations, as defined in numerous statutes on the subject.

4th. It is urged with great force on the part of the defendant, the New York, Chicago & St. Louis Railroad Company and the other parties defending, against the validity of the sale of such bonds and stocks, and the mortgage given for the purpose of securing the same, that the said mortgage is absolutely illegal and void by the express provisions of the statute of the state. Section 3313 of the Rev. Stat., provides as follows:

"All capital stock, bonds, notes or other securities of a company, purchased of the company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void."

And the question is, is there any way to honestly avoid the grave consequences that seem to result from this statute? When we remember that this illegal disposition of all the securities and available assets of this railroad company for a wholly inadequate and illegal consideration, resulted in completely wrecking this now great railroad corporation, in depriving this great public instrumentality for a thoroughfare through the states of its means of fulfilling its duties to the public, for which under the statute it was, or ought to have been, chiefly created, and rendered it helpless to finish, furnish, or equip the road properly, to run it for any length of time, to provide proper terminal facilities, and resulted in driving it into hopeless and inevitable bankruptcy within a year or two after its completion, thus involving a great pecuniary loss and inconvenience to the public, we may more clearly understand the nature and extent of the evils which this statute was intended to prevent and nullify as far as possible; and, in our opinion, this statute is a wise one, framed in pursuance of a wise public policy, that it meant absolutely to nullify any and all transactions in violation of its provisions, and that it is of just as much binding force for that purpose on all directors and railroad corporations as if incorporated into the fundamental law of the

state; and we know of no rule of construction that will honestly enable us to say that in the sale of such securities the statute can be ignored or defied, and still the mortgage made to carry out and secure said unlawful scheme, be as good and as valid as if the statute had never been passed.

We therefore hold and decree that the alleged fifteen-million-dollar mortgage claimed by the Central Trust Company, having been executed and delivered to secure bonds and stocks sold and transferred to the directors and other persons associated with them, in a scheme which was fraudulent and illegal in its entirety, and in plain violation of said statute, is absolutely null and void under its provisions, and that no preference or lien can be had under said mortgage by said Central Trust Company or by any holder of any bond attempted to be secured thereby, unless the negotiability of the bonds secured thereby, when they are in the hands of innocent holders, will save the mortgage from such a condemnation.

5th. It has been claimed that the bonds secured by this mortgage are all now in the hands of innocent holders and purchasers for value. We have not had much definite information on this point as to the extent that this is true, but possibly enough to make it probable that a great many of them are in the hands of innocent holders in good faith for value before due; but, in our opinion, it makes no difference in the real question involved, for we are not passing on the validity or the invalidity of these negotiable bonds in the hands of innocent holders; nor is it necessary for us to decide whether, if such is the case, they can be enforced as proper claims against the Railroad Company; but the question we are passing on is whether or not, by virtue of the mortgage given to secure the bonds, the holders, even if innocent holders, have any preferred lien for the amount thereof on the railroad property described therein. On this point we hold that, whatever may be the law of any other state of the Union in regard to mortgages given to secure negotiable promissory notes or bonds, in this state, it has been the settled and undisputed law since the decision in the case of *Bailey v. Smith*, recorded in the 14 Ohio St., 396, that a mortgage given to secure negotiable notes or bonds is itself a non-negotiable chose in action, and open to all defenses existing between the mortgagor and the mortgagee, even when the notes and bonds secured thereby, in the hands of innocent holders for value are not in themselves open to any such defense.

In *Bailey v. Smith*, the court below held that *Smith*, the innocent purchaser in good faith, before due, of a negotiable note secured by mortgage, which note had been originally fraudulently obtained by *Bowles* from *Bailey* was entitled to hold and foreclose the mortgage, and that *Bailey* was not entitled to defend against the mortgage, because he could not defend on the note in the hands of *Smith*, the innocent holder. The Supreme Court of our state, in reversing this holding of the court below, delivered an able and very well-reasoned opinion. Among other things, it says:

"At law, a mortgage effects the conveyance of an estate upon condition, but in the view of a court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object."

The court further say:

"In order to further sustain the judgment rendered in this case, it is indispensably necessary to affirm, either that the mortgage, when

made to secure a negotiable note, contrary to its general nature and qualities, becomes a negotiable instrument, or that the transfer of such a note, without the aid of any statute, or of any judicial decision, except those of very recent date, has an effect beyond the note itself, and draws after it, and within, the one of the most important incidents of negotiability, a collateral contract having relation to the same debt. A very careful consideration of the whole subject has convinced us that we have no power to do either and that neither justice nor public policy would be promoted by making the attempt."

The court also affirms the fact that promissory notes themselves were first placed on the footing of negotiability by the statute of the fourth Anne, and that from that day to this neither in England nor in this country has an instrument been added to the list of negotiable securities without express legislative sanction. And on page 413 of the same decision, the court says, in speaking of mortgages:

"This remits them to the position they have so long occupied—that of mere choses in action; and, whether standing alone or taken to secure negotiable or non-negotiable paper, they are only available for what was honestly due from the mortgagor to the mortgagee."

This being the position unmistakably assumed by our Supreme Court, we think there can be no doubt that it logically follows that when a mortgage is made on purpose to secure an illegal transaction, which is a unity in its character and made void by statute there is a perfect defense against the enforcement of such a mortgage, no matter in whose hands the paper secured thereby may be.

It is pretty difficult for us to see how there was anything "honestly due" from the railroad company to this syndicate, or how they could foreclose the mortgage on the bonds they held until they should honestly pay up for or restore to the company the fifty million dollars of stock for which, under any construction we can give to the transaction, they have paid but a very small portion.

It is clear to us that the directors and syndicate themselves, if they held this mortgage, could not have foreclosed it, under the circumstances of the case; and it is equally clear that the same defense can be made in this state on the mortgage when it is sued upon by innocent holders of bonds secured thereby: The assignee of a mortgage stands exactly in the shoes of the assignor, and he can take no title except the title of the assignor.

6th. We do not consider it necessary to discuss what effect, under other circumstances, the alleged misrepresentations of President Vanderbilt might have had on the stock exchange in 1883, or the recitals in the second mortgage might have in estopping the road from making a defense to its mortgage, even if the mortgages might have been invalid for various other reasons; for we hold that the doctrine of estoppel cannot be utilized in this case; for, no matter how often the transaction may be ratified, it is illegal still; and if this were otherwise, we do not think that sufficient facts and circumstances have been proven in regard to the dealings of any or of all of the holders of the stock to warrant us in holding the road to be estopped as to them in setting up the defenses in question.

7th. Neither do we think that the fact that the mortgage in question was executed and delivered in trust to the Central Trust Company, with certain recitals and provisions for the benefit of each successive holder of any bonds secured thereby, makes the mortgage negotiable; that it cuts off legal or equitable defenses, or estops the defendant from setting

them up; nor do we think that it alters or changes the legal effect of the instrument so far as to make it in any of these respects materially different from mortgages generally.

8th. Having already held that the corporation was a corporation *de facto*, it was, of course, able to make the ten-million-dollar mortgage held by the Union Trust Company as security for the bonds; and we hold that the ten-million-dollar mortgage held in trust by the Union Trust Company is a good and valid lien and lawful mortgage, which, by reason of the defaults which had been made thereon as alleged in the petition of the plaintiff, it is entitled to foreclose on said railroad for the amount of bonds issued thereunder, and secured thereby, which are in the hands of purchasers, and also for such of them as are in the hands of the holders as collateral for value to the extent of their lien thereon; and, if there is any dispute as to the amount of either due, there may be a reference had to ascertain the same; and, as I have said, we find that by the terms of said mortgage the plaintiff is entitled to a decree for a foreclosure and sale of said railroad property.

I will say while the matter was not much controverted, there was a hint that perhaps all of these bonds were not in the hands of holders for value. The question was not discussed upon the trial of the cause. I do not know that there will be any difficulty whatever in arriving at just exactly the number of bonds that were not issued for value, and the amount, but counsel can confer about that matter and make it subject of a further order.

As to the Car Trust certificates, it is conceded that the agreement of 1882 between the New York, Chicago & St. Louis Railroad Company, on the one part, and Shethar and McGourkey, trustees for said Car Trust Company, on the other, was duly filed with the secretary of state, and the Revised Statutes of the state of Ohio (Ohio L., vol., 79, page 40, supplementary to sec. 3378) were fully complied with, if such equipment contract, lease or sale was such an instrument as falls within the scope and meaning of that statute.

It is strenuously contended that, notwithstanding the language of the agreement expressly declares that the property therein described is leased at a fixed rental, and that the title to the property shall not vest in the railroad company, but shall remain in said trustees until the terms of agreement shall be fully complied with, yet that the agreement must be legally construed and take effect as what it is in reality, and not what it may be called or named by the parties thereto; and it is insisted that the agreement, when all of its parts are read and considered together, is clearly not a lease nor a conditional sale, but is, in fact, an absolute sale, with delivery to the vendee, coupled with an attempt to retain security for the purchase price, and that such a sale is not protected by the statute, and not included in its provisions, and there being no chattel mortgage on record of the same, the instrument is void as to creditors of the railroad company or mortgagees in good faith.

In the absence of the statute referred to, the construction contended for would possibly be correct, with the results claimed. If it was either a conditional sale or lease, it is conceded the statute applies. If it was neither, when construed independently of the statute, we still think it may well be held, in the language of the statute, to be "contract of and for the sale of railroad equipment." Section 3378 of the statutes reads as follows:

"No contract of or for the sale of railroad equipment, rolling stock or other personal property to be used in or about the operation of any railroad, by the terms of which the purchase money, in whole or in part, is to be paid in the future, and wherein it is stipulated or conditioned that the title to the property so sold shall not vest in the vendee, but shall remain in the vendor until the purchase money shall have been fully paid, shall be valid against creditors or innocent purchasers for value, unless recorded in the office of the secretary of state, or a copy thereof filed in the office of the secretary of state; and when said contract is so recorded, or a copy thereof so filed, as aforesaid, the title to the property so sold, or contracted to be sold, shall not vest in the vendee but shall remain in the vendor until the purchase money shall have been fully paid, and such stipulation or condition shall be and remain valid, notwithstanding the delivery of the property to, and its possession by, such vendee."

The agreement in question, if it be not a lease, is certainly "a contract of sale" or "for the sale of railroad equipment," whether it be in fact conditional sale or otherwise. By the terms of said contract the purchase money, in whole or in part, is to be paid in future, as provided in the statute. In the language of the statute, it is therein stipulated that the title to the property so sold shall not vest in the vendee, but shall remain in the vendor until fully paid.

The agreement is therefore of the kind that falls within the statutory description, and contains in its terms all the stipulations required, and is therefore a valid transaction, and entitled to the statutory protection.

We also find, from the papers and evidence in the case, that no part of said equipment was included in, or covered by, the ten-million-dollar mortgage to the plaintiff, or the fifteen-million-dollar mortgage to the Central Trust Company, but that the title to said equipment property was in Shethar and McGourkey, trustees, at and previous to the time of the execution and delivery of said Car Trust certificates, and that the said Shethar and McGourkey, as said trustees, have by virtue of said Car Trust contract, a valid lien on said property for the amount due thereon.

And the decree in this case may provide for the separate sale of all the equipment property and rolling stock described in the Car Trust agreement, and out of the proceeds of sale pay costs and taxes, if any there are, and bring the balance into court, such part to be paid over to said trustees, on surrender of their certificates, as may be found to be lawfully due them, after deducting all payments made by said road, or by said receiver under the order of said court on account of the use of said property.

I am not aware whether there is any dispute in regard to the exact amount that shall be due in this matter, but I presume not. I presume that can be adjusted without any further trouble.

We understand that the apparent controversy in regard to the \$590,237.86 deposited in the Metropolitan Bank between the New York, Chicago & St. Louis Railroad Company on the one part, and said trustees of the Car Trust on the other, was substantially avoided and terminated by certain concessions that were made during the trial, that it belonged to said Railroad Company, and was available, and therefore we supposed there was no necessity for any further controversy about it. Counsel will doubtless have no difficulty, therefore, in agreement to the proper decree regarding this matter.

I understood that there was at first a dispute as to whether the bank was good. It therefore became important who was responsible in case of

the loss of the funds; but upon the trial of the cause it was conceded that the bank was good, and that the money was therefore available, and belonged to the Railroad Company, and, of course, it may be so decreed.

A decree may also be entered in this case ordering the appraisement, advertisement and sale of the entire railroad of New York, Chicago & St. Louis Railroad Company, with all its property and appurtenances included in said mortgage, extending from Buffalo to Chicago, and at those points, by one or more special master commissioners, to be hereafter appointed, who are hereby directed to bring said money into court, to be applied on said plaintiff's mortgage and any other liens, and for distribution among the general creditors of said road.

For all minor details of the decree on any matter in controversy, if any further order is necessary application may be made to his Honor, Judge Hamilton, who participated in the hearing, and concurs in the decision, of the cause.

We find further that neither the Lake Shore Railroad Company nor any of the judgment creditors of the New York, Chicago & St. Louis Railroad Company have any lien by virtue of their judgments on its property, nor any interest therein, except as creditors to the extent of their judgments against said road.

An order should also be drawn up, independent of the general decree in the case, directing the receiver to give notice by publication in some newspaper of general circulation, for three weeks, in each of the cities of Buffalo, Erie, Cleveland, Fort Wayne and Chicago, to all parties interested as creditors of said road, requiring them to present their claims against it, duly verified by affidavit, within three months from the date of publication, and that said receiver make written report thereof to this court as soon as may be thereafter.

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STREET RAILWAYS.

[Hamilton Common Pleas, Filed October 15, 1886.]

CINCINNATI (CITY) V. COLUMBIA & CINCINNATI STREET RY. CO.

Defendant's railroad was built in 1864 under the Street Railway Act of April 10, 1861, and in pursuance of a written grant from the C. C. & W. Turnpike Co., on and along said turnpike from the east corporation line of said city, to a point in the then incorporated village of Columbia, but without the consent of the council or corporate authorities of said village required by sec. 5, of said act; and said railroad has been maintained and operated ever since. In 1872 the city acquired said turnpike from its east corporation line, on through said village, and subsequently said village was annexed to said city. In an action to enjoin defendant from further operating its railroad on the street that was formerly said turnpike, and for removal of its track, etc.: On demurrer to the petition, *Held*:

1. That the Turnpike Company had a right to grant to the Railroad Company the use of its road-bed for street railroad purposes, consistent with the other public uses of the road as a public highway.
2. That the village of Columbia, having been incorporated for general purposes, came within the provisions of sec. 5 of said Act of April 10, 1861, and had the legal right to have prevented the construction of said railroad within its corporate limits.

3. That the city succeeding to the ownership of the turnpike, took it, subject to all the rights and franchises of the Railway Co., and after the annexation of said village, the city had no more or greater rights, as against said Railway Co., than said village had before the annexation.
4. That after an acquiescence of over twenty-one years, by the village and city together, in the construction and maintenance of said railroad on said turnpike, the city has no right now, on the ground that said village did not consent to such construction and maintenance, to enjoin the further operation of said railroad and remove its tracks. The cause of action, as alleged, is barred by the statute of limitations.

HUSTON, J.

This is an action to enjoin the defendant from further operating its railroad on the street that was formerly the Cin., Col. & Wooster Turnpike, and for removal of its tracks, etc.

It is based on the following grounds:

1. That the Turnpike Co., from which the defendant, under a pretended agreement, obtained the right to build and maintain its railroad on said turnpike, had no power to grant such a right.
2. That defendant did not obtain the consent of the council of the village of Columbia, for the construction and operation of said railroad on said turnpike, within the limits of said village.
3. That this railroad is not, and never has been a street railroad as contemplated by the laws of Ohio, but that the cars on said road are propelled by a steam engine, which is a wrongful and illegal use and occupation of said street.

The defendant files a general demurrer.

As to the last ground, the city solicitor, for the purposes of the demurrer, assumes, that this road is a street railroad, and governed by the law controlling street railroads.

The second ground is the one mainly discussed and relied upon by the solicitor, on the theory, that, "if the petition alleges a want of authority to lay such railway track on any part of such turnpike, it is sufficient in law." And the argument is, that the railroad company having failed to get the consent of the village council of Columbia, the construction and operation of said road within the limits of said village were without lawful authority.

This railroad was built under the provisions of the street railroad act of April 10, 1861 (58 Ohio L., 66), and in pursuance of an agreement between the Railroad Company and the Cincinnati, Columbia & Wooster Turnpike Co., dated July 11, 1864, which purported to grant the right "to lay a street railway track along and in said turnpike, from the east corporation line of the city of Cincinnati, to the Columbia Hotel, a point in the then village of Columbia, and to operate cars thereon by horses, mules or steam."

The question raised depends upon the proper construction of sections 5 and 7 of the act of April 10, 1861. These sections and others of the act were fully considered by the Supreme Court of Ohio in the case of *Street Railway v. Cummins*, 14 Ohio St., 523.

Section 5 requires the consent of the council or corporate authorities of the city, town or village to be first obtained, before the construction of a street railroad in such city, town or village.

The petition alleges that the village of Columbia was an incorporated village, and that no consent of its council, or corporate authorities, was obtained for the construction and operation of defendants' railroad within the limits of such village. And the Supreme Court, in said case *Street*

Ry. v. Cumminsville, *supra*, defining the sense in which the word "village" is to be taken in said section 5, say: "Looking at the connection in which it is used, to sundry other statutes employing the same language, to the objects intended to be accomplished, and finally, to the fact, that the just rights of special road districts are fully provided for in the 7th section, we think it was intended to be confined to villages incorporated for general purposes, and invested with police powers over all the highways, and other public grounds within their limits."

In that case the village of Cumminsville was incorporated for the special purpose of being a road district, and came within the provisions of said sec. 7, which required the consent of "the company, or public officer, or public authorities," to the construction of a street railroad without the limits of any city, town or village.

But it appearing, that the proposed extension of the railroad in that case was to be upon the road-bed of a turnpike company in pursuance of a grant from that company, the court held, that the turnpike road was not a public road within "the exclusive supervision and control" of the "public authorities" (trustees under secs. 44 and 45 of said act) of a village incorporated for a special purpose, and that the Railroad Company having the consent of the Turnpike Company, no other consent was necessary.

So in this case, if said sec. 7, and not sec. 5 is to govern as to the construction of defendant's railroad partly within the limits of said village of Columbia, as is claimed by defendant's counsel, it being admitted that the Railroad Company had the consent of the Turnpike Company, the petition would fail to allege a cause of action on this ground (2d).

But, we think, that, under the allegations of the petition, said sec. 5 applies, and the consent of the council or public authorities of the village of Columbia was necessary.

It follows, that the allegations of the petition, so far as concerns that part of the railroad within the corporate limits of said village of Columbia, are sufficient in law, unless the plaintiff is barred from asserting this cause of action by the statute of limitations, or is estopped by its own acts

The grant was given by the Turnpike Company to the Railroad Company, July 11, 1864. It is admitted that the road was constructed in that year, more than twenty-one years before this suit was commenced.

In 1872, the city acquired, by purchase, all that part of said turnpike west of the then corporation line at Crawfish creek and, by legal proceedings, all that part east, through the village of Columbia; and on December 13, 1872, said village was annexed to said city, which, it is claimed, became thereby vested with all the rights of said village to have said railroad removed.

Certainly, the city, succeeding to the ownership of said turnpike, took it subject to all the rights, privileges and franchises therein of the Railroad Company. For the purposes of this demurrer, we take it that the original grant by the Turnpike Company to the Railroad Company was binding upon said Turnpike Company.

It undoubtedly had the right to grant permission to the Railroad Company to use the road-bed of the turnpike for street railroad purposes, consistent with the other public uses of the road as a public highway. The court, in the 14 Ohio St., case referred to, seem to recognize the right of the Turnpike Company to make "a plenary grant" to the Railroad Company as was done in that case (p. 549). So that the city must

rely on whatever rights it acquired by the annexation of the village in 1872. If the village would have been barred, the city is now barred.

It is the law in this state, that "municipal corporations are subject to the operation of the statute of limitations in the same manner, and to the same extent as natural persons. *City of Cincinnati v. Evans*, 6 Ohio St., 594; *Lessee of City v. First Preb. Church*, 8 Ohio, 299.

The defendant has had open, notorious, adverse and continuous possession of said turnpike within the limits of said village ever since 1864, for the purpose of its railroad. The village, through its council or corporate authorities, had the legal right to prevent the construction of said railroad within its limits, or if it allowed the construction, to agree with the Railroad Company upon terms and conditions as to both the construction and operation of the road.

This was not done. After an acquiescence of over twenty-one years, the city, as the successor of the village, now comes, under plea of its police power, and as an arm of the state, and asks the court of equity to intervene in its behalf.

We see no good reason why the statute of limitations should not apply in this case, the same as against a private individual. At least we think no cause of action is alleged on the ground of police power.

Demurrer sustained.

LANDLORD AND TENANT.

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[Hamilton Common Pleas.]

LAW & GANSEL V. HALEY, POOLE & Co.

1. A tenant of business property has the right to use for his business sign, the outside of the part of the building occupied by him.
2. When the sign space, to which several tenants have the right, is for their business purpose properly and reasonably used by some of them to the exclusion of the remainder, the former having prior possession will not be enjoined from such exclusive use at the suit of the latter.

SHRODER, J.

This is an application for an injunction against the use of part of the building Nos. 56 and 58 West Third street for the purposes of a business sign. Both parties are tenants in the same building. The plaintiffs occupy what may be called the ground floor for their business as insurance agents; the defendants occupy the basement for their business as real estate agents. The room occupied by plaintiffs is not on a level with the street, but a few feet above the level, and is reached by a short flight of stairs. On the outside of the building the space between the two rooms thus occupied is a panel, and the defendants have placed the sign of their business in that panel.

The plaintiffs complain that is a trespass upon them; that it interferes with their business, and they ask for an injunction against such use by the defendants. Both parties claim to use this panel as founded upon their respective leases, and as included within the term "appurtenance" contained therein.

In as much as the outside part of a building occupied for business purposes can be legitimately used for signs, and such use is within the necessary and reasonable enjoyment of the tenancy, it is an incident to the term leased, and it is a part of the grant whether or no the term "appurtenance" is used in the lease. So that neither party can gain any particular advantage by the use of that word in their lease, or lose anything by its absence. 53 N. H., 503; 3 Sumner, 502; Meek v. Breckenridge, 29 Ohio St., 642.

It so happens in this case that the space occupied by the defendants is not entirely on the outside of either of the premises. A part of it is in front of the premises tenanted by the defendants, and a part of it in front of the premises of the plaintiffs. The panel is of such size that it is only useful, and its necessary and reasonable enjoyment can be only available, when used in its entirety. Half of the panel for the use of signs is of no advantage to anybody. As a result, both parties would be entitled to the use of the entirety of such panel for the reasonable and necessary enjoyment of the premises rented to them. The one who first takes possession of it has a priority of right. The rule of law is the rule of common sense: First come, first served.

In this case there is another feature. The defendants rented their place in November, 1885; the plaintiffs rented theirs in December, 1885. At the time the plaintiffs took their lease, the defendants were in occupation of their premises, and in use of the panel for their signs, so that the plaintiffs had constructive and actual notice of the claim that the defendants made to the use of the premises.

Again, when they took the lease from the landlord, they called his attention to this panel, and wanted to have a special grant of the use of it. He declined to give it to them. It is argued by counsel for plaintiffs that that was not tantamount to an exclusion. But inasmuch as the plaintiffs must rest their claim upon a clear exclusive right they must show that there was such grant made to them. Spandler v. Cleveland, 43 Ohio St., 526.

Under all the circumstances in the case, and the facts shown to the court, the plaintiffs have failed to show any right to an injunction, and the relief will be refused.

Nat. C. McLean, for plaintiffs.

A. S. Longley, *contra*.

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CONTEST OF WILL.

[Hardin Common Pleas, January Term, 1887.]

LUELLA W. BRUNDIGE V. DANIEL W. BENTON ET AL.

1. A testator having drawn a pen through certain codicils and substituted different legacies by interlining without proper attestation, on contest of the will the common pleas court has jurisdiction to try the issue of what part of the paper is the will.
2. The will not having been revoked in one of the ways named in Rev. Stat., sec. 5953; a verdict that the writing as admitted to probate, which included the interlined codicils, is not the will, and that the writing striking out the interlined codicils and leaving in the erased codicils is the valid will, will be sustained and judgment rendered upon it.

MOTION for new trial and for judgment on general verdict.

"Kenton, Ohio, July 3, 1885. Codicil. Item 1. I hereby give and devise to Clarence D. Benton the following list of books: 1. The bound volumes of the Journal of the Conventions of the P. E. Church in the Diocese of Ohio. 2. Bishop McIlvaine's vol. of twenty-two sermons.

3. All bound volumes of Standard of the Cross. 4. Ten volumes may be chosen from my library; also my book-case.

"Item 2. To my granddaughter Eva M. Benton I give one share *To my granddaughter Elmira B. Saylor I give one share of stock in the Kenton Savings Bank.*

"Item 3. To my granddaughter Mary E. Benton, I give one share *To Myrna L. Saylor I give one share of stock in the Kenton Savings Bank.*

"Item 4. To my granddaughter Sarah M. Benton, I give one share of stock in the Kenton Savings Bank.

"Item 5. I hereby revoke and make void the item number 4, in my will, giving D. W. Benton five shares in the Kenton Savings Bank, he having already received it. You will find a note enclosed explanatory of this codicil."

The will and codicil were admitted to probate, including the interlined legacies to Elmira and Myrna (which are in dispute), and are shown above in italics.

The paper referred to in the codicil was put in evidence by the plaintiff, and was identified. It is merely explanatory of the will. The interlined legacies are carefully written in between the original lines of writing in items 2 and 3 of the codicil; and are apparent on inspection. To get the sense read each alternate line.

The only witness who knew of the contents of the will, or codicil, before the testator's death, or of the interlineations, was Rev. George Bosley, one of the subscribing witnesses to both will and codicil. He testified that he wrote the will, and explanatory paper at the same time, and also wrote the codicil; all at the request and dictation of testator. That the testator was blind, but of good business capacity. The will and codicil were duly signed and witnessed; but no interlineations were then in the codicil.

The explanatory papers were signed by the testator, but not witnessed.

That about a month after the codicil was executed, the testator met witness on the street near the bank, and asked him to come into the bank with him, which he did; testator asked the cashier for his papers. They were handed him; and he and witness stepped aside to a desk. Testator said, "I want to give each of my granddaughters Elmira B. Saylor, and Myrna L. Saylor, a share of bank stock in this bank, and I want you to interline the same for me here in the codicil to my will." Witness said to testator, "it will probably be illegal to do that." The testator said, "they all understand it, and are satisfied, and there will be no trouble about it." Witness then, at the testator's request, and dictation, interlined and wrote in the legacies in the codicil to Elmira B., and Myrna L., as they now appear. There was no signing, nor witnessing to these legacies, and testator and witness were alone, and not in hearing of any third person. Testator put the will, and codicil, and explanatory papers, all back together in an envelope, and gave it to the cashier with his other papers to put back in place again. The envelope, with these papers in it, was left there until after the testator died. The testator died leaving personal property to be distributed under the residuary clause of the will, and twelve grandchildren who are all parties here. Only the one executor qualified.

PENDLETON, J.

The question for us to determine is: What judgment shall be entered on these verdicts; or what decree made upon the facts independently of them?

The contest of a will in this state is called in the statute, and in the decisions of our courts, an "appeal;" but since the revision, is by civil action. Section 5858.

The verdict of the jury is conclusive unless there is a new trial, or the judgment be reversed, or vacated, on assignment of error. Section 5861, Ohio L., vol. 82, p. 36.

The contestant's counsel claim:

That the only issue the jury can pass upon, is the one prescribed by statute, to-wit: "Whether the writing produced is the last will or codicil of the testator, or not." That the general verdict responds to that issue, and dethrones the whole will; and judgment can only be entered accordingly. That no statute authorizes the court, or jury, to establish only part of the will proved; and to reject part. That this court has only probate jurisdiction; and no equity or other powers in a case to contest a will. That the will having failed as a whole it should be adjudged to be revoked, for want of statutory power to try any other issue. And that the interlineation being material revokes the will by operation of law—whatever may have been the intent of the testator.

This view is plausible; and the argument finds support.

Section 4956 provides that "where in part three of this revision special provision is made as to service, pleadings, competency of witnesses, or in any other respect, inconsistent with the general provisions of this title the special provision shall govern unless it appear that the provisions are cumulative." Part three includes contests and wills, and the sections above noted seem to confer only probate jurisdiction; and to exclude the right to give any construction to any part of the will or codicil. *Mears v. Mears*, 15 Ohio St., 90, 96; *Booles v. Harris*, 84 Ohio St., 38, 41.

The issue made by the executor who is also an heir to be benefited by it, if the effect be to destroy the will, is his declaration by answer, and is subversive of the rights of other legatees, and not to be given effect as against them. *Thompson v. Thompson*, 13 Ohio St., 356.

This view would narrow the issue down to the one prescribed by statute, which is to be construed strictly. *In re Sinclair's Will*, 5 Ohio St., 291, 293; *Mosier v. Harmon*, 29 Ohio St., 220, 225.

Further support is given this view by other cases that deny the equity jurisdiction. *Morningstar v. Selby*, 15 Ohio, 345, 364, 365.

On the contrary, the contest is a civil action, sec. 5858. It is an appeal only in name, for the jurisdiction is original, not appellate. *Bradford v. Andrews*, 20 Ohio St., 208, 221. In civil actions the verdict must be either general or special. Section 5200. And "when the special finding of facts is inconsistent with the general verdict the former shall control the latter and the court may give judgment accordingly." Section 5202.

The special verdict establishing the will exclusive of the interlined legacies, is inconsistent with the general verdict, which must yield. *Haynes v. Haynes*, 33 Ohio St., 598.

The interlineations in the codicil, unexplained, would be presumed to have been made after its execution. 1 Jar. Wills (R. & T. Ed.), 304; 1 Redf. Wills, *323.

But the will could only be revoked in one of the modes named in the statute: "Section 5953. A will shall be revoked by the testator tearing, cancelling, obliterating, or destroying the same—with the intention of revoking it—by the testator himself, or by some person in his presence, or by his direction; or by some other will or codicil in writing, executed as prescribed by this title; or by some other writing, signed, attested, and subscribed in the manner provided by this title for the making of a will; but nothing herein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." This statute being the same in substance as the former English statute. *Kent v. Mahaffey*, 10 Ohio St., 204, 212; *Woodfall v. Patton*, 76 Ind., 575; s. c., 40 Am. R., 269, 271; *Dixon's Appeal*, 55 Penn. St., 424, 427; *Gay v. Gay*, 60 Iowa, 415; s. c., 46 Am. R., 78, 80; *Lovell v. Quitman*, 88 N. Y., 377; s. c., 42 Am. R., 254, 258; 1 Jar. Wills, 284; (*130), and note to pp. 284-287; 1 Redf. Wills, *305; *McCune v. House*, 8 Ohio, 144. For the present English statute see 3 Jar. Wills, 791-793, and note 21 for the statutes of the different states.

A few cases, under special circumstances, or under special statutes, hold that a material alteration or mutilation after execution, unexplained, amounts to a revocation. *In re Wilson*, 8 Wis., *171; *Malin v. Malin*, 15 Johns., 293; *Woodfall v. Patton*, *supra*; *Succession of Mihh*, 35 La. Ann., 394; s. c., 48 Am. R., 242; 1 Jar. Wills, 291, *133; 2 Greenl. Ev., sec. 681.

Such also seems to have been the view taken by the trial court in the charge in *Holman v. Riddle*, 8 Ohio St., 384 which was approved by our Supreme Court. But see *Haynes v. Haynes*, 33 Ohio St., 598, 617-619 (and cases there cited).

Many authorities hold that erasures, and partial mutilation of a will or codicil, is only a revocation *pro tanto*, and not of the whole. 3 Greenl. Ev., sec. 681; 1 Jar. Wills, 291, (*134); 292, 293; and notes; 1 Redf. Wills, *301; *Bigelow v. Gillott*, 123 Mass., 102; s. c., 25 Am., 32; notes; *Linnard's Appeal*, 93 Penn. St., 313; 39 Am. R., 758.

"The mere act of canceling a will is not a revocation unless it be done *animo revocandi*. 45 Am. R., 338 note.

"A careful interlineation is not an obliteration." 1 Jar. Wills, note 15 to p. 291 (R. & T. Ed.), citing *Dixon's Appeal*, (*supra*); *Clark v. Smith*, 34 Barb., 140; *Cogbill v. Cogbill*, 4 Hen. & Munf., 467; *Means v. Moore*, 3 McCord, 282; *Wheeler v. Bent*, 7 Pick., 61; *Jackson v. Holloway*, 7 Johns., 394; *Doane v. Hadlock*, 42 Me., 72; *Wells v. Wells*, 4 Mon., 152.

"So where there has been an attempt to alter certain portions of the wills by erasure without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration which having failed the will remained intact as before; *Will of Ladd*, 60 Wis., 187 s. c., 50 Am. R., 355, 364; citing *Short v. Smith*, 4 East., 418; *Kirke v. Kirke*, 4 Russ. Ch., 435; *Martins v. Gardiner*, 8 Sim., 73; *Lock v. James*, 13 L. J. Exch., 186; *Jackson v. Holloway*, 7 Johns., 394; *McPherson v. Clark*, 3 Bradf. Surr., 92; *Wolf v. Bollinger*, 62 Ill., 368; *Wright v. Wright*, 5 Ind., 389; *In re Penniman's Will*, 18 Am. R., 368, 379 note; *Quinn v. Quinn*, 1 Thomp. & Cook, 437; *Wheeler v. Bent*, 7 Pick., 61. To which we add as being especially in point, *Onions v. Tyrer*, 1 P. W., 343; *Eschbach v. Collins*, 61 Md., 478; s. c., 48 Am. R., 123; *Gay v. Gay*, 60 Iowa, 415; s. c., 46 Am. R., 78, 80; *Lovell v. Quitman*, 88 N.

Y., 377; s. c., 42 Am. R., 254; Wilbourn v. Shell, 59 Miss., 205; s. c., 42 Am. R., 363, 365; Peck's Appeal, 50 Conn., 562; s. c., 47 Am. R., 685; 25 Am. R., 35, 36 notes; 45 id., 338 notes; 8 id., 238; 1 Jar. Wills, 294, *135; 1 Redf. Wills, *314, 315.

Is the rule of these cases the law in Ohio? In considering the question, it is to be observed that the course of decision in this state, so far as our courts have gone, with perhaps one notable exception, has been to treat the will, as admitted to probate, as an indivisible unit; to stand as a whole if established in the suit to contest; or if any part shall fail the whole will is defeated. *Glancy v. Glancy*, 17 Ohio St., 135, 139; *Holman v. Riddle*, 8 Ohio St., 384, 389; *Bolles v. Harris*, 34 Ohio St., 38; *Converse v. Starr*, 23 Ohio St., 491; *Mears v. Mears*, 15 Ohio St., 90, 97, 98; *Walker v. Walker*, 14 Ohio St., 157; In *Banning v. Banning*, 12 Ohio St., 437 a slight variance between the destroyed will admitted to probate, and the one proved on the contest, was held not sufficient to defeat the will.

And in *Haynes v. Haynes*, 33 Ohio St., 598, the word "west" in a material land description in the will was found written over the word "east." A dispute arose as to whether the alteration was made since the probate, or before the execution of the will. The trial court ignored the question of alteration, and upon the trial of the case treated the paper writing produced as a unit. The case was reversed and the rule laid down that in case the will is established, it should be done by the jury "as it read when executed" and "by special verdict." This case breaks in on the idea of a will being an indivisible unit, and that its words must be established in this court, in all cases on contest, substantially, as found in the probate court.

Counsel assail the syllabus as an innovation upon a long and well settled rule to the contrary in this state.

It is not unusual to try the question of erasures and interlineations in a will in the action of ejectment; as in *Short v. Smith*, 4 East, 418; *Jackson v. Holloway*, 7 Johns., 394; (see brief 15 Ohio, 349); or by granting relief on the ground of mistake made by the testator, *Onions v. Tyrer*, 1 P. W., 343; or charging a trust against the will, *Harris v. Tisereau*, 52 Ga., 153; s. c., 21 Am. R., 242 (and cases cited by the court; or to set the will aside for mistake, *Couch v. Eastham*, 27 W. Va., 796; s. c., 55 Am. R., 346; or in a suit to give a construction to the will, *Eschbach v. Collins*, 61 Md., 478; s. c., 48 Am. R., 123; *Linnard's Appeal*, 93 Penn. St., 313; s. c., 39 Am. R., 753; or by bill to attack the residuary clause when fraud is claimed, although the probate is relied on, *Marriott v. Marriott*, 1 Strange, 666; *Bennett v. Vade*, 2 Atk., 324, 326; or by bill after probate to attack the will on the ground that it is a forgery, *Barnesley v. Powell*, 1 Ves., 284; *Broderick's Will*, 21 Wall., 504; or for fraud, *Goss v. Tracy*, 1 P. W. (288); 2 Pom. Eq., sec. 919, and cases cited in his notes; 2 Barbour & Harrington's Eq. Dig., 111.

In *Mitf & T. Eq. Pl.*, 346, it is said: "A will and probate even in the common form in the proper ecclesiastical court, which is in the nature of a sentence, is a good plea to a bill by persons claiming as next of kin to a person supposed to have died intestate. And if fraud in obtaining the will is charged that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the ecclesiastical court, which is competent to determine upon the question of fraud. But where the fraud practised has not gone to the whole will, but only to

some particular clause, or if the fraud has been practiced to obtain the consent of next of kin to the probate; the courts of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin. Where there are no such circumstances, the probate of the will is a bar to a demand of personal estate."

The ecclesiastical courts formerly as to wills of personalty "exercised powers and followed methods unknown to the common law, derived from the same source, the civil law, as the powers and methods of the court of chancery. It established lost, mutilated or destroyed wills; it set aside its own judgments, and allowed rehearings and reviews for good cause, and examined questions of fraud, accident and mistake as keenly and searchingly as did a court of chancery." 21 Am. R., 247.

But a strange and illogical narrowing of this jurisdiction of the courts has followed the codifying of the laws pertaining to wills, and the remedial powers of the courts. By the constitution and laws the exclusive original jurisdiction to prove and establish a will is in the probate court. But the proceedings there are strictly *ex parte*. No witness adverse to the will, or any part of it, can be heard. (No difference what fraud or mistake is charged), if the subscribing witnesses and those producing the will there make a case, the will is admitted to probate as it is. Hathaway's Will, 4 Ohio St., 383; Mears v. Mears, 15 Ohio St., 90, 96; Converse v. Starr, 23 Ohio St., 491, 498, 499; Bowles v. Harris, 34 Ohio St., 38, 41; Bradford v. Andrews, 20 Ohio St., 208, 222.

And that court cannot correct its own mistakes after it has once acted. Davis v. Davis, 11 Ohio St., 386; Johnson v. Johnson, 26 Ohio St., 357, 363; Stat. sec. 5365.

But the order of probate is held to be, like a deed, conclusive in all collateral attacks. Brown v. Burdick, 25 Ohio St., 260; Haynes v. Haynes, 33 Ohio St., 598, 618 (doubtingly); Truman v. Lore, 14 Ohio St., 144; Holman v. Riddle, 8 Ohio St., 384, 392.

And this court, as above shown, upon the contest gets only a probate jurisdiction, which is held to be conclusive and exclusive; and error will not lie to the probate court, Mears v. Mears, 15 Ohio St., 90, 96, 97; Mosier v. Harmon, 29 Ohio St., 220, 225-26; Converse v. Starr, 23 Ohio St., 491, 498.

But in cases other than wills this court is said to have equitable jurisdiction outside of remedial statutes. Coates v. Chillicothe Bank, 23 Ohio St., 415, 432.

While equitable jurisdiction has been denied in a number of cases, concerning wills. Morningstar v. Selby, 15 Ohio, 345, 365; Sinclair's Will, 5 Ohio St., 291; Kent v. Mahaffey, 10 Ohio St., 204; Mears v. Mears, 15 Ohio St., 90, 97.

But in the case of Broderick's Will, 21 Wall., 504, it is maintained that where the probate or other law court having cognizance of wills, cannot under the statute grant full relief, courts of equity have inherent jurisdiction. Where the right is plain and clear there ought to be an adequate remedy; and would be, were it not for the narrow scope taken in our legislation, it being silent on the subject of alterations made by a testator in his will after its execution.

The cross-petition of the executor seems to be framed on the view that this court has jurisdiction to try the question there raised; and we think it has. Whether it is original, as held in Bradford v. Andrews, 20 Ohio St., 208, 222; or appellate and enlarged by the pleadings as in other appeals, O'Neal v. Blessing, 34 Ohio St., 33; or is equitable only; or

whether the special verdict is conclusive or advisory; it will make no difference in this case, as the verdict seems to be right; that it was practicable to submit all the questions raised to the jury.

In a case of numerous and disputed alterations in a will by a testator, after its execution, under circumstances that show that the will is not thereby revoked; but that leave it doubtful as to what particular parts are to be left out, and what kept in, a jury of twelve men might not be expected to agree on any intelligent special verdict. But where the case involves no such difficulties, or where the issue goes to the whole will, the jury is the proper forum.

It may be that the paper explanatory of the will, is entitled to probate as part of the will, and that the verdict here as to that, is of no effect. No judgment will be entered upon that branch of the verdict, so that the parties interested may offer it for probate in the probate court if they so desire to do, or deemed necessary. *Newton v. Freeman's Friend Society*, 130 Mass., 91; s. c., 39 Am. R., 433; *Baker's Appeal*, 107 Penn. St., 381; s. c., 52 Am. R., 478; 49 id., 454; *Fickle v. Snepp*, 97 Ind., 289; s. c., 49 Am. R., 449, 451, 454 and note.

The motion for a new trial is therefore overruled, and judgment entered on the special verdict sustaining the will and codicil in its modified form, after striking out and excluding said interlined legacies.

L. M. Strong and A. R. Creamer, for plaintiff.

West, Brown & West and Stillings & Allen, for defendants.

MUNICIPAL CORPORATION—NOTES OF.

250

[Tuscarawas Common Pleas.]

OHIO FARMERS' INS. CO. V. NEW PHILADELPHIA (VILLAGE).

1. A village, by its council, has power to borrow money for some purposes under sec. 2701, Rev. Stat., and the fact that the village desired the loan for the illegal purpose of giving it as a bonus to secure the location of a mill in the village will not prejudice the lender if he acted in good faith.
2. The village may issue negotiable notes for its loan, being the usual form of security, and notes to evidence the loan are not required by sec. 2703 to express on their face the purpose of their issue. That section applies only to bonds issued to be sold to the highest bidder, and not to a note for a loan.

PEARCE, J.

This action is brought to recover the semi-annual installments of interest due April 5, 1886, on two promissory notes executed by the mayor and clerk of the defendant, the incorporated village of New Philadelphia, on the fifth day of October, 1882, of which the following are copies:

"\$2,500

NEW PHILADELPHIA, OHIO,

October 5, 1882.

"Five years after date, for value received, the incorporated village of New Philadelphia promises to pay to the Ohio Farmers' Insurance Company, or order, twenty-five hundred dollars, with interest at the rate of five per centum per annum, payable semi-annually after date.

"In testimony whereof I hereunto set my hand and affixed the seal of said corporation, this fifth day of October, 1882.

[SEAL.]

"Attest:

WM. CAMPBELL, Mayor."

A. M. MARSH, Clerk."

The other note is exactly like the above with the single exception of the time of payment, which is six years, instead of five years.

The defendant paid all the previous installments of interest.

To the plaintiff's petition the defendant has answered, setting up two defenses, one only of which I need here notice, as the questions made arise upon a general demurrer to that defense.

The defense is substantially that certain citizens of the village, desiring to secure the location of a certain rolling-mill at the village, had pledged themselves to the proprietor of the mill to raise by private subscription, \$5,000, to purchase the ground on which to erect the mill, and then to donate the land to the proprietor of the mill in case he located the mill on that ground, and that, having failed to secure the \$5,000 by subscription, they applied to four members of the village council for a donation of that amount, and that these four members, on the fourth day of October, 1882, in a regular session of the council, adopted a resolution for that purpose in the following language:

"Resolved by the council of the village of New Philadelphia, Ohio that said village for the purpose of securing a loan of money, that it make and deliver its two several promissory notes to the Ohio Farmers' Insurance Company for the sum of five thousand dollars (\$5,000), each of said notes to be twenty-five hundred dollars (\$2,500), payable to the said Ohio Farmer's Insurance Co., or its order, in five and six years after date, with interest thereon at the rate of five per cent. per annum, payable semi-annually; and be it further resolved, that Wm. Campbell, mayor of said incorporated village, and A. M. Marsh, clerk thereof, be and they are hereby authorized to make and deliver to said Ohio Farmers' Insurance Co. two promissory notes for the amount hereinbefore named, and sign and attest and affix the seal thereto of said village, for the purpose of carrying into effect the foregoing resolution."

The notes authorized by the resolution were, as defendant alleges, accordingly signed, sealed and delivered to the plaintiff and are the same notes described in plaintiff's petition, and that said resolution is the only authority for the execution of said notes; and the defendant further alleges that the \$5,000 were not paid by the plaintiff to the treasurer of the village, but to the mayor, William Campbell, upon delivery by him of the notes to the plaintiff; that said money was never paid into the village treasury by Campbell or any other person, but was used by Campbell for the purpose of said donation. It is also, denied by the second defense that the council had the power to make this loan, and that the mayor and clerk had any authority, other than said resolution, to execute said notes, and that they are, therefore, not the notes of the defendant; further that the defendant received no consideration for said notes, the money not having been received by it, but by Mayor Campbell, and never paid by him into defendant's treasury.

As counsel for defendant has not, in argument either orally or in writing, suggested any other question than that in relation to the power of the village council to borrow this money of the plaintiff, and to execute therefor the notes sued on, I have considered that question only, and believe it to be the only question of moment raised by the demurrer.

As it is not alleged that the plaintiff had knowledge or notice of the purpose for which the money was borrowed, and that it was to be used to make a donation to a mill company, the question I take it for solution should be stated thus: Did the council of defendant, under any circumstances, have the power, under the general and public laws of the state,

in relation to municipal corporations, to borrow this money of the plaintiff, and to give these notes therefor in their present form? If it had such power, then I take these notes are the defendant's notes, and binding on it, and it should pay the interest here sued for, and, also, the principal when it becomes due; but otherwise if the council had not such power, then they are not the notes of defendant and not binding upon it, and it is not liable for the interest sued for, nor for the principal either, for then the notes for the want of such power would be absolutely void, and, therefore, incapable of ratification even by the act of council in paying the previous semi-annual installments of interest thereon, for a void act being no act is incapable of ratification.

It must be admitted that, if this money was borrowed for the purpose alleged and so applied, it was an act clearly unauthorized and without sanction of law; but this consideration of itself should not affect the validity of the notes as against the defendant, especially after the plaintiff has fully executed its part of the contract by paying the money upon the notes and without notice or knowledge of the alleged unauthorized purpose for which the money was borrowed; and the fact that it was paid to the mayor, and not into the treasury of defendant, should make no difference so far as the plaintiff is concerned, for the mayor had a right to receive the money. See sec. 1751, Rev. Stat., and by that section was required to pay it into the treasury of defendant within a week after its reception by him, and at the first regular monthly meeting of the council thereafter to submit a full statement of such money, from whom and for what purpose received, and when paid into defendant's treasury, and the plaintiff had a right to presume he would do so. And here we are furnished with another strong reason for holding, if possible, these notes to be the defendant's notes, for it must have known of the borrowing of the money, the giving of the notes and the purpose thereof within a very few days thereafter, and no doubt did in fact know all about it, for it is fair, in the absence of any denial by defendant to the contrary, to presume that the mayor made the statement as required of him by sec. 1751, before mentioned, and that the defendant then knew, if it did not know before, what its agent the council, had done in relation to the borrowing of this money, the giving of the notes, the receipt of the money by the mayor and the purpose for which it was borrowed and received; and yet strange to say, in the light of the averment in the answer that certain citizens of the village had solicited the borrowing of this money by council, they nor any of the other citizens of the village did not take any steps to prevent the accomplishment of that purpose and to undo what their agent, the council, had done in the matter, and never until now, nearly four years after the borrowing of the money and the giving of the notes, has the defendant attempted to repudiate the transaction on the ground here alleged, or on any other ground; but on the contrary has for all that time paid the interest on the notes as it accrued, voluntarily and without objection to its liability to do so. Still, as I have said before, if the council had no power, under any circumstances whatever, to borrow this money of the plaintiff and give these notes, we must hold them to be void, notwithstanding the seeming and real injustice and hardship to the plaintiff of doing so, on the ground that the plaintiff could not then, in such case, be treated as an innocent party without notice of the council's want of such power; for it is presumed to know the law and will not be permitted to say it did not in order to uphold and enforce on its part an unauthorized and illegal contract,

although it has executed its part of it, especially where the money borrowed has not been employed by the council for the use and benefit of the village, but in aid of an outside enterprise which is clearly without sanction of any statutory law and in violation of section 6, of article 8, of our state constitution. Counsel for the defendant argues and insists that defendant has no such power as was here exercised by the council, and further says in his printed brief, and so stated in his oral argument to the court, "that the statute plainly requires all bonds and notes of a municipal corporation to have written or printed upon their face the purpose for which they were issued." After a careful examination of the several sections of the law bearing upon the subject, I find myself unable to agree with counsel, for I think his statement is entirely too broad and sweeping.

Section 2701 of the Rev. Stat., provides for the issuing of bonds or borrowing of money and for such length of time and at such rate of interest as the council may deem proper not to exceed, however, the rate of eight per cent. per annum, for the purpose of extending the time of the payment of any indebtedness, which from its limit of taxation such corporation is unable to pay at maturity. This section is in chapter 2, title 12, division 9, and is entitled, "the power to borrow money and issue bonds." Section 2706 of the same chapter provides for the form and requisites of bonds, notes or certificates of indebtedness; but they are such as are issued for the improvement of any street or portion thereof as authorized by the preceding sec. 2705, and sec. 2706 provides that such bonds, notes, etc., shall have the name of the street or portions thereof, so improved, legibly written or printed on them, signed by the mayor, etc. This section does not apply to bonds or notes issued under sections of chapter 2; it does not apply to sec. 2701. The only other section in this chapter that relates to the matter of form of securities is section 2708, which provides as follows: "All bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance." This section, we see, says nothing about notes; it mentions bonds only, and the reason for not doing so it seems to me is plain. The bonds are to be sold to the highest and best bidder and for not less than their par value, and to that end it is important, if not absolutely necessary, that bidders and purchasers should be assured of their validity, so that the amount received for them should be as much, at least, as the corporation will have to pay to redeem them. In the case of a borrowing the corporation is sure to receive as much as it has to pay to redeem its notes. There is to be no sale of the security where the fund is to be obtained by borrowing; the idea of a sale is excluded by such mode of obtaining money.

As I am satisfied that sec. 2701 provides for a condition of things or a circumstance under which defendant's council would have the power to borrow this money of the plaintiff, it is not necessary that I should pursue the inquiry any farther to see whether there are any other section or sections of the law that would authorize such borrowing, either expressly or by implication, though I am inclined to the opinion that such implied authority does exist by virtue of other sections of the law, and, therefore, if the council had the power to evidence this borrowing in the mode adopted by it, which is these notes, then they are the defendant's notes and binding upon it, and its defense of *ultra vires* here set up, should be overruled, and this is so whether the condition of things or circumstance authorizing the borrowing of the money as provided in sec.

2701 did or did not in fact exist at the time of the borrowing, for I take it that it was not plaintiff's duty before loaning the money to inform itself of the purpose for which the money was wanted. It was sufficient for the plaintiff's protection to know that the corporation had the power to borrow money in this manner, and that in loaning the money to the defendant the plaintiff acted in good faith supposing, as it had a right to do, that it was borrowed for legitimate purposes. The undisclosed intent of the defendant to the plaintiff, to devote the money to an unauthorized purpose should not be allowed to work any prejudice to the plaintiff, if it acted in good faith in the matter. *Mills v. Gleason*, 11 Wis., 470, reported in 78 Am. Dec., 721, 727.

"Where a corporation has lawful power to issue bonds and does so, a *bona fide* holder has the right to presume that the power was properly exercised, and is not bound to look beyond the question of its execution." *Inhabitants of the Township of Popton v. Cooper Union*, 11 Otto, U. S., 196, decided in 1879.

The case of *Bissell v. City of Kankakee*, 64 Ill., 249, reported 16 Am. Rep., 554, would seem to support the views of counsel of defendant and sustain this defense; but I have thought best to not regard it as an authority as it looks to me to be against the reason and justice of the case at bar, and, also, against the weight of authorities upon the question here made, among which is the decision of the Supreme Court of the United States in the case of *Hackett et al. v. City of Ottawa, Ill.*, which is a much later case than *Bissell v. City of Kankakee*, the second paragraph of the syllabus reading as follows:

"A corporation is held to a careful adherence to the truth in its dealings, and cannot, by its representations or silence, involve others in onerous engagements and then defeat the calculations and claims which its own conduct superinduced."

I, also, quote from the opinion of Justice Harlan, who delivered the resolution of the court in that case. He says: "Had the bonds upon their face made no reference to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city, and to issue bonds therefor, the liability of the city to a *bona fide* holder could not be questioned. It would be the greatest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability, upon the ground of the falsity of its own representations, made through the official agents and under the corporate seal, as to the purposes with which these bonds were issued."

As to the form of the securities here given, it is well settled that where the mode of contracting is not prescribed by the law authorizing the issuing of the securities, the council may adopt the usual, ordinary mode of negotiable securities, as was done in this case; may act like a natural person and give its notes or bonds for the money borrowed. *Bank of Chillicothe v. Chillicothe*, 7 Ohio, Pt. 2, 31; 29 Ohio St., 339; *I Dillon on Mun. Corp.*, sec. 83; 4 *Wait's Actions and Defenses*, 602-3-4.

The demurrer for the foregoing reasons and authorities is sustained.

J. Andrew and John A. Buchanon, for plaintiff.

F. Douthitt, for defendant.

INDICTMENT—ELECTIONS.

[Franklin Common Pleas.]

† THE STATE OF OHIO V. GRANVILLE ET AL.

1. To charge a crime against the increasing or decreasing of tallies, under sec. 7061 Rev. Stat., (as amended, 78 O. L., 30) the indictment should aver that the defendants did falsify and mark upon the tally-sheet in this, to-wit: by increasing or decreasing the tallies. To aver that the tallies were changed, altered, erased or tampered with, charges no crime under this statute.
2. Such indictment should set out a copy of the poll-book or tally-sheet, on which the alleged offense was committed.

ON DEMURRER to an indictment for altering a tally-sheet.

It is claimed that this indictment is bad for duplicity. This, I think, is a matter that comes more properly under a motion to quash, and is not a matter to be considered on demurrer.

It is claimed that there is an attempt to charge two crimes in this indictment, there being but one count, to-wit, the altering of the tallies and changing of the figures, and for this reason among others it is bad for duplicity.

It is certainly very apparent that there is no crime charged as against the addition of tallies, because that comes under another subdivision of the section of the statute under which this indictment is drawn.

The portion of the statute referring to this matter, Laws of 1881, page 30, is as follows:

"Whoever * * * shall wrongfully change, alter, erase or tamper with any word, name or figure contained in such poll-book, tally-sheet, list, book or paper; or falsify, mark, or write on such poll-book, tally-sheet, list, book, or paper in any manner whatsoever" * * *, then follows the penalty. To charge a crime against the increasing or decreasing of the tallies, the indictment should aver that the defendants did falsify and mark upon the tally-sheet in this, to-wit, by increasing or decreasing the tallies.

There is no such averment as that in this indictment. To aver that the tallies were changed, altered, erased or tampered with, charges no crime under this statute. The language of the statute is, "whoever shall wrongfully change, alter, erase, or tamper with any name, word or figure contained in such poll-book, tally-sheet, etc." It cannot be claimed that a tally is a word, name or figure. Hence the words, change, alter, erase, and tamper with, do not refer to a tally.

To charge a crime with reference to increasing or decreasing the tallies, the pleader must use the language contained in the other portion of this statute.

He must aver that the defendants falsified, marked or wrote upon the tally-sheet in this, to-wit, setting out the matter. As this has not been done, there is no crime charged as to the increasing or decreasing of the tallies.

If the indictment charges any crime at all, it is that of changing, altering or tampering with the figures placed on this paper called a tally-sheet, indicating the sum total of the ballots cast for the different candidates. This, therefore, in my judgment disposes of the matter of duplicity, if it were proper to consider it upon a demurrer, which I have already stated I think it is not.

To come then to the demurrer. In passing upon the sufficiency of the indictment in this action, it seems to me the just thing is to determine what the document charged as having been altered is.

Is it an instrument? If it is, should the same rules of pleading be applied to it as would be applied to the alteration of any other instrument?

An instrument, say Burwell and Webster, is a writing, or the means of giving formal expression to some act. The term *writing* includes printing.

What is a tally-sheet? Is it not the means of formally expressing the result of an election? If so, does it not come within the definition of an instrument? Is it not an instrument?

If it be an instrument, and a charge be made that it has been altered, how must it be pleaded in an indictment? Under the common law it would be necessary to set out a literal copy.

† This decision was reversed by the Supreme Court; see opinion, 45 O. S., 264.

This rule has been modified by statute in this state. Section 7218, Rev. Stat., is as follows: "In an indictment for falsely making, altering * * * any instrument, it shall be sufficient to set forth its purport and value."

Value, as here used, says the Supreme Court, *Chidester v. State*, 25 Ohio St., 433, is in the sense of effect, import, and not in the sense of worth in money.

If a tally-sheet is an instrument, and an indictment charges that it has been altered, under our statute, is it not necessary to set out its purport and effect?

Is it sufficient to simply aver that it is a tally-sheet?

Is not that pleading simply a conclusion, an opinion? Should not the indictment aver the facts necessary to show that the paper was in the form prescribed by statute; that it contained the requirements of the statute; that it contained the necessary certificate, and that it was signed by the judges and clerks of the election.

The object under the common law, in requiring a copy of the instrument to be set out, was that the court might see and determine that it was such an instrument as that the altering of it would constitute a crime. It was not only necessary to set out the copy, but it was required to be averred in the indictment that it was a copy. So held by the Supreme Court of Ohio in the case of *Dana v. The State*, 2 Ohio St., 91-93.

In the case at bar, in the absence of the copy, or the purport and effect, how is the court to determine that the paper charged as having been altered comes within the provisions of the statute upon which this action must be founded?

Purport means the substance of the instrument as it appears on the face of it. If, then, a tally-sheet is an instrument, and under sec. 7218, it is necessary to set out at least the purport and effect of an instrument, the question then is, if the indictment does not contain the purport and effect, is it partially defective? This brings us then to a consideration of sec. 7215, Rev. Stat., which cures certain defects and omissions in indictments.

No portion of this section could apply to the case at bar, unless it is in the last clause, which reads as follows: "No indictment shall be deemed invalid for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Was it the intention by this clause to waive the pleading of these matters necessary to be proved to make out a case? If so, a defendant might be put upon trial without being advised of the crime with which he stands charged. And again, if that be the function of that clause, is it not in direct conflict with section 7218, which provides in effect, that an indictment for altering any instrument, if it do not set out the copy, must set out the purport and effect?

That this is not the proper construction to be put upon that clause, I think is clearly shown by the clause preceding it. That clause provides that no indictment shall be deemed invalid for want of averment of any matter *not necessary* to be proved. Does not that clearly indicate that if matter necessary to be proved is not averred, or a legal excuse given for not averring it, that then the indictment is invalid.

Again, as the constitution guarantees to the accused the right to demand the nature and cause of the accusation against him, has the legislature the power to abridge that right?

The Supreme Court of Ohio, in a number of cases, has said that the legislature may prescribe the form of the indictment, and may dispense with some of its technical formalities; but it cannot dispense with the indictment itself, nor with the averring of all the material facts that must be proven to procure a conviction.

Is it necessary to prove that the instrument claimed to have been altered is a tally-sheet?

Does that not meet us right at the threshold? Is it not the very first thing to be proven?

If so, should it not be properly averred in the indictment? Is it properly averred?

Are the facts set out which show that it is a tally-sheet?

Is there any averment tending to show it? Is a paper a tally-sheet if it is not prepared in conformity with the form given in the statute? Is it a tally-sheet without a certificate? Is it a tally-sheet without the signatures of the judges and clerks of the election? If these things are requisite, should they not be averred in the indictment? And if they are not averred, is it not a fatal defect?

Is this reasoning in conflict with the decision of the Supreme Court announced in the *Stoughton v. State*, 2 Ohio St., 563, cited by counsel for the state?

The language used there is: "Unreasonable strictness ought not to be required; and where an indictment *clearly charges* a crime and *fairly advises* the

defendant what act of his is the subject of the complaint, the principal object of pleading is attained."

Does the indictment in the case at bar *clearly charge* a crime?

If it be necessary to give the purport and effect of the instrument, charged as having been altered, then it does not clearly charge a crime, and this decision of the Supreme Court is not applicable to the case.

"It is a rule of criminal law based upon sound principles says Judge Brichard in *Lamberton v. State*, 11 Ohio, 281, 284, that every indictment should contain a complete description of the offense charged; that it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet; of the act done which it behooves him to controvert, and so that the court applying the law to the facts charged against him, may see that a crime has been committed." How can the court in this case tell that a crime has been committed against a tally-sheet, if neither a copy nor the purport has been set out? Is it unreasonable strictness to require that an indictment shall aver all the material facts, which it is necessary to prove to produce a conviction, as says the court in *Dillingham v. State*, 5 Ohio St., 281? In my opinion it is not.

In *Henry v. The State*, 35 Ohio St., 128, where a copy of an instrument was set out and called a receipt, but which did not *prima facie* appear upon its face to be a receipt, the court held the indictment bad because it did not aver extrinsic facts to make it appear upon the face of the indictment that the instrument was a receipt.

The court says, Judge White announcing the opinion, "That an averment that the instrument set out was a receipt, does not have the effect to change its *prima facie* character. Nor will the character of the instrument be changed by an averment that by the rules of the bank where the instrument was used, it was upon its face a receipt. It should be shown how, or in what way the instrument, if genuine, would under the rules of the bank have the operation and effect of a receipt." Are we applying the rule any more strictly than the court did in that case?

In my judgment, for the reasons stated, the indictment is bad, and the demurrer should be sustained.

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CERTIFICATES OF STOCK.

[Superior Court of Cincinnati, Special Term.]

†MARY J. PERIN v. CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC R. R. Co.

1. Where a party receives certificates of stock from one he knows to be the secretary of the company appearing to have issued such certificates, in consideration of a loan made to such secretary as an individual, and without making any inquiry of the officers of the company as to such certificates, or the validity thereof, such person cannot recover against the company on the ground that its officers fraudulently or negligently caused or permitted the issue of such certificates, if it appear that they are void as part of an overissue of the stock of the company.
2. Where certificates of stock bear the genuine signatures of the president and secretary of the company and the corporate seal, they are presumed to be genuine, and the burden of proving them spurious rests upon the company.
3. Such certificates are presumed to have been duly issued, and if they could have been lawfully issued only upon the surrender of other certificates of equal amount, such surrender will be presumed to have been made when the certificates were issued, and the burden of proving that the certificates are invalid for want of such surrender rests upon the company.
4. The books of the company are admissible as evidence in its behalf upon the question of the validity of certificates purporting to be certificates of the stock of the company; but it is for the jury to determine how much if any weight shall be given them as evidence, where they appear to contain fraudulent and irregular entries.

†This case was affirmed by the Superior Court in general term, *post* 18 B. 382.

This action was one of those growing out of what was claimed to be an over-issue of the stock of defendant company. In the petition plaintiff's case was stated in two "counts," or causes of action. In the first she alleged that she was the pledgee of two certificates of stock in the company, numbers 296 and 322; that she had acquired them from George F. Doughty, as security for a loan made by him to her, and that Doughty had signed a blank power of attorney on the back of each certificate with his name at the time he delivered them to her, authorizing the transfer of the certificates to her name on the books of the company; that she had presented them to the proper officers of the company and requested them to transfer the stock to her, and that such officers had refused to make the transfer, whereby she had been damaged.

The same allegations were set forth in the second cause of action, with the addition that when the certificates were presented for transfer, the officers of the company assigned as a reason for refusing to make the transfer, that the certificates were part of an overissue of the stock of the company, and were spurious and void. Plaintiff alleged that if such were the case, the officers of the company had negligently or fraudulently permitted or caused the issue of such certificates, and that the company had therefore caused injury to her in the amount of the loan she made on the faith of such certificates.

On the trial of the case it appeared that Doughty, from whom plaintiff had received the certificates, was the secretary of defendant company, and as such that it was his duty to attend to the issue and transfer of certificates of stock, and that his name as such secretary appeared on each certificate. It was also admitted that plaintiff prior to taking them had made no inquiry of any officer of the company concerning the certificates. It was in view of this fact, and upon the authority of the Board of Education v. Sinton, 41 Ohio St., 504, and Railway v. Third National Bank, 1 C. C., 199, that the court instructed the jury that plaintiff could not recover upon the second cause of action, as appears in the charge given below, which was put in writing by the court at the request of counsel.

The jury returned a verdict for the plaintiff on the first cause of action, and for defendant on the second cause of action, as directed.

CHARGE OF THE COURT TO THE JURY.

PECK, J.

Gentlemen of the Jury: At the request of counsel I have heretofore given you certain special charges, and you will take them in connection with what I am about to say, and any point not mentioned herein will probably be found covered by them.

The case to be determined by your verdict may be stated as to each of the certificates, 296 and 322, in a single question. Does such certificate represent actual stock in the defendant company, or is it spurious? All the evidence before you is to be considered for the purpose of determining that question. As to the second cause of action of the petition, you will return a verdict upon it for the defendant, and you have nothing to do with the questions involved in it. It is not for you to consider whether the certificates were acquired by plaintiff in good faith, or whether they were issued by the officers of the company under such circumstances as that it should be held liable, even if the certificates be spurious. Dismiss those questions from your minds, and turn your attention to the solution of the question of the validity or invalidity of these papers as certificates of stock in the company.

To such a certificate the law attaches a presumption of validity, a presumption of the sort which prevails until the contrary appears, and all the presumptions of which I shall speak in this case, are of that sort.

The presumption of validity attaching to these certificates arises from the admitted presence thereon of the signatures of the president and secretary of the company, and especially from the corporate seal. The attachment of the seal of a corporation to an instrument of this nature implies a grave and deliberate act, and that the representations therein contained were carefully and deliberately made by the officers of the corporation. Such a presumption is not to be lightly disregarded, or to be overcome without satisfactory proof that it is erroneous; but if such proof be adduced, then it is overcome.

Certificates of stock are not negotiable instruments. That is to say, they belong to the class of instruments which, when assigned by one person to another, confer upon the assignee no greater or better right than they conferred upon the assignor; and you are therefore not at liberty to find for the plaintiff, because she took these certificates for value and without notice of any defect, if such be the case; but you

must find for her if they are valid representatives of stock in the company, and against her if they are not.

On the whole case, the burden of proof rests upon the plaintiff; but you will perceive that the undisputed facts make out a *prima facie* case for her; that is, a case upon which she is entitled to recover unless it is overcome by other facts established by the evidence; so that the question for your consideration is resolved into this: Has the presumption of genuineness attaching to the certificates, been overcome? On that question you will consider all the evidence adduced, determining what, if any, facts are shown which go to support the presumption of genuineness, and what, if any, there are which tend to prove the certificates to be spurious. Into the one scale place the presumption with whatever circumstances, if any there are, which give it additional weight; and in the other all the evidence, if any there is, which goes to prove the certificates spurious, and return your verdict in favor of the party in whose scale the greater weight is found. If the defendant has adduced evidence sufficient to balance or to outweigh the presumption and corroborating circumstances, as proved by plaintiff, if any there are, then your verdict should be for the defendant, otherwise, it should be for the plaintiff.

A valid certificate of stock must have been issued either upon an original subscription, or in lieu of a valid certificate or certificates, surrendered in consideration of its issue. In the present case, the certificates of stock, for the entire capital of the company, had been issued to original subscribers, before the issue of certificates 296 and 332; so that they can not be said to have been issued as original certificates; nor does plaintiff so contend; but the question remains, whether they were or were not issued in lieu of valid certificates surrendered; and that is, as you have probably long since discovered, the real point of conflict in the case, towards which the most of the evidence and the efforts of counsel have been directed.

Here there is also a presumption in plaintiff's favor, or rather the original presumption of validity extends so far as to cover this point. It is presumed until the contrary appears, that a certificate, valid on its face, was issued in lieu of a certificate or certificates, for shares of equal number, duly surrendered, when the certificate in question was issued. This presumption may be overcome by evidence showing that such surrender was not made. The defendant has endeavored to make such showing, and upon your finding as to whether or not it has succeeded, your verdict will depend.

These certificates having been issued to George G. Doughty, and by him pledged to the plaintiff, the question then, is whether he did or did not surrender valid certificates for an equal or greater number of shares, when the certificates in question were issued. A great deal of evidence has been introduced, bearing more or less upon this point, and from it you should patiently endeavor to extract the truth.

Upon this evidence various claims are made by the parties, which should receive your consideration. Defendant claims it has shown that all the stock, at any time held by Doughty, at or prior to the issuance of these certificates, consisted of the 650 shares originally subscribed for by him, and ten shares which he afterwards purchased; and that all these are accounted for in such a way that none of them could have been surrendered, so as to render valid the issue of certificates 296 and 332. If that claim is well founded the defense is complete, unless the plaintiff has shown by a preponderance of evidence, that Doughty afterwards surrendered valid certificates, which in whole or in part would go to render valid the certificates here in question.

In order to give validity to these certificates, by such after surrender of other certificates, it must appear that the surrender was made under circumstances such as would authorize the application of the surrendered certificates to that use. If there were other certificates issued by Doughty then outstanding, which were spurious, and you find that such subsequent surrender was made without special reference to them, or to certificates 296 and 332 then such surrendered certificates should be applied to give validity to invalid certificates in the order of their dates, so far as they would go, just as a payment on general account would be applied to the extinguishment of the earlier items of the account; and if numbers 296 and 332 wholly or partly come within those to which such surrendered certificates could, in that event, be applied, then they would, to that extent, be rendered valid; but if the number of shares represented by invalid certificates issued prior to 296 and 332 was greater than the number of shares represented by such after surrendered certificates, if any there were, then it is plain that no part of the latter could be applicable to give validity to the certificates here in question without proof of the intention of Doughty, or an agreement between himself and the officers of the company, that they should be so applied.

It is claimed by plaintiff, that there is evidence going to show that Doughty had shares other than the 660 mentioned, of a number equal to or greater than the 210 represented by certificates 296 and 332, at the time the latter were issued; and a claim is also made by plaintiff in that connection, having special reference to certificate 332. The books of the company show that No. 332 was issued upon the surrender of certificate 90 which was one of the valid certificates issued to Doughty upon his original subscription; but at the time No. 332 was issued, No. 90 was not in possession of Doughty, but in that of the bankers Espy, Heidelbach & Co., to whom it had been pledged as security for a loan, and therefore could not have been surrendered when No. 332 was issued; but Doughty afterward paid off the loan and secured possession of the certificate No. 90, and it was found in an envelope in the safe after Doughty's death. About the facts, as to the alleged connection between Nos. 332 and 90, there is, up to this point, no room for dispute; but plaintiff claims, and defendant denies, that the circumstances under which certificate 90 was found in the safe, are such as to show that Doughty had surrendered it to the company. You have heard the testimony as to how and where it was found; and you have in the special instructions been informed as to what constitutes a surrender of a certificate. If you find that Doughty placed certificate 90 among the papers of the company, intending to surrender it, that would constitute a surrender; but if you find that when it came again into his possession, he placed it among his own papers, without the intention to give it up to the company, then it would be plain that he did not surrender it. If he surrendered No. 90 to the company, after having issued No. 332, and made the entries with respect to it, which are found in the books, that would constitute certificate 332 a valid certificate; but if he did not surrender No. 90, the fact that it came again into his possession would not serve to render No. 332 a valid certificate.

Defendant further claims to have shown that all the stock at any time held by Doughty, has been proved to have been so disposed of that none of it could have been surrendered so as to give lawful ground for the issuance of the certificates 296 and 332. Plaintiff disputes this claim, urging that Doughty had numerous transactions in this stock, which do not appear upon the books, and that the evidence offered by defendant is insufficient to show all the stock that was held by him, or the disposition of it.

Defendant may show the certificates in question to be invalid, either because Doughty had no certificate to surrender when these were issued, or if it fail in that, because he did not surrender those which he had; but it must have adduced sufficient evidence on the one proposition or the other to overcome the presumption of genuineness before mentioned, for that includes a presumption both of possession and of surrender by Doughty.

Defendant is not bound to prove to a certainty, or beyond a reasonable doubt, that Doughty did not own and possess, or did not surrender certificates when Nos. 296 and 332 were issued. It is sufficient if the defendant has, as to either of these propositions, adduced sufficient evidence to satisfy a reasonable man, as against the evidence to the contrary, that such is the case. You are also to be guided by the same rules in considering that wider process by which defendant has sought to show that all the stock of the company was issued in such a way that none of it could have been surrendered so as to validate certificates 296 and 332. The same presumptions there exist in favor of plaintiff, to be overcome by the same sort of evidence, if furnished by defendant. In considering this part of the evidence, you will perceive that its weight depends upon the number of shares traced and accounted for. If all the certificates originally issued be traced through all their transfers to the present holders, and from that it appears that Doughty could have surrendered none of them in lieu of certificates 296 and 332, that would amount to a demonstration of the correctness of defendant's claim. But if a small number were omitted, that would very much weaken the evidence of this sort; and if a large number were not accounted for, such evidence would be of little or no weight.

A large part of defendant's evidence consists of the entries in the books of the company, which have been admitted as evidence, because books regularly kept in the course of business are presumed to contain correct statements as to the transactions which are entered in them, and because the stock register of such a company is presumed to contain a correct statement of the issue and transfers of certificates of stock of such company. The weight of the entries in these books as evidence is much questioned by plaintiff; and it is for you to determine how much weight there is in them. If the books were regularly and fairly kept, they are entitled to great weight, even if they should be found to contain a few errors of irregularities; but if the errors and irregularities be numerous the weight would be much less, and maybe nothing at all. It is claimed by defendant that the entries

as to the irregular issue and transfers of stock can be readily separated from those showing regular and valid transfers; and that as to the latter the books are shown by the other proof of the present ownership of stock to have been correctly kept in all essential particulars. It is for you to consider and determine the correctness of that claim, examine the books, consider the testimony concerning them, and then determine how much you may rely upon evidence derived from them. If you find them trustworthy, the books are important as bearing upon the question of Doughty's ownership, and transfers of stock. I have heretofore stated to you that he is presumed to have possessed and to have surrendered certificates of 210 shares of stock when 296 and 332 were issued. But if the books have been kept so as to fairly and regularly show all the transfers of valid stock, and from them alone, or in connection with the other evidence, it appears that Doughty did not then own or surrender valid certificates of shares of a number equal to or greater than the numbers of shares represented by said certificates, then the presumption of ownership and surrender has been overcome. In other words, if you find that the books are reasonably correct, and to be relied upon, and they with the other evidence show that all the stock held by Doughty was so disposed of that none of it could have entered into the certificates in question, then plaintiff fails unless she has shown by other evidence that Doughty was, at the time of the issue of these certificates, the owner of other certificates which might have been surrendered when 296 and 332 were issued. If he was then the owner of such certificates, he will be presumed to have surrendered them, unless it appears that they were otherwise disposed of; but if the books are to be relied on, and all the stock of Doughty therein appearing is shown to have been disposed of in such a way that none of it could have entered into the certificate in question, you will not be at liberty to assume that Doughty acquired stock not mentioned in the books, merely because he might have done so. You are aware of the custom of transferring such certificates by blank endorsement, and there is evidence tending to show that the stock of this company was dealt with in that manner; but those facts are not, of themselves, sufficient to justify you in presuming that Doughty purchased and held at the time Nos. 296 and 332 were issued, certificates not shown on the books; but that fact must be established like other facts, by evidence to that effect.

If you find the books so incorrect and irregular that the entries in them are not to be relied upon, you will turn to the other evidence offered by defendant, and determine whether or not it is sufficient to rebut the presumption of validity attaching to plaintiff's certificates, and return your verdict according to the evidence as you then find it.

Testimony has been offered concerning an alleged conversation between Mr. Cook and Mr. Perin on the first day of June, 1882, wherein plaintiff claims that Mr. Cook, in his capacity as president of the railway company, said the certificates, 296 and 332, were "all right," or used some expression about them of that sort. Mr. Cook denies, having said anything of that kind about the certificates; and it is for you to determine whether he made such statements, and if he did, to ascertain what was meant. You can readily perceive there would be a great difference in the meaning of such expression as used at one time, and in one way, from what it would mean if used in another way or at another time. If Mr. Cook having his attention called to the certificates, and knowing their number and date and the name of the holder, and being aware of the fact that spurious certificates had been issued, stated to the plaintiff's agent, when asked about them, that they were "all right," that may be construed as an admission of the validity of the certificates by the company, of which he was president; but if he were only asked in a general way about the certificates, not knowing that there was or could be any doubt of their validity, and made such a statement, you will readily perceive that it could not amount to an admission. And if you find that it was an admission, it would not be conclusive upon the company; for if it was made in ignorance of the facts, and was erroneous, the company would not be bound by it. But if you find that it amounted to an admission, it may be taken into consideration in connection with other testimony as to the certificates for the purpose of determining whether or not they are genuine or spurious. If no such conversation was had, of course it could not affect the case in any way.

It is your duty, gentlemen, to determine the facts, mine to state to you the law applicable to the case. In this state neither court nor jury may trench upon the province of the other. You will therefore carefully and dispassionately consider all the evidence, and endeavor to ascertain the facts, and having done that, apply the law as I have stated it to you, and return your verdict accordingly.

It is not to be considered by you that your verdict may cause a loss to the one party or to the other. Let the loss, if there is to be a loss, fall upon the party upon whom it is placed by the law and the evidence.

If the plaintiff is entitled to recover, she is entitled to the value of so many shares represented by the certificates in question or either of them, as you may find to be valid, at the rate of \$88.00 per share, that being the admitted value of valid shares, with interest at six per cent. from June 24, 1882, to the first day of this term, March 7, 1887; but the whole amount of which plaintiff may recover, can, in no event, exceed the sum of \$15,120.00 with interest as aforesaid.

The following are the special charges on the subject of surrender of certificates, given by the court and referred to in the general charge.

At the request of plaintiff:

10}. It was not necessary in order to constitute a valid surrender of certificates when 296 and 332 or either were issued, that Doughty should have made a record thereof on the books of the defendant, or that he should have cancelled the certificates surrendered. It would have been sufficient to place them in the ordinary place for keeping surrendered certificates with the intention to surrender them.

At the request of defendant:

Although Doughty was the secretary of the company, he had another relation to it when he held or owned shares. The stock held by him, at any time, was held by him in his individual and not in his official character. The surrender of a certificate held by him could not be made by a mere mental operation or resolution on his part. His purpose to surrender must be evidenced by an act of surrender. If he held a genuine certificate at any time, which he retained within his individual control, and without delivering it to the company, or cancelling or defacing it, or placing other marks upon it to indicate such surrender and make no entry in the books showing the fact of surrender or transfer, but kept such certificate within his own possession or control, and sold and delivered it to another, the jury cannot presume or find that such certificate was surrendered by him. These facts would negative the presumption which might otherwise exist, that such certificate was surrendered.

Kittrege & Wilby, and Paxton & Warrington, for the plaintiff.

Hoadly, Johnson & Colston, and Ramsey, Maxwell & Matthews, for defendant.

STREET RAILWAYS.

265

[Hamilton Common Pleas.]

W. H. HARRISON ET AL. V. MT. AUBURN CABLE RY. CO.

1. A property holder cannot enjoin the construction of a street cable railway half a mile distant from his property on the ground that his access is impaired. And as to such of his property as abuts on the street in which the railway is to be made, the mere fact of it being a cable railway is not an obstruction to access, but is a question of fact, depending on the width of the street and the effect on its grade.
2. The street railway operated by an underground cable is not to be classed as a steam railway and is not additional burden entitling owners of the fee of a street to additional compensation, and is within the power of a city council to authorize.
3. Tax-payers have no right under sec. 1777 Rev. Stat., to complain of want of consents, to the construction of a street railway; abutting lot owners alone are interested in the subject.
4. A turnpike company may grant the use of its road bed for street railroad purposes.
5. A village incorporated for general purposes could, under sec. 5 of the street railway act of 1861, have prevented the construction of the street railway within its limits for want of consent of council, but no objection having been made for over twenty-one years the statute of limitation applies against the village, and a city to which the village has been annexed has no greater rights

SHRODER, J.

Two actions, the above, and that of *Doherty v. Same*, were instituted for the same purpose, and were tried together. The plaintiffs' object is to enjoin the defendant from building or operating the cable railroad described in the petition. Each petition claims that—

1. The defendant has no authority by the articles of its incorporation to maintain or operate a line of street railway.

2. The consents of the majority of abutting lot-owners represented by feet front have not been obtained on each street of the proposed route.

3. Council has no power to grant the right to operate steam railways on the streets of the city.

4. That part of the route, at the date of the ordinance establishing the same, passed through the private property of Henry Martin, the president of the defendant company; and that this prevented the competitive bidding provided for in sec. 2502, Rev. Stat.

5. That the city has failed to provide for the construction of the streets upon which the railway is proposed, in accordance with the provisions of sec. 2503, Rev. Stat.

6. That by the terms of the ordinance it is not to be of effect until the village of Avondale has consented to the construction of the Avondale portion of the route; and this consent has not been given.

The Harrison petition (No. 76,911) contains an additional ground of complaint: That the approaches, the ingress and egress to and from plaintiff's property on Highland avenue, between McMillan and Oak streets, will be materially impaired by the construction of this road, both on Sycamore Hill, between Auburn and Saunders streets, and along Highland avenue, in front of their properties.

The Harrison action is brought by the plaintiffs in their right as abutting lot-owners.

The Doherty action is brought by the plaintiffs in their character as tax-payers, under sec. 1777, 1778 and 1779, Rev. Stat.

In each case the plaintiffs now move for a temporary injunction.

Taking up the Harrison case, the plaintiffs therein can appear only in their right as abutting property owners, and this only in relation to that part of the street which adjoins their property. It consists of a private right, legally attached to their contiguous ground and improvements thereon, being a title to certain facilities and franchises, among which is the right of way or passage to and from the street as it exists. Any material or substantial change of the street by mean of structures placed on it, to the injury of such way or passage, is an appropriation of private property which must first be compensated for before it can be lawfully authorized. *Crawford v. Village of Delaware*, 7 O. S., 459; *Parrot v. C., H. & D. R. R.*, 10 O. S., 624, 630; *Cincinnati and Spring Grove Avenue Railway Company v. Cumminsville*, 14 O. S., 523; *Jackson v. Jackson*, 16 O. S., 163, 169; *Branahan v. Grand Hotel Company*, 39 O. S., 333.

The charges as to the obstruction to the approaches via Sycamore Hill, as well as to that on Highland avenue, are based on this right of property.

As to the Sycamore Hill approach: This street is more than a half mile distant from plaintiffs' property, and leads to a number of streets on Mt. Auburn besides Highland avenue. The plaintiffs alleged an injury to their said property from the construction of the road on this street, and this injury is one which they suffer in common with all who reside or have

occasion to use the street in visiting that portion of Mt. Auburn. The injury to these plaintiffs is not different in kind from the rest of the public. Inasmuch as the law does not authorize any person in his own right to prosecute an action for a wrong to the public the plaintiffs cannot avail themselves of this charge. *P., C. & St. L. Railway v. Hambleton*, 7 Rec., 562; *Parrot v. C., H. & D. Railroad*, 10 O. S., 624, 630.

As to the Highland avenue obstruction: A personal view, taken by the court at the request of counsel for all parties, together with evidence introduced as to the width of the street, and as to the space between each curb and the nearest rail, has satisfied the court that the construction and maintenance of the proposed cable road would not cause any material or substantial change of the street or impairment of access to either plaintiff's property. This conclusion has been confirmed by the court's comparing this street with Park avenue, north of McMillan, on Walnut Hills—a street of same width and occupied by a double track railroad.

By reason of Rev. Stat. sec. 2502, these plaintiffs as abutting lot-owners possess such an interest in the street of this route as would entitle them as such lot-owners, and only as such lot-owners, to complain of the abutting property-owners on each street of the route. *Roberts v. Easton*, 19 O. S., 78, 88; *Sommers v. Cincinnati and Sedamsville Railway Co.*, 6 Dec. Re., 887.

The evidence, however, fails to sustain this part of the complaint. It was also claimed at the trial that the cable road, being a steam railway, is such a new use of the streets and constitutes such an additional burden upon the plaintiffs' property on the street as to entitle them to compensation before such use would be permitted. As to this claim it has been held by our District Court in *Taphorn v. C. & M. R. R. Co.*, 6 Dec. Re., 865; that the extent to which a street may be subjected to an additional use so long as the street is not practically extinguished, is committed to the city council. Moreover, a cable road is not a new use, since in its structure and operation it is like a horse railway, and wholly unlike a steam railway, with reference to the abutting property as well as to other uses of the street ordinarily made by others for purposes of travel and transportation.

From what has already been stated, it follows that as to the other grounds for injunction presented by *Harrison & Shillito*, they are not the proper parties entitled by law to prosecute the same.

In the *Doherty* case, it may be said that as tax-payers their complaint is under Rev. Stat., sec. 1777, confined to the abuse of the corporate powers of the city, or to the performance of contracts in its behalf in contravention of law. The court is upon the hearing to make such order "as the equity and justice of the case demand." As tax-payers they have no right to complain of the want of consents, abutting lot owners alone are interested in this subject. *Sommers v. City*, 6 Dec. Re., 887.

As to the right of council to authorize the operation of a cable railway on the streets of the city: The city has the right to the use of the streets and to control, and maintain them for the purpose, among others, of facilitating travel. The mode of carrying passengers by cable railway, as described in the evidence, is but the exercise of this right with new appliances. Any new application for such purpose is rightful if it be a reasonable and customary adaptation of the street to such use, and is unobjectionable in law, except to the extent it may encroach upon the property rights of abutting lot-owners, as described in the *Harrison* case. *Clements v. Cincinnati*, *ante*, 000; *P., C. & St. L.*, *supra*, 19 B.,

367; Cincinnati and Spring Grove Avenue Railway v. Cumminsville, *supra*.

It is already decided that the evidence presented does not prove that its construction by this defendant is an encroachment upon the rights of any abutting lot-owner. And that its use is a reasonable and customary adaptation of the street for purposes of travel is witnessed by its employment in New York, Philadelphia, Cincinnati, Chicago, Kansas City, San Francisco and other cities.

Another claim is that because the route was, when established by the ordinance of June 25, 1886, to pass through the private property of John Martin, the president of the defendant company, that thereby the competitive bidding provided for in Rev. Stat., sec. 2502, was prevented. The defendant, on February 4, 1886, applied to the Board of Public Works to recommend the ordinance which was passed by council June 25, 1886. The petition proposed this route over Martin's property. Martin himself, acting as defendant's president, was not merely a silent looker-on, but was the active promoter of the petition. In consequence of this petition and his prosecution of it, the city, through its constituted agents, took all the steps required by law, which resulting in the ordinance defining the route of June 25, 1886. If these proceedings on the part of the defendant and the city had the effect in law of vesting the city with the right of controlling and using this part of Martin's property as a route and as a street, then as between Martin and the city, he is estopped from asserting any right in himself inconsistent with the right of the city. Corwin v. Collett, 16 O. S., 289.

The offer to the city of this property as a railway route necessarily imparted an offer to use it as a street under Rev. Stat., secs. 2640, 2501. This clearly evidences an intention to dedicate it to the city for a street.

Baker v. Johnston, 21 Mich., 340-346; Long v. Battle Creek, 39 Mich., 323; Crockett v. Boston, 5 Cush., 182; 2 Dillon on Municipal Corp., sec. 630 et al.; Harding v. Jasper, 14 Cal., 142; Underwood v. Stuyvesant, 19 Johns., 181; Cook v. Harris, 61 N. Y., 454.

In law dedication *in pais* operates by estoppel upon the fact of intention to dedicate and an acceptance being clearly shown. The ordinance of June 25, 1885, establishing the route, was such an acceptance by the city under the statutes as completed the dedication. Wisby v. Bonte, 19 O. S., 238.

The evidence is that these transactions were public and duly advertised; that their legal effect was open to all concerned in making bids; and there does not appear any reasonable and just ground to conclude that competitive bidding was prevented by the alleged circumstance. As to the charge of want of authority of the defendant under its certificate of incorporation to operate a line of street railway, it is sufficient to say that it is not the right of these plaintiffs, but of the state, to complain either of the validity of the franchise or of its abuse by the corporation. It may, however, be said that the certified purpose of the corporation is to maintain and operate a cable railway through described streets of Cincinnati. It is difficult to discover the alleged want of authority.

With reference to the claim of want of consent on the part of the village of Avondale, and the city's failure to provide for the construction of the street, as directed by sec. 2503 Rev. Stat., the evidence does not support either of the charges.

The conclusion of the court is, that the motion in each case must be denied

Ramsey, Maxwell & Mathews, and Storer & Harrison, attorneys for plaintiffs.

Harmon, Colston, Goldsmith & Hoadly, and Smith & Martin, for the plaintiffs.

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DEPOSITION—CONTEMPT.

[Superior Court of Cincinnati.]

PHILIP B. SHAW V. OHIO EDISON INSTALLATION CO. ET AL.

1. A witness is not excused from giving his deposition under secs. 5265 and 5266, Rev. Stat., on the ground that he is not interested in the action; that he is within the county in which the action is pending, and that he does not intend to depart; that he is in good health, and will be able to attend court as a witness when the case is reached for trial.
2. The notary need not commit a witness refusing to answer a question, but may consult the court and obtain a ruling upon the question.

TAFT, J.

A notary engaged in taking depositions in this case has certified to the court proceedings before him and seeks the advice of the court in regard to his duties in the premises. It appears from the certified record that George Altenberg was duly subpoenaed to appear before Joseph W. O'Hara, a notary public in and for Hamilton County, O., to give his deposition on behalf of the plaintiff; that proper notice was served upon counsel for defendants, that the person who was subpoenaed, and counsel for both parties were present at the appointed hour; and that when the person subpoenaed was requested to take the oath by the notary, he refused to be sworn, giving his reason to the notary in his written affidavit, which is included in the notary's record of the proceedings.

The regular statutory mode of obtaining the opinion of the court on such a state of facts is for the notary to commit the witness for contempt under sec. 5252, Rev. Stat.

The witness may then make an application to the court for his release under sec. 5255, Rev. Stat., and in considering the application, the court must review and pass upon the ground of commitment. I am informed, however, by former members of this court, that on the principle that the notary engaged in taking depositions in a case pending in this court is as much an officer of the court as a master or a referee appointed by the court, and following the Chancery Practice (see *Bradshaw v. Bradshaw*, 1 Russell and Mylne, 358), notaries have been allowed to consult the court and obtain an opinion as to the relevancy and competency of a question put the witness whose deposition is being taken, when the witness refuses to answer. There can be no distinction between such action by the court and that which is sought for here. Counsel for both parties join in requesting the opinion asked by the notary. In *State ex rel. Lanning v. Lonsdale*, 48 Wisconsin Rep., 370, this practice seems to be approved, although under the code and statutes of Wisconsin, as well as those of Ohio, there is no such course prescribed.

Proceeding then to the merits of the question presented, the reasons for the refusal of the person subpoenaed to be sworn, as stated in his affidavit, are as follows:

1. That he is not a party and has no interest in the action in which his deposition is sought to be taken.

2. That he is now within Hamilton County, Ohio, and has no expectation of leaving or being absent therefrom.

3. That he expects to be in said county on each and every day of this and the next term of court, and at any other term of court when said cause is tried.

4. That he is 21 years of age, is robust in health, both physical and mental; is not suffering from any infirmities whatever, does not expect to be imprisoned, and will be able to attend court as a witness when the case is reached for trial.

5. That the testimony of affiant is not required upon any motion pending in said cause, but upon the merits of the case.

The right to take depositions and use them in evidence depends entirely on the statute. At common law no such right existed. *McCall v. Sun Mutual Insurance Co.*, 50 N. Y., 733; *Frye v. Barker*, 2 Pick., (Mass.), 73.

The question must therefore be determined solely from the provisions of our statutes on the subject.

Section 5265 provides that depositions may be used only in the following cases:

1. When the witness does not reside in or is absent from the country where the action is pending, or by change of venue is sent for trial.

2. When the witness is dead, or from age, infirmity, or imprisonment is unable to attend court.

3. When the testimony is required upon a motion, or when the oral examination of the witness is not required.

Section 5266 provides, that "either party may commence taking testimony by deposition at any time after service upon the defendant."

Section 5269 provides that the deposition may be taken before a justice of the peace, notary public, etc., or before any person empowered by a special commission from the court, implying that the notary public, justice of the peace, etc., needs no special commission.

Section 5273 provides for a written notice of intention to take the deposition, to be given to the adverse party, except in cases where a special commission may be used.

It is evident that between the commencement of this action and the time of trial, there may be such a change in the condition of the witness, either in residence or health, as to make a deposition admissible in evidence under sec. 5265, which when it was taken could not be used as testimony. It is of course just, that a party should not be deprived of his witnesses either by death or removal. Accordingly, in chancery, it was permitted on application to the chancellor after the bill had been filed, to take the deposition of a witness *de bene esse*. In order to obtain such permission, it was necessary to make a showing that the change by which the party might lose his witness was probable. Similar provisions have been incorporated in the codes of many of our states. The deposition in such states can only be taken after an application to court and a showing that loss of the evidence is probable unless the deposition is taken. Where there is such a provision of the statute, the courts are necessarily vested with the discretion to say whether the probability of the loss of the

evidence is great enough to justify the taking of a deposition. But no such discretion is given the courts of this state. No commission need be applied for. Notices upon opposing counsel and a subpoena for the witness are the only two preliminaries to a deposition before a notary. The proceeding takes place without notice to the court. It must be and is conceded that depositions which would be classed "*de bene esse*," can be taken of residents of the county under the general power given by sec. 5266, and that these may be taken without the interposition of the court. It follows that in this state, by sec. 5266, there is given to the party seeking the deposition the power otherwise placed in the courts, of deciding whether the probability of loss of evidence is so great as to warrant him in securing it by deposition. Nor can this power be limited by any showing to the court in which the trial is pending, that the probability of loss of evidence is very slight. For it can never be proven that there is no possibility of loss of evidence; for every man may die or leave the country, however improbable such an event may be. And so long as there is any possibility, there is sufficient ground for the party to base a judgment upon in favor of taking the deposition, and such judgment is conclusive.

Sections 5266, 5269 and 5273 relieve the court from any responsibility for loss of evidence by the party. The risk is the party's, and by these sections it is in his power completely to avoid any risk.

Judge McElroy, in the Knox county common pleas court, has held a contrary opinion. See *in re* W. R. Langford, 15 W. L. B., 267. I cannot follow the reasoning of the learned judge. He argues that where there is no probability of a deposition being admissible in evidence, the party taking it cannot be said to be "taking testimony by deposition," within sec. 5266, Rev. Stat., because there is no probability that it will ever be testimony. As stated above, because of the uncertainty of human affairs, it cannot be said that there is absolutely no possibility of a deposition being used in evidence. Therefore the only difference between a deposition not testimony at the time of taking, and yet which by the ruling of the judge might properly be taken as testimony because of the probability of the death of the witness, or his removal from the county, and the one which he holds illegal is in the degree of the probability of their use as testimony. In other words, he holds that a witness by questioning the right of a party to take his deposition, may give the court the power to decide the probabilities and withhold or grant the right to take a deposition just as the Chancellor did in England, or as the courts do in those states where they are given the express power so to do. It seems to me that such a construction of sec. 5266 savors of judicial legislation, and ought not to be followed.

The code of the state of Kansas in its provisions for taking depositions, is a copy of ours. The sections referred to above are copied word for word. The Supreme Court of that state, *in re* Abeles, 12 Kansas, 451, passed upon the same question now under discussion, and held that no limitation could be imposed upon a party's taking depositions of witnesses living in the county where the cause is pending, because under the statute the party was the whole judge of the necessity for taking such deposition. The same view was taken by Judge Barber of the Cuyahoga common pleas in *in re* Nashuler, 4 Dec. Re., 299.

It is urged that this construction of the statute will give rise to great abuse; that a party will go fishing for evidence among the witnesses of the opposing party, and will learn the case of his adversary.

To this it may first be said, that it is an argument more properly addressed to the framers of the law than to the courts construing it. Secondly, there is likely to be no motive for "fishing" unless the person whose deposition is sought has been unwilling to state his knowledge upon inquiry. If a witness is so reluctant as not to state his knowledge to a party asking it, the witness cannot complain if the party presumes that the knowledge thus withheld may be useful evidence to him on the trial of the case, and that his refusal to give information indicates a desire to avoid the trial. Witnesses do not belong to one party more than to another. What they know relevant to the issue should be equally available to both sides, and if they claim immunity from examination by deposition on the theory that their testimony is one side's rather than the others, their claim is utterly indefensible. What a witness is presumed to know is the truth and that cannot vary between the time of taking the deposition and the trial. If there is likely to be a variance in the testimony, the earlier a witness is committed to a statement the better for the sake of the truth. There is no objection that I know, why each party should not know the other's case. Each is supposed to state his case in his pleading in the beginning. By serving notices under sec. 5292 Rev. Stat., one party may compel the other to furnish a copy of such papers as he intends to use as evidence. If such is the rule in regard to written evidence, it is hard to see that it is a great objection to our construction of sec. 5266 that it may in some cases enable a party to take depositions which will disclose to him the evidence which his adversary will produce.

If a party takes a deposition it must be filed. See sec. 5275 Rev. Stat. If he does not use it himself, and it is admissible, his adversary may use it, and will then have the advantage of a cross examination of his own witness. If it is not used at all, then the party taking it must pay the costs. This last condition of taking testimony is likely to keep parties within reason in their exercise of the right given them by sec. 5266.

I have been considering the question from a stand point of the party. It should perhaps be considered from the stand point of the witness. His only right infringed is the consumption of his time. I cannot think that once taking his deposition in addition to his testimony at the trial, is so great a deprivation of his rights as to warrant a court in restraining a party from the exercise of his plain right under the statute. It is no greater than to be called upon in two trials of the same case.

For the reasons stated the order to the notary will be to swear the witness.

Jordan & Jordan, for plaintiffs.

Champion & Williams, for defendant.

STREETS—WATER AND SEWER PIPES.

294

[Hamilton Common Pleas.]

† CINCINNATI & AVONDALE TURNPIKE CO. V. AVONDALE (VILLAGE.)

1. Cities and villages, in the absence of an express reservation by the owners of the soil, have, as against the abutting property-owners, a qualified fee in the streets, under which they may lay water and sewer pipes under the surface, without either obtaining the consent of the abutting property-owners, or compensating them.
2. Cities and villages, however, do not have the right over a turnpike road. The surface of such a road is the private property of the turnpike company, and is subject to the same rules as other private property.

MAXWELL, J.

This cause was submitted to the court upon a motion to dissolve a restraining order heretofore granted, together with the affidavits and exhibits offered by counsel for plaintiff and defendant, in support of their respective claims.

The restraining order was issued in favor of the plaintiff and against the defendant, to prevent the defendant from entering upon the turnpike road of the plaintiff, which extends from the south to the north line of the village, excavating trenches therein, and laying pipes therein to conduct water from the Cincinnati Water Works to supply residents of the village.

In making the motion to dissolve the restraining order, counsel for the defendant rely upon several grounds.

In May, 1866, the Cincinnati & Xenia Turnpike Company, the grantor of the plaintiff in this case, made an agreement with Robert Mitchell and others, in which it was provided that Mitchell and his associates should keep in repair, according to the charter of the company, that part of the turnpike within the village, including the culverts and drains on the same, but should not, either by grading, ditching, or in any other manner, cause any damage to the turnpike. The turnpike company on its part was to pay Mitchell and his associates one-fourth of the tolls taken by the turnpike company between the city and the five-mile stone, which payments were to be made quarterly. This agreement was to continue in force so long as the company had the right to take tolls. This agreement was assigned by Mitchell and his associates to the village of Avondale, and the village has ever since been performing its part of the agreement, and has been receiving the tolls provided in the agreement to be paid.

Counsel for the defendant submit that the foregoing agreement gives the village the right to enter upon the turnpike and do the acts against which the restraining order was issued. It does, undoubtedly, give the village the right to enter upon the road to make necessary repairs, but has it any further power? It seems to me that the agreement was one of employment. The turnpike company did not grant or convey to Mitchell and his associates any franchise or any control over the road. Mitchell and his associates had no right to collect tolls, they had no right to do any single thing authorized by the charter of the company to be done. They were only employed to keep the road in repair, and were to be paid for that service a proportion of the tolls. The assignment by Mitchell and his associates to the village could of course, give the village no greater rights than the grantors possessed. An instance of a different contract may be found in the grant by the Cincinnati & Xenia Turnpike Company to the Cincinnati & Avondale Turnpike Company, the plaintiff herein. In that, the latter company, the present plaintiff, is vested with full control over that part of the turnpike within the village, although they do not receive all the tolls. I do not think the Mitchell contract gives the defendant any right except that of making repairs.

It is further claimed that the consent of the abutting property owners, along the line of the turnpike, who, it is claimed, own the soil beneath the surface of the turnpike, would give the village the right to enter upon the turnpike for the pur-

† This case was reversed by the circuit court, as stated in case of Spring Grove Avenue v. St. Bernard (village), 1 Ohio Dec., 99 100. The circuit court was affirmed by the Supreme Court without report, April 17, 1888, Deckman, J., dissented.

pose of laying down pipes. This claim depends for its weight upon getting the consent of all the property owners, so as to make a chain without a missing link. It appears that only the consent of the majority has been obtained, which fact destroys this defense.

The defendant next relies on what may be called the unwritten municipal law with respect to the power of cities and villages over their streets, and this raises the most difficult question in the case. If we can determine clearly what the rights of cities and villages are over their streets, can it then be maintained that the village has the same control over the turnpike that it has over one of its streets? I can find no authorities upon this latter question; it can only be settled by reasoning it out.

The right of a city or village over its streets, as against the abutting property owners, or any other claimants, has been extended so as to permit the city or village to lay any kind of pipes beneath the surface that may be necessary for public uses, such as water and sewer pipes. This, of course, practically destroys the rights of the abutting property owner in the soil beneath the surface of the street, and leaves him only ingress and egress to and from his premises.

In order to give color of right to this power of the city or village to so confiscate the soil, it has become necessary to hold that the city or village has a qualified fee in its streets, qualified only by the right of public travel, and the right of the abutting property owner to his ingress and egress.

Will the same rule apply to the relation between the village and the turnpike? Does the village hold a qualified fee in the turnpike including the soil beneath? It may be that the abutting property owners by uniting together could give the village certain rights in the soil, but has the village any right in the surface of the turnpike?

The turnpike company by virtue of its charter, by purchase, by grant and by labor, has acquired a private property in the surface of its road, subject only to the right of the public to travel over the road upon payment of the prescribed tolls. The village never had and cannot have any qualified fee in private property. It has only the right of eminent domain over it. If I am right in saying that the city has the unchallenged right to lay water and sewer pipes in its streets by reason of its qualified fee therein, then the converse must be true, that where such fee does not exist, the right does not exist.

It seems to me that the legislature has recognized the foregoing principle in the statutes regulating turnpikes. Section 3491, Rev. Stat., provides that no toll gate shall be nearer than eighty rods to the limits of a city or village, but that compensation shall be made to the company for the damage it may sustain by enforcement of such regulation, and surrender of such part of its road, and that if an agreement cannot be reached between the parties, the municipal authorities shall appropriate such property in the manner provided by law for the appropriation of property (meaning no doubt private property) by municipal corporations.

An examination of the various sections relating to turnpikes, beginning at 472, Rev. Stat., will show conclusively, I think, that the turnpikes are entitled to the same protection as private property as against the requirements and grants of municipal corporations.

I am of the opinion that the village cannot enter upon and lay down the water pipes in the turnpike of the defendant without first agreeing upon compensation, or, if that cannot be done, condemning and appropriating the property.

The motion to dissolve the injunction will therefore be overruled.

W. L. Avery and A. B. Huston for the motion and village.

Kittredge & Wilby and Paxton & Warrington, for the turnpike company.

STRIKE—UNLAWFUL ASSEMBLY—INJUNCTION. 306

[Cuyahoga Common Pleas.]

**NEW YORK, LAKE ERIE & WESTERN R. R. CO. V. JOHN WENGER
ET AL.**

1. An injunction will lie to prevent a trespass.
2. Men have a constitutional right "to assemble together in a peaceable manner, to consult for their common good;" but an assembling of men for the purpose of forming a combination and agreement to go upon the premises of a railroad company to obstruct, interrupt or stop its business, and prevent by force, threats or intimidation, its employees from performing their duties, is an unlawful assembling.
3. The act of "striking," or discontinuing work, terminates the contract relation between employer and employe, when the contract is not for a specified time.
4. It is a trespass for persons so discontinuing work to go upon the premises of a railroad company and interfere with its business, or, by force, violence, threats, intimidation or request, seek to induce employes to join in such "strike."
5. When such combination is formed for such common purpose, all are responsible for the acts of each.

DECISION on motion to dissolve injunction.**STONE, J.**

This case is now before the court on a motion to dissolve the injunction granted herein on the fifth day of the present month.

The action was brought by the plaintiff as the lessee and operator of the New York, Pennsylvania & Ohio Railroad, against the several defendants named, who had before that time been employes of said company, to enjoin and restrain them from interfering with said plaintiff in the operation of its railroad, located in this city and county.

It is alleged in the petition that "the plaintiff is engaged in operating said railroad as such lessee, under the laws of Ohio, as a common carrier in said state; that the railroad in Cuyahoga county, constitutes the Cleveland terminus of what is known as the Cleveland & Mahoning Valley Company's railroad, which extends to and beyond Youngstown, Ohio, and is part of a direct through line of railroad connecting Cleveland and Pittsburg, and is also an essential, integral and very important part of a through line of railroad, operated and largely owned by this plaintiff, between the cities of New York and Chicago, and between New York and Cincinnati, and constituting one of the largest and most important trunk lines of railroad transportation and communication in the United States. That what is known as the Cleveland yard of said railroad, constitutes an essential, vital part in the operation of said entire railroad system."

It is further alleged, that the defendants are men who were employes of plaintiff as yard-men, conductors and brakemen in the Cleveland yard, among many others so employed by the plaintiff as the force of employes by which it operated said railroad yard as a part of said railroad system; that the defendants, together with many others of the employes of the plaintiff, are now out on "a strike," and are refusing to perform their accustomed labor and duties under their employment; that the alleged grievance of the defendants and others now on a strike is the intention and direction of the railroad company, through its officers and

superintendent, to discharge from its force of employes, and from any "crew" in said force, such employes as, in the present light state of the traffic in said yard and other places, should be found to be surplus, supernumerary or unnecessary men to proper preformance of the duties and labors required of such "crews."

That the plaintiff has never agreed or contracted, or in any way held out, or promised or encouraged the belief in the defendants, or any of its employes, that it would keep in its employment men whom the condition of its traffic or business rendered it unnecessary, imprudent or extravagant to retain; that the defendants, with others whom it is now impossible for plaintiff to designate or name, have conspired and combined for the unlawful purpose of preventing the plaintiff from moving freight cars in its said yard; that by threats and intimidation the defendants have already stopped almost entirely the necessary handling, switching and movement of freight cars by plaintiff in its said yard; that many of plaintiff's said yard force remained ready and willing to continue their duties as such employes in their labors in their said employment in and about the plaintiff's said business as such common carrier in said yard; other men stand ready and willing to accept and enter upon said employment; and that, with said employes who remain willing to perform said duties and such others as stand ready to enter said employment, the plaintiff could and can do and perform its necessary, lawful and important business and duties as such common carrier but for the threats, intimidation and threatened forcible prevention thereof by said defendants and such others as have entered into such unlawful conspiracy with them.

That the defendant give out and threaten that the plaintiff shall not be allowed or permitted by them to move any freight cars whatever in said yard until the plaintiff shall have agreed and bound itself not to discharge any man from any of its said "crews" in said yard, in the Youngstown yard, on the Hubbard branch of said road, and between Youngstown and Girard. Also, that no man shall undertake to move such freight cars for plaintiff in said Cleveland yard before the plaintiff shall submit to said terms dictated by defendants, on pain of being prevented by force and bloodshed by the defendants and those so combined and conspiring with them as aforesaid. That plaintiff is now, by said unlawful threats and intimidation upon its employes and others willing to enter on said employment and performance of duty, delayed, hindered and prevented of full or any considerable performance of its duty as such common carrier and accomplishment of its lawful business, and that plaintiff is suffering great and irreparable damage and loss to its business, profits, property and duty as such common carrier by said unlawful acts and threats. That the consignees and shippers of freight over plaintiff's line passing through, into or out of said Cleveland yard all are suffering great and irreparable loss and damage by reason of said acts, threats and conspiracy aforesaid. That plaintiff has in its cars so stopped by the defendants in said yard large quantities of freight of various kinds belonging to its customers, some of which is of a perishable nature, and all of which is to the great and irreparable damage and loss of plaintiff and its said customers to have prevented and delayed of movement as aforesaid; and all delay in the handling thereof by plaintiff for its customers and the public as such common carrier brings the plaintiff under great danger of liability to claims for damage of uncertain amounts, and innumerable litigations concerning the same in this and many other states.

It is further claimed that the defendants do not content themselves from abstaining and refusing to themselves perform the labors of said employment, but that they gather in numbers and come singly and in couples and in squads upon the premises, and into the yards and buildings, the freight houses, engine-houses, depots and offices of the plaintiff, and there threaten, notify to stop work and impede the peaceably disposed and faithful employes of plaintiff, and by so doing prevent, frighten, alarm, dissuade and hinder such employes from discharging their lawful and proper duties. That the state of things as existing is grave and of an essentially remediless and irreparable character by means of any possible action at law, and threatens to continue to grow unless immediately restrained by the order of the court.

The prayer is, "that the defendants and each of them may be commanded to keep off from the premises, lands, yards, and right-of-way of the plaintiff, except as each may have lawful right to enter upon any of said premises to transact any lawful business with plaintiff thereon, or lawfully to cross the same at any public highway thereover; to forbid and restrain each from in any manner whatever molesting or interfering with any engine, tender, car, switch, coupling, engine-house, depot, water-tank or property, appurtenance or freight upon said premises or any of them; to forbid and restrain each from molesting, threatening or in any manner hindering any employes or officer of plaintiff from discharging his duties and employment under plaintiff in said yard and on the premises of plaintiff, or at any other place whatever; to forbid and restrain said defendants and each of them from inciting, inducing and persuading others to do any of the acts and things aforesaid of which they are themselves restrained."

The defendants contend by their motion to dissolve and vacate the injunction, and their affidavits in support of the motion, that the statements contained in the petition are not true; that the same does not contain facts sufficient upon which to grant an injunction; that as citizens of the state of Ohio, they did no more than they, under the law, had a right to do.

So far as I am advised, this is the first instance in Ohio in which relief has been sought in controversies of this character by an appeal to the equitable power of the court through and by its writ of injunction. It is cause for regret to me that I have not had more time to devote to a matter of such grave public concern—than which I know of none more important and far-reaching in its consequences. I must, however, content myself with such views as I am able to submit after a very brief examination of the subject.

First—Counsel for defendants claim that the acts complained of, if true, constitute nothing more than a mere trespass upon the premises of the plaintiff, and that as matter of law, an injunction will not lie to prevent a trespass, and that plaintiff has an adequate remedy at law.

It is not doubted but that at an early day courts of chancery refused to interfere and restrain trespasses; but such is by no means the rule now. If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damage is adequate, equity will not interfere. The principle determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows:

(1.) If the trespass, although a single act, is or would be destructive; if the injury is or would be irreparable; that is, if the injury done

or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money, then the wrong will be prevented or stopped by injunction.

(2.) If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction on the ground of avoiding a repetition of similar actions. (Pomeroy's Eq., sec. 1357.)

The old notion of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous. The remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits the wrong and then seeks compensation for it by the pecuniary damages which a jury may assess. Says the authority above referred to:

"The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed."

The petition alleges that defendants have conspired and combined for the unlawful purpose of preventing plaintiff from moving its freight cars; that by threats and intimidation the defendants have already stopped the movement of freight cars in plaintiff's yard; that with such employees as remain and are willing to work, together with such others as stand ready to be employed, plaintiff could and can do and perform all its necessary business as common carrier, but for the threats, intimidations and others engaged in unlawful conspiracy with them; that this railroad company is unable to move freight or deliver the same to consignees thereof; that some of such freight is of a perishable character. These, and various other things, are alleged, not only as to injury threatened, but injury and damage already done and sustained. Applying these allegations of fact to the principles of law suggested, we think the petition makes a case for an injunction.

How adequate would the company's remedy at law be against these defendants and several hundred more, should they by force or intimidation prevent, for any considerable time, the transaction of business and the delivery of goods and merchandise shipped or in process of shipment to all parts of the country along and over a through trunk line? The mere statement of the proposition is sufficient to exhibit the absurdity of being left or driven to such a remedy, and to such a multiplicity of suits, even in the event that each and all of the parties against whom an action would lie, were, in point of fact, responsible. To my mind it is difficult to see or suggest any class of cases, or any set of circumstances, wherein the equitable power of the courts of this country can be more properly invoked and exercised than in such as this is alleged to be.

We hold, then, that the injunction was properly issued, and is the proper remedy upon such a statement of facts as is set out in the petition in this case.

This brings us to consider the facts as developed by the affidavits and oral testimony submitted by both sides upon the motion to dissolve the injunction. Are the facts as set out in this petition established to that extent and degree that this injunction should be continued in force?

Some preliminary considerations may not be out of place at this time, in view of the discussion or suggestion of counsel for defendants touching the bill of rights and the rights of these defendants and others to assemble together, and the rights we all have as free men in this country. Nobody doubts the right of these defendants and their fellow employes "to assemble together in a peaceable manner, to consult for their common good," for their mutual benefit and assistance. This is a right guaranteed us all by the organic law—the constitution. But the assembly must be for lawful purposes. To make this plain, suppose these men, or any considerable number of them, now on a "strike," should assemble to consider what wages would, in their opinion, be fair and reasonable for men engaged in their several hazardous employments, and what, in their judgment, they ought to receive, and what in their judgment would be reasonable rules and regulations, what would constitute a reasonable complement of men to undertake any given employment or undertaking. This would be altogether lawful and proper. Suppose, while so assembled, they declared their purpose and formed a combination and entered into an agreement to go upon the premises of this railroad company to obstruct, interrupt and stop its business, and prevent by force or threats or intimidation, its employes from performing their duties, and carried out such purpose and agreement, or undertook so to do, then such assembly would become and be an unlawful assembly. Or, if such assembly selected a committee from among their number to do the very same thing, it would thereby become and be an unlawful assembly. It is not doubted that every man has a right to work for whom he pleases, and to go where he pleases, and to do what he pleases, providing, in so doing, he does not trespass on the rights of others. And every man who seeks another to work for him has a right to contract with that man, to make such an agreement with him as will be mutually satisfactory; and, unless he has made a contract binding him to a stipulated time, he may rightfully say to such employe at any time, "I have no further need of your services."

And with equal right may the employe say to his employer, "I decline to work for you longer."

Coming, now, to consider some of the statements made in the affidavits, I desire to call attention to the claim made by the defendants that they are still the employes of the railroad company. The language of the affidavit to which they all make oath is this: "That none of them have been discharged, and they * * * have been and are now employes of said plaintiff." And this counsel for the defendants seem to hold to be a correct proposition. In this belief the defendants are quite in error. When you quit working for the company, by your own act, you discharge the company from its obligations to the contract of employment; when the company discharges men from its employment, the contract of employment is equally at an end. It is a contract either party may terminate at will, when there is no contract binding for a stipulated time. When you quit the service of the company the relation of employer and employe was as effectually terminated as it would or could have been by any act of the company, and the fact that the men had still in their possession—and have yet, perhaps—some of the property of the company (switch-key, books of rules, etc.), would, in the judgment of court, make no difference.

It is, perhaps, not material, in the disposition of this case, as to whether the relation of employer and employe exists or not; but I thought it proper enough to express what must be held undoubtedly to be the law

upon that subject. Where parties see fit to discontinue their work, it is as much their privilege to terminate the contract in that way as it would be the privilege of the railroad company to discharge them at any time for any reason.

The main question, perhaps, in this case is that involved in the conduct of these defendants at or about the time they ceased working for this company. As I recollect it, the strike, so far as it related to the Cleveland yard, was inaugurated on the third of March—possibly on the morning of the fourth; but I have the impression that it was the third. No matter. Their conduct at or about that time and at the time the injunction was granted is important in determining whether or not this injunction should be continued, or whether the motion to dissolve the injunction should be granted.

That makes it important, then, to consider what amounts to a threat; what amounts to an intimidation. The defendants, all of them, as well as quite a number of others who have heretofore been employees of the company, make oath that they have committed no violence; that they have indulged in no threats; that they have done nothing to intimidate the officers, agents or present employees of this company.

I have before me a case that is reported in the Federal Reporter, in which this same subject, but in a little different form, was before the Federal Court in the Western District of Missouri. Two persons were before the court, charged with a contempt of the court. It appears that a strike had before that time been inaugurated upon the Wabash system of roads west of the Mississippi, arising, perhaps, in part because the reduction of wages, and in part because of an order issued by the Master Mechanic to close the shops at a certain town in that state. The court there had occasion to consider three communications addressed by the chairman of the strikers to certain employees. The three are given, and are in these words:

"OFFICE OF LOCAL COMMITTEE,
June 17, 1885.

"S. M. NUGENT, Foreman of Lathes: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees. But in no case are you to consider this an intimidation.

"(Signed),

C. M. BERRY, Chairman."

"MOBERLY, MO., June,
OFFICE OF LOCAL COMMITTEE.

"To W. P. SIE: You are requested to stay away from the shops until this matter is settled. By your compliance with this request your action will be sustained by the Wabash employees to the utmost of their power. But in no case are you to consider this an intimidation. Having sent a similar notice to other foremen, the committee considered it wise to give you an opportunity to establish yourself for or against us.

C. M. BERRY, Chairman."

"OFFICE OF LOCAL COMMITTEE,
June 17, 1885.

"MR. ARTHUR, Foreman R. H.: All other foremen have been informed that it is our wish that they should remain away from the shops until the present difficulty is settled, but in your case you are justified in remaining while passenger trains are running; but we request you to confine your work to passenger engines only. But in no case are you to consider this an intimidation.

C. M. BERRY, Chairman."

Berry, together with another, was before the court, and this was the claim made against him. It is to be said, perhaps, in this connection, that this road was in the hands of a receiver. But on principle, I apprehend, there is no essential difference. The court takes occasion to say, in reference to these communications signed by Berry as Chairman:

"Did these defendants, by what they did, interfere with the rights of others? * * * The defendants, and especially Berry, the recognized leader of the strikers, did interfere in the management of the road. To make this plain, it is only necessary to refer to his notices. What would we say of one signing himself 'chairman' who, in the ordinary transaction of life, would give notice to a foreman in a shop to remain away from his work, and assure him that a compliance with the request would command the protection of a set of men who had combined to resist being discharged from work? What would we say of a man signing himself 'chairman' of an organized body who would write to an employe of a shop to stay away from his work, and that by compliance he would be sustained to the utmost by the body which he represented; that the committee considered it wise to give him an opportunity to establish himself for or against the combination? What would be thought of a man who signed himself 'chairman' of an organized body writing to an employe in a shop that he might remain in it to do a particular kind of work, but to confine himself to work designated by the writer? Such things occurring in ordinary life transactions, no one of common sense would doubt that such acts were an interference. The implied threats contained in notices would justify the placing of the perpetrators under peace-bonds, and if consequences followed, such as in this case, the perpetrator becomes further amenable to the law. The statement in all of these notices that they are not to be taken as intimidations go to show beyond a doubt that the writer knew he was violating the law, and by this subterfuge sought to escape its penalties."

These men were committed to jail for a month for interfering with the road, which was then in the custody of a receiver of the court.

I shall come soon to a consideration of the facts as presented in these affidavits, with a view of determining whether the case to which I have called attention would seem to throw any light upon this subject or furnish any rule for guidance.

There is a case reported in the 23rd Federal Reporter, a decision by Judge Brewer in the Federal Court, in which he puts very clearly, in my judgment, some views that are applicable to the case now under consideration. The decision is valuable because of the simplicity of the language employed by the judge in giving utterance to his views of the matter before him. This was also a matter that came up because of a strike, upon the Denver & Rio Grande Road, I think. That road was also in the hands of a receiver. The court in that case makes a very simple illustration that commends itself to the judgment of every man, and is easily understood. He suggests, in the first place, by way of preliminary consideration, this sort of a case: Suppose a man has a farm of twenty acres, and he employes a man, and says, "Here, you go to work for me;" and then the man says, "All right; I am satisfied with the proposition," and is employed, and proceeds to his work. No time is fixed, no period of employment, but to continue so long as it is satisfactory to both parties. Finally the workman says, "I will work for you no longer." The owner of the land, in that instance, would have no cause for complaint. The man employed was a free man, could work for whom he pleased, as long

as he pleased, and quit when he pleased. And that right which the employe had was the owner's right also. The fact that the owner of the land happens to be an employer does not abridge his freedom. If he is tired of the employer's work, or if he dislikes him for any reason, or if he does not want any more of his assistance on his place, he can say to him, very properly, "I have paid you for all the time you have worked. You can now leave and seek work elsewhere."

"Those are common, every-day, simple rules of right and wrong that we all recognize. Nobody doubts that. Nobody would think for a moment, in a simple case of that kind, of questioning the right, of either of the parties to say, 'The contract is at an end.' And that which is true in these simple matters, where there is a little piece of property, and a single owner, and single laborer, is just as true when there is a large property, a large number of employes and a corporation is the owner. Rules of right and wrong, obligations of employer and obligations of employe, do not change because the property is, in the one instance a little bit of real estate, and in the other a large railroad property; and if we apply these simple, common-place rules of right and wrong, we avoid, often times, a great many of the troubles into which we come."

But, he says, moving on a little further to another matter, suppose the farmer employs two men—that he finds, in the management of his farm, that he is making enough so that he can employ two men instead of one; but after a time, by reason of the period of the year, or for other reason, he sees fit to dispense with the services of one. He says, "I will get along without the services of one of you," naming him, "and I will do with the services of the other," and the one leaves. That is his right—the right of both. Supposing the one that leaves goes to the one who has not left, and says to him, "Now, look here; leave with me,"—giving whatever reasons he sees fit, whatever reasons he can adduce—and the other one says, "Well, I will leave;" and he leaves because his co-laborer has persuaded him to leave—has urged him to leave; that is all right. The owner has nothing to say. He may think that the reasons which the one that is leaving has given to the one that he would like to have stay are frivolous, not such as ought to induce him to leave; but that is those gentlemen's business. If the one whom he would like to have stay is inclined to go because his friend has urged him, has persuaded him, has induced him to leave, the owner cannot say anything. That is the right of both of these men—the one to make suggestion, give reasons, and the other to listen to them and act upon them.

"But supposing—and I will take the illustration that I partially suggested yesterday," says the court—"supposing one is discharged and the other wants to stay, is satisfied with the employment; and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them * * * and the one that leaves comes to the one that wants to stay and says to him, 'Now, my friends are here; you had better leave; I request you to leave.' The man looks at the party that is standing there. There is nothing but a simple request—that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration of force, a demonstration intended to intimidate, calculated to intimidate, and the man says, 'Well, I would like to stay; I am willing to work here; yet there are too many men here; there is too much danger of a demonstration; I am afraid to stay.' Now, the common sense of every man tells him that is not a mere request—tells him that while the language used may be

very polite, and be merely in the form of a request, yet it is accompanied with that backing of force intended as a demonstration and calculated to make an impression, and that the man really leaves because he is intimidated.

"If I take another illustration, I will make it even more plain. Supposing half a dozen men stop a coach (a stage coach), with revolvers in their hands, and one man asks the passengers politely to step out and pass over their valuables; and supposing those men should be put on trial before any court for robbery; would not you despise a judge that would say, 'Why, there was no violence; there were no threats; there was simply a request to these passengers to hand over their valuables, and they handed them over; it was simply a request and a loan of their valuables?' Would not the common sense of every man say that that request, no matter how politely it was expressed was a request backed by a demonstration of force that was really intimidation, and made the offense robbery? Would not you expect any judge to say that? Would not you despise anyone that would say otherwise? And, says the court, 'That is really the question here: whether these parties went there simply, as persons have a right to go, to request engineers and trainmen to desist from further labor, or whether they went there under the circumstances, with such a demonstration of force, with such an attitude and an air, that, although nothing but a request was expressed, it was a request which men did not dare decline to comply with.'"

That expresses, in pretty simple language, what undoubtedly every sensible man would say is altogether a reasonable and proper rule of law.

Now, what are some of the facts in this case, as they appear from the testimony and from the affidavits? And right here let me say, as to the merits of this controversy, as to the cause of this strike, and as to the justness of the complaint which these men have against the company, I only know what the fact is as to the complaint. How well founded it is, what the right and the wrong of that situation may be, I have no means of determining. Nor is that a question now before the court. It is to be hoped that it may be adjusted to the satisfaction of everybody.

The defendants file several affidavits, in which they deny, in general terms, that they have committed any acts of violence; and I think it is to be said to their commendation that up to this moment, so far as I am advised, they have not laid a finger upon any of the property of this company with a view of doing any harm thereto, or interrupting the business of this company beyond the fact of their presence upon the premises and some language that was then used respecting the business. No violence has been done to property. I say this is to be said to their commendation. Now, they say in their affidavits that they have not in any way interfered with this company; they say that they have not intimidated anybody; they have not threatened anybody; they have interfered with no man in the discharge of his duties who is in the employment of this company. They say that in general terms. But two affidavits may be referred to, from which we get some specific language, that is said to have been employed, and from which we may be able to form some opinion as to what was actually done. In one affidavit it appears that on the fourth of March, John Wenger, Hiram Jordan, John Malone and Samuel Weitz, four of these defendants, "came to the affiant in the yard, after having stopped affiant's switch engine in said yard, and John Wenger acting as spokesman at that moment for the four, said to affiant, 'Don't you know what our orders are?' I replied, 'I have not had any

orders from you yet.' He said, 'Don't move any more freight cars.' I told him if I did not have more I would not. Then I said to him, 'I want to put some coal on shop track, and the balance of these cars on No. 2 track.' Wenger then said, 'Don't you move them.' Then after some talk, in which the others of the committee joined, they also telling me not to move them, they gave me permission to put those cars of which we have been speaking on the shop track and on No. 2 track, as I had desired to do and was in the act of doing when they stopped my switching engine and first came to me. Then they made me promise not to move any more freight cars. Samuel Weitz told me, 'Don't you move any more of these cars,' and Jordan said the same thing, and Malone said or told me that if we moved any more cars there would be bloodshed and riot, and this he repeated to me several times. The other three of the committee then went away, and Malone hung about me and the work till I had the switching done, and kept so near to the car that I was in fear lest he should be run over. Since that time I have hired three men, and with each of them done some work. I saw five of the strikers"—it does not appear that any of these were of the defendants—"the day before yesterday come to one of my engines and surround it and my men on it, and when I returned from dinner I had no men."

Again, it is said that the defendant T. E. Whalen, "being in the office on the morning of the fourth of March, said he wanted his time, and I told him he could get it at the superintendent's office. Then he said, before he was done with us, or before it was done with, he would do us up, or words to that effect."

In another affidavit this language is used, and it so appears in the testimony given by one of the defendants:

"Affiant heard the testimony of the defendant Frank E. Kellogg in his own behalf in the contempt proceeding herein, wherein the said Kellogg, as a witness, upon his oath, in open court, said in substance that he himself had engaged with other strikers in sending said committee to yardmaster Keefe to ask said Keefe not to move or undertake to move freight cars in the said Cleveland yard."

It further appears that a telegram was sent from Youngstown to the men here, saying in substance, that they had prevented by force the moving of cars there, and asking them to be firm here, or to do the same thing here; and the reply was sent back, "We are solid here."

Now, as I say, the affidavits of the defendants are to the effect, generally, that they have committed no acts of violence; they have made no threats; they have not sought to intimidate anybody. But there is no denial in express terms of the conversation and the language said to have been used. For the purposes of this hearing it must be taken as having been uttered precisely as it is set out in this affidavit; and because it is denied in general terms, we may assume that although these statements were made, they did not amount to a threat; they did not amount to an intimidation; and that they did no act which, in their opinion, was open to any criticism or rendered them liable under the law. I am unable to take that view of it. It seems to me the language employed here is quite as forcible as any that has been referred to in the several communications made by the chairman, Berry, in the case I have referred to. "Don't you move any cars." "Don't you move these freight cars." Or, after having given permission, perhaps, to move a few onto some switch, "Don't you move any more; there will be trouble if you do; there will be riot; there will be bloodshed." It is

more than likely that that language was used by a man who was not altogether in his right and sober senses on that day, for most of these men are too level-headed and too intelligent men to use that sort of language. But it evidently was used. At least, it is not in terms denied, and we may properly assume that it was used. Nevertheless, they were there for a common purpose, and that was to induce the men in charge of the business there, the yard-master and others, to try to persuade them—you may put it in the form of a request, if you please—to request them to wholly stop the freight business in that yard. That was the purpose of their visit there, and coming, as it is undoubtedly true they did come, as a committee representing substantially the whole body of men who had gone out from that yard, it had all the force and effect that it would have had if a larger number had come there, because it was with their approval and with their sanction. Now, I apprehend no court could be found, and you would have very little respect for the judgment of any court, who would say that sort of language was simply an innocent request and did not have in it all the elements that go to make up intimidation, and did not have in it substantially all the elements of a threat. It was sufficient to accomplish the purpose. It had the very effect desired. It did stop the wheels. It did stop the business.

Now it is a mistaken notion to suppose that men may go upon the premises of another, even although they go there in a peaceable way, and express to men the notions they entertain, that they ought to abandon the employment of the railroad company. I question whether they have even the right to go upon the premises and make a simple request of that sort, and especially so if back of all is the purpose and intention to obstruct the business of the company and prevent it from discharging its lawful business as a common carrier. What would you say if I, or any other man should go into a prominent dry goods store on Superior street here, and should go from one employe to another and say to them, "It is your duty to quit here, and you ought to quit. You had better quit. You must quit. You are not earning what you ought to earn; you can do better. They are not treating you right; you work too many hours"—should go from one to another and try to persuade them to leave the store and leave the employment, to break the contract of the employment? What would you say, what would anybody say, of my conduct in doing a thing of that sort? Would it be lawful? I apprehend not. I do not think you can find a man anywhere in his right mind who would say that I could properly go in there and interrupt the business, engage these men in conversation, induce them to abandon the employment they are engaged in, interrupt and injure the business, and interfere with it. But you say, perhaps to me, "Why, you never have been employed there. You do not occupy any such position as we do." Well, in law would I be in any better position, if I had been in the employ of the firm, and had quit of my own accord, because I could do better, or for some grievance that I believed I had—had severed my connection, had removed myself from the premises? Would I have any better right to go in there and obstruct the business? I think not. And so in this case.

From these facts, it is clear to my mind that these men, when they went there, under the circumstances under which they went there, were clearly trespassers, and that it was altogether and essentially unlawful to go there, even, seeking to compel or urge or invite other men to abandon their employment, and to thereby obstruct the business. It is a trespass. It is a wrong. And when I say this I do not mean to question the right

of these men, off of the premises, by reasonable and peaceable means, to ask other men who have been with them in the employ of this company, their fellow employes, to join with them, or try to persuade them by reasonable means, that it is for their benefit and advantage to go elsewhere or to cease their employment. I do not question that right I do not find it necessary in this case to question the right. But what I do hold to be a correct proposition is that while out of the employment of this company, in this case as in any other case that may arise, the parties so ceasing employment have no right to go upon the premises and, by force or by violence or by threats or by intimidation or by request, ask other men to join them, or in any way interfere with or interrupt the progress of the business that is then being sought to be carried on. I do not believe there can be any difference of opinion among reasonable men on this subject, and I think these troubles arise, in large measure, out of a mistaken notion as to what the rights of men are.

I do not think it necessary at this time to go over at any considerable length the facts as they are made to appear here by affidavit and by the oral testimony offered, beyond what I have already done. It is not suggested that any one of the defendants occupies a position different from that of any other. They all occupy substantially the same relation, and undoubtedly, when they go together, or go on behalf of others, everything that any one of them does or says is the act of every other one of them. It is the common act. It is the act of all, for which all are equally responsible. However injudicious the remark of one man may be, however much it may meet with the disapproval, perhaps, afterwards, of some of the others, yet, when he is in their employment and at their request, engaged in a common purpose, whatever he says becomes the act and conduct of every other.

With the views I entertain in this case, I think this injunction ought to be sustained, and the motion is overruled.

318**MALICIOUS PROSECUTION.**

[Morrow Common Pleas.]

WESLEY C. BARR V. M. L. RILEY ET AL.

DICKEY, J.

In an action for malicious prosecution in procuring plaintiff to be indicted by the grand jury, and prosecuted on such indictment, the averment was sought to be supported by the evidence of one of the grand jurors of what was testified by the defendant who was subpoenaed as a witness before the grand jury.

Held, that the evidence was not competent, and could only be taken in a case where the petition averred that the indictment was procured by the false, malicious and corrupt testimony of the party against whom damages are claimed.

May 11, 1887.

CHATTEL MORTGAGE—EXEMPTION.

318

[Highland Common Pleas.]

BARBARA S. HISER V. H. C. DAWSON.

1. Where a husband gives a chattel mortgage to his creditor and the creditor gets judgment on the debt and levies on the chattels, the wife cannot claim an exemption from execution in them.
2. The chattel mortgage is not a mere waiver by the husband alone of the exemption, but is a conveyance, and she cannot claim the exemption any more than if he had sold the chattel.

SUIT in replevin. Heard on demurrer to second defense.

HUGGINS, J.

The matter of substance in the second defense contained in the answer is: (1), that the defendant is sheriff; (2), that acting as sheriff he levied an execution upon the chattels in question and sold them in pursuance of the levy; (3), that such execution was issued upon a judgment in favor of one B. W. Creed, and against Allan S. Hiser, husband of plaintiff, which judgment had been rendered in an action upon a promissory note; (4), that Allan S. Hiser, had given a chattel mortgage upon the chattels, in question, being then the owner thereof, to Creed, to secure the payment of such note; (5), that Hiser failed to pay the note when due, judgment being taken thereon as aforesaid.

The claim made for the plaintiff, is that she had a right to select and have set off the goods levied upon as exempt from execution in lieu of homestead. The question raised by the demurrer is: can a wife select, demand, and have set off in lieu of homestead, as exempt from execution, chattels upon which her husband has given a mortgage to secure the judgment creditor for the debt upon which the judgment is founded, and on which the execution issues; he being the owner of the goods when the mortgage was made?

It is admitted by counsel for demurrant that the husband would have no right to have this property set off;—that the chattel mortgage has divested him of the right he would otherwise have had. It is claimed however, that by virtue of sec. 5441, Rev. Stat., as amended (Ohio Laws, vol. 81, 148), the wife has this right though the husband has not.

No doubt the wife can demand any right the husband has. She is invested with this privilege by the statutes of Ohio and decisions of the Supreme Court in pursuance thereof. But the claim here is, that she has a greater right than he has, and can do that which he cannot. This claim rests upon the proposition, thought to be derived from the case of *Frost v. Shaw*, 3 Ohio St., 270, that the execution by the husband of the chattel mortgage is a mere waiver of his right to demand the exemption, and that, as the wife has the same right and has not waived it, it must still exist in her. If the mortgage were a mere waiver of the right in question, there would be some force in the proposition. The making of a chattel mortgage doubtless includes such a waiver. But it is not merely that. A chattel mortgage is a sale upon condition, 1 Pars. on Cont., 569. "A chattel mortgage in the usual form conveys to the mortgagee the property mortgaged, and he thereby becomes the general owner of it." *Robinson v. Fitch*, 26 Ohio St., 659, 663. It would not be claimed that

if Hiser, being the owner, had sold this property without condition, that any right remained in his wife to have it exempt, though personally she had done nothing to waive her right. The conditional sale is just as surely a divestiture of such right because it "conveys to the mortgagee the property mortgaged, and he becomes the general owner of it." This is recognized in the very case relied on for the plaintiff. "The owner of chattel property, which is exempted by law from execution and sale for the payment of debts, is not divested of the right of the disposing of it by pledge in security for the payment of debts." *Frost v. Shaw, supra*. If the owner can dispose of the exempt chattel by pledge, what right remains in anybody after such disposition? The disposition would not amount to much if it could be defeated by the wife's demand.

A chattel mortgage has not been considered the best security. If the claim made here be well founded, a chattel mortgage is no security at all. If he who gives a chattel mortgage on exempt chattels, thereby cutting off his own right to have them exempt, can hold the goods against the mortgagee simply by standing back, and allowing his wife to make the demand, then the mortgage is vanity and vexation of spirit.

The solution of any apparent difficulty in the question here presented lies in an appreciation of the legal effect of a chattel mortgage, which is that it evidences a sale upon condition, vesting title in the mortgagee, leaving an equity in the mortgagor. In pursuance of such equity the wife could demand, as could the husband, any surplus arising from a sale of the mortgaged chattels.

Demurrer overruled.

†CINCINNATI SOUTHERN RY. (TRUSTEES OF) V. DAVID BANNING ET AL.

After confirmation of verdict in probate court in condemnation under Municipal Code, payment of the amount of the award was made to the land owners. Thereafter, on error prosecuted by the corporation, the judgment was reversed in the common pleas court, which reversal was affirmed in the district court, and the cause remanded for a new trial. On such new trial the land owners pleaded the payment in estoppel of the corporation's right to re-trial of the question of compensation. On motion to strike answers from files on ground of irrelevancy and immateriality, *Held*:

1. The judgment having been reversed, the probate court is necessarily concluded by the judgment of reversal.
2. Appropriation by the plaintiffs is under the state's power of eminent domain delegated by the legislature to the municipality.
3. The constitution contemplates a judicial proceeding to make the condemnation effective. The appropriation is not complete until there is a verdict and a judgment of the court confirming the verdict, and no title passes until the judicial proceeding is ended.
4. Whenever the corporation is entitled to take the land its former owner is equally entitled to the money.
5. The deposit of money in court is in legal effect for the land owner's use, and it belongs to him as soon as the land becomes the property of the corporation. And this is so, notwithstanding either party may prosecute error, and reverse the judgment.

†For decision of the common pleas reversing this holding, See *post* 21 B. 9.

6. The final judgment of the probate court completes the appropriation for the purpose of transferring title, whether the money be paid into court or paid to the parties, it makes no difference so far as the result of the error proceedings are concerned.
7. If the judgment be reversed on error there is then no verdict and no judgment—both of which are essential.
8. Each party is left to the risk of any recovery, to which one may be entitled against the other, as the result of the new trial.

On the tenth day of August, 1877, a jury having been impaneled in this court, to assess the compensation for property belonging to this defendant, for the use and benefit of the city of Cincinnati, in constructing the Cincinnati Southern Railroad, returned a verdict assessing the compensation to David Banning in the sum of \$9,000, and subsequently an order was made by the court directing plaintiff to pay to the defendant the amount so found due, and ordering, on the payment of said sum, that the defendant surrender the property so condemned. The money having been paid, the property surrendered, the plaintiffs filed their petition in error in the court of common pleas to reverse the judgment of this court.

Upon hearing of the petition in error the judgment was reversed, and it is now sought to have a compensation again assessed. To this proceeding the defendant files his answer alleging the proceedings heretofore had, the payment of the money, the possession of the property by the plaintiffs, and denying their right to again have a compensation assessed. Plaintiffs thereupon filed their motion to strike from the files said answer for the reason that said answer is immaterial to the issue of the case.

GORBEL, J.

The original proceeding was under the municipal code. In the determination of the questions involved we must be governed by the law then in force. Whether the law then in force authorized a proceeding in error is immaterial at this time.

Proceedings in error have been instituted and the judgment having been reversed, this court will not review the judgment and finding of the common pleas court, but is necessarily concluded by the judgment of reversal, and this case must be considered as if the parties were originally here. Under the municipal code in 1877 there was no statutory provision which authorized plaintiffs to pay the money into court or to the parties. The same having been paid, however, to the party, the plaintiffs having taken possession of the property and the judgment having been reversed, the question presents itself whether the plaintiffs are entitled to have again a compensation fixed?

The constitution, after declaring that property shall ever be held inviolate and subservient to the public welfare, provides that except when taken in time of war or other public exigency imperatively requiring its seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall first be made in money or first secured by a deposit of money, and such compensation must be assessed by a jury. This means a jury subject to the judicial direction by a court, as in other cases. This jury is a tribunal presided over by the court, and under its direction hearing the evidence upon the issue, and by its verdict declaring the truth upon the evidence under the law as given them by the court. *Smith v. A. G. W. R. R. Co.*, 25 Ohio St., page 91.

But it requires something more than a verdict. By the verdict the compensation is merely fixed in the event the land is taken. The constitution contemplates a judicial proceeding to make the condemnation effective. The appropriation is not complete until there is a judgment of the court confirming the verdict, and no title passes until the judicial proceeding is ended, that is, until the verdict of the jury is made effective by a judgment. *Wagner v. R. R. Company*, 30 Ohio St., 47.

The fact that the plaintiffs paid the money to the defendant and have taken possession of the property, would seem to make no difference, since the property could not be taken except by due process of law and until a full compensation therefor had been paid to the owner, and in that respect the rights of the parties are mutual. Whenever the corporation is entitled to take the land, its former owner is equally entitled to the money. The right to the money accrues *eo instanti* with the right to take the land. The deposit of money in court is in legal effect for the landowner's use, and belongs to him as soon as the land becomes the property of the corporation. *Meily et al. v. Zurmehley*, 23 Ohio St., 628.

And this is so, notwithstanding either party may prosecute error and reverse the judgment. The final judgment of the probate court completes the appropriation for the purpose of transferring title. Nor do I see any difference where the money has been paid to the parties or it having been paid into court; for in either

case it requires the judgment of the court confirming the verdict. The right of possession passes as an incident of a consummated appropriation; to deprive the owner of his right of possession until appropriation is made would be obnoxious to the constitution. It must follow that the verdict of the jury being set aside, there is not now either a verdict or a final judgment, both of which are essential to a complete appropriation. The motion to strike the answer from the files will be granted, and this case will proceed on its merits.

W. T. Porter, for trustees of Cincinnati Southern Railway.
Judge Huston and L. Maxwell, Jr., for Banning.
John R. Von Seggern, for other property owners.

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CURTESY—ADOPTED CHILD.

[Hamilton Probate Court.]

PETER CLARK, EXECUTOR v. ROBERT HARLAN ET AL.

1. On petition of an executor to sell real estate of a deceased wife to pay debts, the probate court has jurisdiction to allow the surviving husband to be made a party, and to act on his consent to sell free of his curtesy and award him curtesy out of the proceeds.
2. The status of an adopted child of a man and of his wife is now such as that on the death of a man and remarriage of his wife and her death the second husband is deprived of curtesy in the estate inherited by the child from the mother, but the second husband is entitled to such curtesy.
3. There is no curtesy in the interest of the grandchild of the deceased wife by a former husband.

ON MOTION for an order of distribution of the proceeds of sale of certain real estate.

GORBEL, J.

The determination of the questions here involved, requires a full statement of the facts.

Mary Clark and Elliott Clark, her husband, on the eighth day of June, 1866, jointly adopted under the statutes of Ohio, and by a proceeding in this court, one Rosaline Jones. Mary and Elliott Clark had one son, who died in the life-time of his parents, leaving a daughter, who is known in this proceeding as Florence Turner. Subsequently Elliott Clark died, leaving this granddaughter Florence and his adopted daughter, Rosaline, and his widow, Mary Clark. Mary Clark on the twenty-first day of December, 1876, intermarried with Robert Harlan and during coverture acquired the property in question. She died testate and seized of the same, leaving no issue of the marriage with Harlan. Peter H. Clark, who had been appointed executor, instituted proceedings in this court to sell this real estate, which was not specifically bequeathed, to pay debts of the deceased, and made, among others, Robert Harlan a defendant. Harlan files his answer, claiming curtesy in said real estate and consenting to the sale, free of his curtesy, and praying the court to ascertain the amount due him on account thereof, and for an order to pay the same. A sale was had, and Robert Harlan now files his motion for a distribution, and to have his amount of curtesy paid to him out of the proceeds of sale. This motion is resisted by the heirs, legatees and devisees of Mary Harlan for two reasons:

First—That the estate by the curtesy did not exist in the property sold.

Second—If it did exist, this court had no jurisdiction to order it sold.

The first question to consider is, did the court have power to order a sale of this property free of Harlan's curtesy.

It is maintained that in the absence of statutory provision directly authorizing the court to order the sale of real estate, either free of, or subject to the curtesy, the motion of Harlan must be denied. There being no statutory provision, we must look to the general provisions, authorizing proceedings of this kind. This is a civil action under sec. 6167 of the Rev. Stat., which may be commenced in the probate court or in the common pleas court.

The chapter relating to proceedings of this kind, further provides, who shall be made parties, and while Harlan is not one of those mentioned in said section, yet, if his application to be made party, were denied, it would be impossible for this court to determine the equities between persons, claiming an interest in the subject-matter, and to order a distribution of the proceeds of sale as contemplated by sec. 6145 of the Rev. Stat.

I think that on full consideration of the various sections of the statutes, relating to proceedings of this kind, it was intended to give this court full and complete jurisdiction over the subject-matter. This is evident, from the fact that, prior to the act of 1858 a proceeding of this kind was not an adverse one, but the amendatory act of 1858 gives a full adversary character to the petition of an administrator for the purpose of selling real estate to pay debts.

And it is so held in the case of *Holloway v. Stuart*, 19 Ohio St., 472.

But there is another consideration to be urged in favor of Harlan's right to be made a party, and of the court's power to pass upon his rights.

The common pleas courts having concurrent jurisdiction with the probate court in proceedings, would find ample authority under sec. 5006, Rev. Stat., for making Harlan a party, which carries with it the power to pass upon his rights. Section 6411 provides:

"The provisions of law governing civil proceedings in the court of common pleas shall, so far as applicable, govern like proceeding in the probate court, when there is no provision on the subject in this title."

If, then the common pleas court may recur to sec. 5006 to supply a real or apparent omission, why may not the probate court in a proceeding under sec. 6411 do the same?

It would seem that for this purpose then, the probate court has the same jurisdiction and the same power to determine all questions involved, that the court of common pleas has, and has the same power to make a party defendant, who has or claims an interest in the controversy, or who is a necessary party to the complete determination, or settlement of the questions involved.

The next question to consider, "did the estate by the curtesy exist in the property sold?"

The determination of the right of Harlan to an estate by the curtesy as a surviving husband, depends upon the construction of sec. 4176, Rev. Stat., which reads as follows:

"Nothing in this chapter shall be so construed as to affect the right which any person may have to any estate by the curtesy or in dower in any estate of any deceased persons, and surviving husbands, whether there be issue born during coverture or not, shall be entitled to the estate of their deceased wives by the curtesy, but if any deceased wife, leave

issue or legal representatives of such issue by a former marriage, her surviving husband shall not be entitled to an estate by the curtesy in the interest of such issue, or legal representative of such issue, in her estate, unless the estate came to the deceased wife by deed of gift from the surviving husband, or by devise or deed of gift from his ancestors."

The property in question was not specifically devised by the testatrix, but was charged with the payment of debts and certain legacies, which it proved insufficient to pay.

For these reasons it is claimed that Florence Turner had no interest in the same, and that therefore Harlan is entitled to curtesy in the whole.

The question as to the extent of the interest such issue would have, has been settled in the case of *Tilden v. Barker*, 40 Ohio St., 411, in which the court held that the words "the interest of such issue" referred to such interests, as the issue would have taken, if the mother had died intestate, and is merely descriptive of the extent to which curtesy is excluded.

It must follow that as against the interest of this grandchild, Robert Harlan has no curtesy. Has he curtesy in the interest of the adopted child? The solution of this question depends upon the further construction to be given to sec. 4147, Rev. Stat.

The right to curtesy at common law, depends upon the birth, alive, of issue of the marriage out of which the estate grew. In the act of 1858 the right of the husband was enlarged by dispensing with the necessity of issue born during the coverture, as a pre-requisite to the estate by the curtesy, while in the act of 1869, and incorporated in sec. 4176, Rev. Stat., that right was limited by the provision, "that if the deceased wife shall leave issue or legal representatives of such issue by former marriage." To give the word "issue" its literal construction and applying it to the laws of conjugation, it must be apparent that an adopted child is not "issue," child of the blood of such adopting parents, and we must look to the statute of adoption applicable to adoption, to determine what legal effect should be given to adoption, to determine what legal effect should be given to sec. 4176, Rev. Stat. In construing the words, "issue by former marriage," the statute declares that the adopted child shall be the legal heir, that it is to be the child to all legal intents and purposes of the adoptors, as if begotten in lawful wedlock.

It was held by the court in the case of *Upson v. Noble*, 35 Ohio St., 655, in construing the act of adoption in connection with the general statute regulating "descents and distribution" of personal estates that the word "child" was not used in the sense of heir, within the meaning of the general statutes relating to descents and distribution; that the legislative intent was not to take away from the child the capacity to inherit from the natural parent, nor on the other hand the capacity to transmit an inheritance to the natural parent. By the words "legal heir of his or her adoptor," a new capacity was given to the child, to-wit: A capacity on the part of the child to take by way of inheritance from the adopting parent, and this was the whole extent of the innovation.

In the case of *Bruner v. Briggs*, 39 Ohio St., 478, the court held, that the proviso of the sec. 17 is a limitation on the right of a surviving husband to curtesy in his deceased wife's real estate, made in favor of her issue or legal representatives of such issue by a former marriage. The right to curtesy secured by the general clause of said section cannot be affected or defeated, by showing that the deceased wife left illegitimate issue, who under sec. 15 of said section inherited her estate.

By the terms of said sec. 17, as amended, the provision of sec. 15, as amended, which provides that bastards shall be capable of inheriting or transmitting inheritance from and to the mother, in like manner as if born in lawful wedlock cannot be so construed as to affect the surviving husband's curtesy in the real estate of his deceased wife, in all cases provided for in sec. 17.

It was contended in that case that as the statute gives to bastards the capacity to inherit and to transmit inheritance on the mother's side, the same as if born in lawful wedlock, this must be construed as equivalent to the words in section 4176, "issue by former marriage." The construction contended for would be to eliminate from the statute the significant words, "by former marriage," or it would add to them, the additional words, "or leaving illegitimate issue."

In the case of *Lathrop v. Young*, 25 Ohio St., 451, the court also held, that the act of April 1850, and the act of March 29, 1869, gave to the adopted heir the legal statute of a child of the adoptor, and the statute requires him to be regarded as such child, in tracing descent to or from him in the cases there specified; but in cases which do not come within those acts the operation of the statute of descents is the same as if this had not been passed. It must be apparent that by this statute giving artificially new powers and capacities of inheritance to others than legitimate children, confines these to the cases clearly and expressly covered by their terms, and are not to be so construed as to repeal and nullify the provisions of sec. 4176, Rev. Stat., which gives and secures the right of curtesy to the surviving husband, in all cases except that covered by the proviso, to-wit: "In the interest of issues of the wife by former marriage, or the legal representative of such issue."

It must follow that Robert Harlan has curtesy in the interest of this adopted daughter.

Stevenson & Day, for Robert Harlan.

W. T. Porter, for assignee of Beatty.

Wulsin & Perkins, for Beatty heirs.

Harmon, Colston, Goldsmith & Hoadly, for Clark.

CONTRACTS.

331

[Superior Court of Cincinnati, General Term, February, 1887.]

Harmon, Force and Peck, JJ.

† KIRALFY ET AL. V. MACAULEY ET AL.

1. Where one party to a contract pursuant to its terms expends money or incurs liability in preparing to perform it on his part, and the expenditures, etc., are of such a nature as to be entirely lost unless the contract is fully performed, he may recover the full amount thereof from the other party, upon the latter's wrongful refusal to perform, upon mere proof that they were reasonable and proper.
2. While such amount is liable to be reduced by any loss which would have been incurred had the contract been fully performed, the burden is on the party in fault to show there would have been such loss.

† This case was affirmed, by refusal of Supreme Court of leave to file petition in error, April 24, 1888.

3. When an oral contract is made with a provision that it shall afterward be reduced to writing, which is never done, such contract is enforceable unless it affirmatively appear that both parties understood the performance of such provision to be a condition to the contract taking effect.

HARMON, J.

The plaintiff was a theatrical manager in Louisville, and the defendants were proprietors of a troupe engaged in giving shows around the country; and the two made a bargain by which the defendant was to hire the Exposition Building in Louisville, do the necessary advertising and incur the other necessary expenses for attracting and gratifying audiences in that city, and on a certain day the defendant was to appear with his troupe to give a performance extending over a period of a week or two.

The plaintiff having rented the Exposition Building and made and incurred various expenses in preparing it for the exhibition and advertising the same, and procuring other necessary aids and additions, the defendant refused to appear with his troupe. Thereupon the plaintiff brought this suit for damages for breach of the contract.

The case was tried to a jury, and it is here on petition in error, the alleged errors arising upon the charge of the court. The principal one, which was most argued by counsel, related to the measure of damages. The court told the jury that, there being no evidence tending to show what profits could have been realized (as it was apparent from the nature of things that none could be given that would be worthy of being called evidence, because this was a special sort of a venture, not an ordinary performance in a regular house) the plaintiff made no claim except to be reimbursed for money expended in his preparation, and that he was entitled to recover such expenditures as they found reasonable and necessary, less any loss which the jury might find would have been incurred; that is to say, less any sum which they might find, if there was any, that the receipts would have fallen short of paying the expenditures; there being a provision in the contract for the division of gross receipts and not for the division of net profits. It is contended for plaintiffs in error that the court erred in this, and that the jury should have been told that the only ground of recovery could be the value of the contract, the anticipation of profit, and, as there was no evidence on that subject, that the plaintiff was entitled at most to nominal damages.

A great number of authorities were cited, and as the question seems to be an interesting one, we have examined them fully. In Massachusetts the first case is *Johnson v. Arnold*, 2 Cush., 46, in which the defendant agreed to supply the plaintiff with goods to carry on the defendant's store in Indiana. The plaintiff agreed to go to Indiana at once and take charge of the store. It was contended that the plaintiff was only entitled to the loss of the profits he would probably have made in the business, but he was allowed for loss of time and expense in removing to Indiana and back, the defendant having refused when he got there, to carry out the contract on his part.

In *Smith v. Sherman*, 4 Cush., 408, the plaintiff in an action for a breach of promise of marriage was allowed to recover her expenses in preparing for the marriage. Then comes the case of *Noble v. Ames Manufacturing Co.*, 112 Mass., 492, in which, the defendant having written to the plaintiff who was in the Sandwich Islands, that if he would come to Massachusetts they would employ him for a year, he was held not entitled to recover the expenses of removing himself and family

to Massachusetts where, on his arrival, the defendants refused to employ him. *Johnson v. Arnold*, *supra*, was referred to by the court, but without overruling it. The court say there was a manifest difference in the facts of the two cases; the difference was that in the former it was a part of the agreement that the plaintiff should go to Indiana, the contract was made before he went to Indiana; in the latter there was no contract except that they would do something if he came to Massachusetts, and his coming to Massachusetts might be to his advantage whether he was employed or not. In other words, those expenses were not incurred in performance of the contract.

In the following volume, 118 Mass., 114, we find *Pond v. Harris*, which was a case for breach of contract to submit a dispute to arbitration, and it was argued that the plaintiff should have only nominal damage at most, because it must be presumed that the arbitrators, if the case had been submitted to them, would have come to the same conclusion that a jury had afterward come to, which was against the plaintiff; but the court said the plaintiff had been deprived of his right to submit his claims to the tribunal the parties had agreed on, and he was allowed to recover his expenses in preparing evidence for the trial of the case, loss of time, counsel fees and so on; but his recovery was subject to be diminished by such benefit as that preparation had been to him in his subsequent trial; in so far as those preparations were useful for the ordinary trial he did not lose them, otherwise he did.

In *Woodbury v. Jones*, 44 New Hampshire, 206, we find a case like *Johnson v. Arnold*. In *Durkee v. Mott*, 7 Barb., 423, the action was for the breach of a contract by which the plaintiff was to raft logs for the defendant at a certain price. He was allowed his expenses in sending men to do the work before the defendant repudiated the contract. The time of the plaintiff in making the contract was not allowed, because, said the court, in the absence of fraud or agreement to that effect, nothing preceding the contract could be allowed in damages, and he was also allowed his profits, because no profits would come until after the repayment of his expenses.

In *Briggs v. Dwight*, 17 Wend., 71, the plaintiff was allowed to recover his expenses and loss of time in removing his family and goods to a place where the defendant had agreed to rent him a house.

Then comes two cases in New York cited on the other side. In *Masterson v. Smith*, 7 Hill, 61, the contract was for the supply of marble by the plaintiff to the defendant who was engaged in constructing a public building; and the court held that the measure of damages was the difference between the cost of purchasing and furnishing the marble and the contract price, which is the common rule, and the case contains nothing new in that respect. Also *Taylor v. Bradley*, 39 N. Y., 144, which is a case very much like *Rhodes v. Baird*, 16 Ohio St., 573, the same rule was applied without reference to these other cases in New York and elsewhere; and we will hereafter speak of *Rhodes v. Baird*, *supra*.

Then in 48 N. Y., 231, *Dillon v. Anderson*, the plaintiff was to manufacture and furnish boilers to the defendants, and the defendants notified the plaintiff that they would refuse to take them; the plaintiff was permitted to recover expenses for labor already done, and diminution in the value of the materials, the ruling being the same as in the other cases, limiting him to the labor so far as it was lost, and the value of the materials so far as it was diminished.

Then, in 101 N. Y., 214, *Wakeman v. Sewing Machine Co.*, the court cited the language of Judge Field, in *Law Reports*, 1 Q. B. D., 284, that it must be assumed that the plaintiff would make some profit; that is to say, it is fair to assume in the absence of proof to the contrary, that at least the outlay will be recovered in the venture.

In 19 Wallace, 87, *Buckley v. U. S.*, the plaintiff was allowed to recover for loss of time, trouble and expense in preparing to transport supplies for the government, which supplies the government concluded not to transport. And in *Construction Co. v. Seymour*, 91 U. S., 654, the plaintiff was permitted to recover items of damage incidental to the work done, the loss of material and supplies which had been used in construction, the expenses of the hands, etc. If that case truly states the law, it would be that whether a party can recover for profits or not, meaning what the parties would have realized over and above the cost of producing the thing or doing the work, he may recover for expenditures which perish in the expending, for diminution in articles prepared or materials procured for the particular purpose; in other words, that such losses as advertising, and rent of a building, which from its nature, could be used for nothing else, would be the subject of damages.

Upon the other side are cited, in addition to the cases already referred to, which are plainly distinguishable, the case of *Adams Express Co. v. Egbert*, 86 Pa. St., 360, where the Express Company was sued for the failure to deliver plans and specifications which the plaintiff had prepared and forwarded for competition, and the damages were held to be the value of his chances of succeeding, and not his costs of preparing the plans. An English case is cited by the court as holding to the contrary, and the case is distinguishable upon two grounds, first, that the expenses of preparing the plans were all incurred before the contract of carriage was entered into, making the case like the *Sandwich Islands* case in *Massachusetts*; and second, there was nothing to show that the plans were useless for any other purpose. So, the only rule must be that stated.

In *Allan v. Thrall*, 36 Vermont, 720, an action by a manufacturer for a breach of contract by which the plaintiff was to make machines for the defendant, and the defendant refused to receive them, the jury were charged that the measure of damages was the value of the labor and material used in the part performance by the plaintiff, and the contract price for complete machines; this was properly held error, because the result of the ruling would give the plaintiff both the cost of the material and labor and the result, and he would have on hand a staple article; and in all those cases where one of the parties is to receive for something a fixed price, the rule is to take the difference between that fixed price, and what it would cost, or has cost, if the other party is fully prepared to perform his part.

In *Curtis v. Smith*, 48 Vermont, 121, the same ruling was made as in the other cases, where the plaintiff had quarried stone to furnish in a building which he was to put up for the defendant; and the court very properly held that all he was entitled to claim was the diminution in the value of the stone by reason of its being prepared for a particular building; that he could not, of course, keep his stone and recover for what it cost him to quarry it out and cut it.

In *Atkinson v. Bell*, 8 B. & C., 277, it will be found upon examination that the plaintiff having furnished materials to complete certain machines ordered by the defendant, he was held not entitled to sue for

goods sold and delivered, because he had not sold and delivered them; nor could he recover for work, labor and materials, because he had expended the labor and used the materials, not on the property of the defendant, but on his own, which he was at liberty to transfer to somebody else; and the court held that the action must be an action on a breach of contract to accept. And in *Wigsell v. Sch. Dist.*, 8 Q. B. D., 857, the defendants, who were the grantees of certain land, had covenanted to put a stone wall around the land for the benefit of the grantors, who reserved the surrounding land; and it was contended that the grantors, upon the failure of the grantees to build the wall, were to recover what it would cost them to build the wall; but the court said that the proper rule of damages was the diminution of value in their land by reason of there being no wall around the other land, because if they were permitted to recover what it would cost to build the wall, they were under no obligation to build it, and they could keep the entire cost, and the wall would not be there, which would also be of some benefit to the land of the grantees; that if plaintiffs desired to have the wall built, they should have sued for specific performance.

It is enough to say from the examination of the authorities, and there are others which will be found in the text books on damages, see *Sutherland* 118 and notes, to which we will not stop now to refer, that the rule is as stated above; that where one of the parties after a contract is made, incurs certain expenses, reasonable in amount, which both parties had in contemplation at the time the contract was made as necessary to its performance, he is not only entitled to recover profits, if he can prove any, which would be what he would get over and above expenses; but that he is also entitled to recover expenses, properly so called, money which, when expended, is lost, unless the enterprise proceeds; *United States v. Behan*, 110 U. S., 339, 343-346. It is a fair rule, unless the law is to say to injured parties that it will furnish them a remedy, and then furnish them only an illusory one, that if the one party wants to recover profits, the burden is on him to show that there would have been profits; if the other party wants to insure himself from the consequences of a willful breach of his contract by showing a loss; that is to say, that if the contract had been performed the other party would not have recovered what he had expended, the burden is on him to show it. It certainly is consistent with the general rules of law and presumption, that the party alleging a thing shall prove it; one party says, there would have been profits, let him prove it; the other says there would have been a failure to pay the expenses in whole or in part, let him prove it. So says Justice Field in *England*; so says the Supreme Court of New York. If that is not the rule, then the law confesses itself unable to give a remedy to the party who, it must be conceded, has suffered a loss by the wrongful failure of the other party to proceed with the contract, in the expectation of which procedure the plaintiff has expended money for which the only possibility of recovery is in the contract going on.

In *Rhodes v. Baird*, *supra*, the defendant, having agreed with the plaintiff to make him a lease for ten years of a farm on which the plaintiff was to plant peach trees, the plaintiff having planted the trees and gone to other expenses and kept it for two years, the defendant refused to make the lease, and the question was, what was the measure of damages. The court said, just as was said in 39 N. Y., the measure of the damages was what the use of that farm would have been worth for

the remainder of the term. Plaintiff had already had the use of it, with the peach trees on it, for two years, and although they had not begun to bear fruit, their maturing for two years was a value which he had the advantage of by his right to sell his interest in the lease. So it was not a case like this where all the expenditures vanished on the refusal of the other party to do anything toward the carrying out of the contract upon which depended entirely the hope of the plaintiff for any return whatever. The court said—without referring to any of these authorities, and it was so learned a court that we must assume that it was aware of this long list of them on the subject, simply that in cases where the damages may be estimated in a variety of ways, that mode should be adopted which is most definite and certain, recognizing the fact there are different ways; and then in discussing the matter very briefly, the court said, although nothing of the sort was found in the syllabus, "neither did the question of the plaintiff's expenditure made in maintaining or performing the contract, furnish the measure of his damages; because if he made a wise investment, he was entitled to the benefit of it, and if he made a bad one he was not entitled to impose the burden of his bad bargain on the other party." We do not understand that to lay down the rule, that such a measure of damages could not be applied in any case; but the court simply said that that rule was not a fair one for that case.

We are of opinion, upon these authorities as well as upon principle, that the true rule of damages was laid down to the jury in this case. The bill of exceptions does not purport to set out all the evidence, and the statement as to just what the evidence was upon the subject of these expenditures is somewhat vague. It is that the plaintiff offered evidence tending to show that in making the preparations above mentioned he had expended money and had incurred liabilities amounting in the aggregate to so much, \$450.00 of which was for the rent of the building between certain dates, \$1,500.00 was for rent of office, services of manager for ten weeks," etc. As we are not advised what the evidence was, it is fair to presume that certainly all of these expenses were of the class already referred to as pure expenses, and not in any sense investments the results of which could be available for any other purpose, except, it may be said, the furniture; whether the furniture was bought, or whether it was rented is not stated, nor whether if any was bought, it was furniture which would have a value, or whether it was of such a nature as to be fit only for that special purpose; but being of the opinion that the true rule of damages was laid down, we are not prepared to reverse the judgment unless it appears conclusively that there was some error in that respect which has permitted the plaintiff to recover the cost of the furniture and at the same time have the furniture. No charge was asked of the court upon that subject, and while nothing appears directly in the general charge, the inference must be that there was nothing in the testimony calling for it because, it would be necessary if there were, by the very rule the court announced.

The only other question in the case arises upon the exception to the charge of the court upon the question whether there was a contract. In substance the court told the jury, there being testimony at least tending to show that the parties had made and carried on verbal negotiations, and agreed to reduce the contract to writing at a later time, that if the parties had made a contract verbally it was a binding contract notwithstanding the stipulation to reduce it to writing afterward, unless the jury found that the parties understood that the contract was not to take

effect until put in writing; to that the defendants excepted and asked the court in substance to charge the jury that if a verbal agreement was entered into with a provision for its future reduction to writing, the burden was on the plaintiff to show that the provision as to reduction to writing was not in the nature of a condition of its taking effect, the contract having in fact never been reduced to writing.

Without taking time to cite authorities on the question, we will say that an examination of them, as well as a consideration of the principles of contract, leads us clearly to the conclusion that the charge given was the correct one. A writing is ordinarily only the evidence of the contract already made, except in cases where the contract is by correspondence, or where the parties make a contract by signing a writing only. A written contract is ordinarily only the evidence of something already agreed upon, and if the jury found, as they were told in the charge, that the parties had agreed verbally, the mere fact they had also agreed to reduce their contract to an indisputable form would not prevent the contract being a contract if they failed to do so; but it would only fail to be a contract if the intent of both parties was that it should be no contract until the writing was produced.

Upon consideration of all the points made we are of opinion that the judgment should be affirmed.

Wm. Worthington and R. D. Jones, for plaintiff in error.

Wilby & Wald, *contra*.

FORCE and PECK, J. J., concur.

PEDDLERS' LICENSE.

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[Franklin Common Pleas.]

A. E. BURKHART & CO. V. COLUMBUS (CITY).

A city ordinance compelling hawkers and peddlers to pay a license before pursuing business, and also the statute under which it was passed, sec. 2669, Rev. Stat., (82 O. L., 148,) is, in so far as applicable to goods manufactured outside the state, void as a regulation of commerce forbidden by the constitution of the United States, and a dealer who has been required to pay it, may recover it back.

A decision has just been rendered by Judge Pugh, in the Franklin county common pleas, in which he declares the Hawkers' and Peddlers' Ordinance of Columbus, and the statute under which it was passed (Sec. 2669, Rev. Stat., 82 O. L., 148), are repugnant to the constitution of the United States. The decision was in a civil action brought by Messrs. A. E. Burkhardt & Co., Cincinnati fur dealers, against the city to recover money paid by them into the city treasury under the ordinance compelling hawkers and street peddlers and others to take out a license before pursuing their business.

Messrs. Burkhardt & Co. came to Columbus in December, 1885, and putting their goods on exhibition at the Neil House, invited citizens to come and see them. They took orders to be filled subsequently. The mayor decided that they must take out a license, and required them to pay the maximum amount prescribed by the ordinance, namely \$50 per day for each day they continued taking orders. The firm remained two days and paid their \$100 for the privilege. Subsequently they entered

suit in the court of common pleas to recover this money. Their petition set forth three grounds, on either one of which the plaintiffs claimed that they should recover the license fees paid to the city, as follows:

First, because they were neither hawkers nor peddlers and did not sell by auction the goods, these being the only class of persons required by statute and ordinance to pay license.

Second, because if they were either hawkers or peddlers, or sold the goods by auction, they should not have been required, to pay license, for the reason that the goods sold were manufactured in the state, and persons selling such goods were exempt from license.

Third, if they were either hawkers or peddlers, or sold the goods by auction, and even if the goods were manufactured outside of the state, the statute under which the ordinance was drawn up was repugnant to the constitution of the United States, being a regulation of commerce between the states, and being therefore a discrimination forbidden by that instrument. The case was tried by the court about a week ago. On all of the above propositions the court decided in favor of the plaintiffs, and a judgment was entered against the city for \$100.65, the odd cents being for interest claimed by the firm.

City Solicitor Caren, who represented the city, took exceptions to the decision. (Editorial).

(See also in this connection the following remarks on this statute from page 161.)

There seems to be no doubt but that it is within the power of municipal corporations to pass ordinances licensing shows, peddlers, hawkers, etc., provided such power is granted them by the state. In other words it is within the power and province of the state government to grant such privileges to the municipal government.

But in granting such power the state must be careful and not overreach its limits and pass laws in conflict with the constitution of the United States. And the provision which is most likely to be met with here by the state in its legislation is that section of the United States Constitution which provides, "Congress shall have power to regulate commerce * * * among the several states."

This section prevents any discrimination whatever by any state in any law which it may enact in favor or against any commercial article.

The legislature of Ohio has given municipal corporations within its limits the power to exact license by the following statute:

"Section 2669. The council of any city or village may provide by ordinance for licensing all exhibitors of shows or performances of any kind not prohibited by law, hawkers, peddlers, auctioneers of horses and other animals on the highways or public grounds of the corporation, venders of gunpowder and other explosives, taverns and houses of public entertainment, and hucksters in the public streets or markets, and, in granting such license, may exact and receive such sum of money as it may think reasonable; but nothing in this section shall be construed to authorize any municipal corporation to require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him in the state, license to vend or sell in any way, by himself or agent, any such article or product. Provided, that in cities and villages, the council may confer upon, vest in and delegate to the mayor of such city or village, the authority to grant and issue licenses and revoke the same. Provided further, that nothing herein contained shall be construed to limit the power conferred upon cities and villages in section 1692, of said Revised Statutes." (82 O. L., 148.)

Under and by virtue of the authority of this statute, a great number of municipal governments have passed ordinances in accordance with its provisions, and it has thus become of much importance to the people of the state of Ohio.

With all due regard to "the powers that be" and for the wisdom of the legislature, it seems to me that this law under the decisions of the United States Supreme Court is clearly unconstitutional, as coming in conflict with that provision of the constitution above quoted, in this that it discriminates in favor of articles raised or manufactured in this state by not requiring a license from them, and requiring it when the article is raised or manufactured outside of the state. I need only refer

the reader to that part of the statute which is italicized and he will see at a glance the discrimination which is there made. It is so palpable that it needs to be read but once to be easily seen. The only matter of surprise is that the legislature enacted a law so plainly in conflict with the United States constitution as frequently interpreted by the United States Supreme Court.

It has received a good deal of attention from that august body, and some of the cases were almost "on all fours" with the Ohio statute.

In *Welton v. Missouri*, 91 U. S., 275, it was held that a statute which required the payment of a license from persons who deal in the sale of goods, ware and merchandise which are not the growth, produce or manufacture of the state, by going from place to place to sell the same in the state, and required no such license tax from persons selling in a similar way goods which are the growth and manufacture of the state, was in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states, and that the same was therefore unconstitutional, null and void.

In this case the plaintiff in error was a dealer in sewing machines which were manufactured without the state of Missouri, and went from place to place in the state selling them without a license for that purpose. For this offense he was indicted and convicted in one of the circuit courts of the state, and was fined the sum of fifty dollars, which on appeal was affirmed by the Supreme Court of the state on the ground that the license was a tax upon a calling. This was, however, denied by the United States Supreme Court. Mr. Justice Field says in delivering the opinion: "Where the business or occupation consists in the sale of the goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves."

Here it was said that the power was vested in congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it, after it has entered the state, from any burden imposed by reason of its foreign origin.

This statute certainly was very much similar to the Ohio statute.

Guy v. Baltimore, 100 U. S., 434, involved the construction of a very similar statute. By an act of the General Assembly of Maryland, passed in the year 1827, authority was given to the mayor and the city council of Baltimore to regulate, establish, charge and collect to their use such rate of wharfage as they might think reasonable, of and from all vessels resorting to or lying at, landing, depositing or transporting goods or articles, other than the products of that state, on any wharf, etc.

In pursuance of that act the city passed an act regulating the public wharves of that city. By its 33d section it was declared that all goods, wares, or merchandise landed on the public wharves from on board any vessel lying at said wharves, or placed thereon for the purpose of shipment, or exposure for sale, other than the product of the state of Maryland, shall pay wharfage, etc.

The 35th section declares that "all vessels belonging to or lying at, landing, depositing or transporting goods or articles other than the production of this state on or from any wharf, etc., shall be chargeable, etc."

The appellant, Guy, a resident citizen of Virginia, was engaged in the year 1876, in sailing a schooner, of which he was master and part owner, from that state to Baltimore, laden with potatoes raised in Virginia. In June of that year he landed his vessel at one of the wharves of that city. Under the above ordinance, the city harbormaster demanded of him the payment of \$4.40 as wharfage. He refused to comply with that demand, and being sued by the city, judgment was rendered against him. This was reversed by the Supreme Court of the United States.

"Such exactions," says Mr. Justice Harlan, in the name of wharfage must be regarded as a taxation upon interstate commerce. Municipal corporations, owning wharves upon the navigable rivers of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted, by discrimination of that character, to impede commercial intercourse and traffic among the several states, and with foreign nations.

"In the exercise of its police powers, a state may keep from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised are prejudicial to the health, or which would endanger the lives of its people or their property. But if the state, under the guise of exercising its police power, should make such exclusion or prohibition applicable solely to articles of that kind, that may be produced or manufactured in other states, the courts would find no difficulty in finding such legislation to be in conflict with the constitution of the United States.

"In all of this class to which the one before us belongs, says Mr. Justice Swayne in *Howe Machine Co. v. Gage*, 100 U. S., 676, it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Wherever there is, such discrimination is fatal.

"In commenting upon a recent case where a similar question was before the court, the editor of the *Central Law Journal*, 24 Cent. L. J., 160, closes as follows: And to this we can merely add that, howsoever cunningly devised an enactment or ordinance may be, and whatever semblance of fairness and justice it may bear upon its face, if its operation and effect is to place the citizens of another state at a practical disadvantage, or in an unfavorable position as compared with the denizen, in the prosecution of the same or similar pursuits, it will fall within the prohibition of the constitution, and whenever a proper case shall be presented, it will be declared void by the Supreme Court of the United States."

Quite a number of other cases have arisen in the Supreme Court, but it is believed that the cases above cited are sufficient to show that the Ohio statute is unconstitutional.

WM. M. ROCKEL.

Springfield, Ohio.

SURETIES.

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[Superior Court of Cincinnati, Special Term.]

NATIONAL LIFE INSURANCE CO. V. CLEMENT OLHABER ET AL.

1. The failure by an employer to communicate to a surety of his servant or agent his knowledge of any misconduct by such servant or agent will discharge the surety from further liability on the bond only when such misconduct is of a character that if it had occurred before the giving of the bond it would have been a fraud by the employer not to disclose it to the proposed surety. It seems to follow from the opinion in the case of *Dinsmore Trustees v. Tidball*, 34 Ohio St., 411, 418, that such misconduct must be misconduct involving dishonesty on the part of the servant.
2. Where an act, though a breach of duty, may reasonably consist with moral integrity, both the presumption of innocence, and the assurance of the bond itself, justify the employer in putting that construction upon the misconduct as a reasonable one which will make the misconduct only a breach of duty and not an act or course of dishonesty. It would certainly be unjust to the employer to require him as between himself and the surety, to be on his guard against every act which might possibly proceed from dishonest intentions when the surety has vouched for the absence of any such dishonest intention.

TAFT, J.

This is an action by plaintiffs, a life insurance company, against defendants on their bond to plaintiffs, conditioned that Clement Olhaber, principal in the bond, appointed agent of the plaintiff company in Cincinnati, should faithfully discharge his duties as such agent, and should pay over all moneys belonging to the said company. The breach of the bond alleged is the failure by Olhaber to pay over to the company \$751.38 which he had received as agent. Olhaber is in default. The sureties answer. The case has been submitted on an agreed statement of facts. It appears from the statement that Olhaber entered the employ of the company April 11, 1884, and at that time gave the bond described above. His contract of service was made with the general agents of the company at the time. In this contract, Olhaber agreed to devote his time and attention to the interest of the company, to put forth every effort to secure all the business possible for the company in his territory, reporting and remitting for all business in his hands between the first and fifth of each month to Olmstead Brothers, the general agents for the

central department at Cleveland. His sureties did not know the terms of the contract when they signed the bond. From April 1884, until February 1885, Olhaber reported and remitted according to his contract. His report in February showed him behind \$105.74 which he promised to remit in a few days. He made no report for March, and his report for April showed him \$176.98 behind. He wrote as an excuse for his failure to remit and report that he had had a severe illness lasting five or six weeks. In May he sent a check for \$132 reducing his indebtedness to \$99.70. In June a check for \$600, reducing his indebtedness to \$73.22. In July he sent a check for \$500 which was \$53.46 less than the amount he reported to be due for the June business, which increased his indebtedness to \$126.68. He made no regular monthly report in August, September or October. During August and September he complained of trouble in his head, excessive heat, and sickness which prevented his attending to business, and gave these excuses in response to letters demanding reports. August 10th he sent a check of \$250, and on September 12th he sent another check for \$250. He returned several policies of insurances uncollected, amounting to \$117.74. When he had made his last report in July, he had a policy and several receipts on hand amounting to \$706.35. Between July 25, 1885, and September 23d, he was sent renewals and policy receipts amounting to \$715.82. This total of \$1,422.17 was reduced by cash paid in August and September as stated above and by receipts returned and by commissions due Olhaber to the amount claimed \$751.33. The general agents getting no report from Olhaber October first, sent repeated letters and telegrams demanding reports and remittances. Olhaber continued to make excuses until the thirty-first of October, when he wrote "I am unable to make settlement at this time." Olhaber was dismissed and his sureties notified of the deficit in his accounts. Until October the general agents believed that Olhaber would report and remit in full as soon as he was able to make collections, and had no other reason to doubt his integrity and good faith than has been stated above.

The defense set up is that by its failure to notify sureties of Olhaber's first default, and by continuing him in service thereafter, plaintiffs released sureties from all liability except for the first default of \$105.74 in February.

It is a general principle of the law of creditor and surety that mere laches by the former in his treatment of the principal will not release the surety. The principle was applied by Justice Story in *U. S. v. Kirkpatrick, 9 Wheaton, 720*, which was an action by the United States on the bond of a collector who was not removed when he was found by government officers to be in arrears and an embezzler. This decision has been so uniformly followed that there is no question that in actions on bonds of public officers the defense sought to be maintained at bar would fail. As the principle of these decisions was derived by Judge Story from rules governing the relations of private persons, it would be logical to make the same application of it in the case of a bond given to a private person.

But since the case of *Foxall v. Phillips*, decided by the Common Pleas Bench of England in 1872, a different rule has been applied to bonds to private persons, the justice of which has been recognized in a greater or less degree by the courts of this country.

The exact question raised has never been passed on in this state so far as I have been able to discover. But the question has been decided

in England, Massachusetts, in New York, in Georgia, in Virginia, in Pennsylvania, in Illinois and Iowa. The decisions are somewhat conflicting and require examination. The leading case as stated above is *Foxall v. Phillips*, 27 Law Times Rep., 231; 7 Q. B. L. R., 666. This was a declaration on a contract whereby the defendant guaranteed the honesty of one J. S., a servant in the employ of the plaintiff, to the extent of £50. It was the duty of J. S. to collect money for plaintiffs and to account to her for all sums so collected. Breach that J. S. failed to pay over money to the amount of £50 which he had collected. Defendant plead admitting his liability for the loss occurring between June 8, 1869, when contract was made, and twentieth of November, 1869, when the plaintiff discovered J. S.'s dishonesty, but denying his liability thereafter because on the day of the discovery, plaintiff agreed to continue J. S. in his employ and to deduct £3 a month from his wages to pay up the deficit, without communicating his knowledge of J. S.'s dishonesty to defendant.

The plea was sustained by the common pleas bench. The opinion of the court was delivered by Quain, J., for himself, Cockburn, C. J., and Lush, J. Blackburn agreed to the judgment, but in a separate opinion stated different grounds for his conclusion.

In the course of the opinion of Quain, J., occurs the following: "If, therefore, it is correct, as we think it is, on these authorities, to say that such a concealment as is here pleaded, if it had been practiced at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guarantee, a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety unless his assent has been obtained, after knowledge of the dishonesty, that his guarantee should hold good during the subsequent service. * * * * If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance, and until its termination."

Blackburn, J., in the course of his opinion, after disagreeing with the reasoning of the court, says: "Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for the surety's protection, it seems to follow that, by waiving the forfeiture and continuing the employment without consulting the surety, the principal has discharged him. It never had been determined, as far as I can find, in any case, in equity, that the surety has this right. There are dicta tending that way." The justice then approves the dicta and sustains the plea.

The different grounds for this judgment as shown by the opinions lead to two very different rules for determining when the employer is bound to communicate to the surety misconduct of the employed.

If the rule is to be taken from the opinion of the court, then only that conduct of the servant must be communicated which, if it had occurred and was known to the employer before the guaranty, it would

have been a fraud on the part of the employer to conceal from the proposed guarantor.

If, however, the rule is to be taken from the reasoning of the opinion of Blackburn, J., then the employer is bound to communicate to the surety any conduct of the servant in breach of the guaranty, for which the employer might dismiss the servant. The latter rule is much the wider. For it is plain that there may be many acts of a servant in his employment which, though a breach of his duty and ground for dismissal, might yet not be of such a character that a failure by the employer to disclose to the surety such acts committed before the execution of the bond would be a fraud on the part of the employer.

From these two different grounds supporting the judgment of Foxall v. Phillips, has arisen the conflict of authority on the question presented at bar.

Sanderson v. Aston, L. R., 8 Exch., 72, follows the rule growing out of the reason of the opinion by Justice Blackburn. In that case, action was on a bond of a clerk and traveller for breaches in failing to pay over sums of money. The defense was that the clerk before the commission of the said defaults, committed, during the said service, divers other defaults of the same kind, and the plaintiff, though well knowing the last mentioned defaults, wholly omitted to inform the defendant, and continued to employ said clerk in his service, and the defaults sued on were committed during continuance of the service. Chief Baron Kelly in sustaining the plea, admitted that the plea showed no dishonesty, but said that Foxall v. Phillips clearly showed that any default or breach of duty, whether by dishonesty or not, must be communicated by the employer to the surety, on the ground that the surety is entitled to call on the employer to dismiss the servant or agent. Now, it is submitted, that Foxall v. Phillips does not clearly show such a principle, except in the separate opinion of Justice Blackburn. And in the opinion of Justice Blackburn it will be found that the dicta upon which he relied for the existence of an equitable remedy of the surety in calling upon the employer to dismiss the servant are in cases in which the ground for dismissal was dishonesty. See Burgess v. Eve, 43 L. R. Eq., 450. And the opinion of Justice Blackburn was rendered in a case where there was a like ground. With one exception, the courts of this country have refused to follow the Court of Exchequer in Sanderson v. Aston.

In the case of the Watertown Fire Ins. Co. v. George W. Simmons et al., 131 Mass., 85, an agent of an insurance company gave a bond with sureties to the company, conditioned for the faithful performance of his duties as agent according to the by-laws of the company. A by-law required that the agents of the company should render monthly accounts and pay each month the balance due to the company. The agent rendered his accounts regularly; but one month did not pay the whole balance due from him, and thereafter for more than a year his indebtedness to the company increased from month to month until it exceeded the penal sum in the bond, when for the first time the sureties were notified. Held, that these facts did not discharge the sureties.

In the opinion the court say, in commenting on Sanderson v. Aston: "Chief Baron Kelley, in delivering his opinion, says: 'The case of Phillips v. Foxall clearly shows that if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the em-

ployer to dismiss him.' This decision does not seem to be sustained by *Phillips v. Foxall*, which was a case of criminal embezzlement by the servant, and we are not aware of any other decisions sustaining it, at least in this country. Its effect would be to impose upon the creditors the duty of notifying the sureties whenever there are any arrears in the accounts of the agent or servant for whom they were bound, from whatever cause arising. We do not think that any such active duty of diligence to protect the sureties grows out of the relations of the parties, and are not able to agree with the decision in *Sanderson v. Aston*, regarding it as in conflict with the general current of authorities."

In 30 Grattan, 218, in the case of *Railroad Co. v. Casey et al.*, the Supreme Court of Virginia make the same criticism of the case of *Sanderson v. Aston*, and sustain the view taken of *Foxall v. Phillips* by the Supreme Court of Massachusetts, and follow the principles announced by that court.

The New York court of appeals in the cases of *Telegraph Co. v. Barnes*, 64 N. Y., although failing to notice the difference in effect between the decisions of *Foxall v. Phillips* and *Sanderson v. Aston*, lay down the rule as given in Massachusetts and Virginia, that only an act involving dishonesty and moral turpitude must be communicated by employer to surety. The Supreme Court of Iowa have followed these courts in three cases, the most well considered of which is *Home Ins. Co. v. Holloway*, 55 Iowa, 571. The Supreme Court of Pennsylvania has also decided in favor of this rule in *Railway Co. v. Shafer*, 59 Penn. St., 350. The Supreme Court of Illinois alone has followed *Sanderson v. Aston* in *Rapp v. Ins. Co.*, in 15 Insurance Law Journal, 35. Considering that the principle announced by the court in *Foxall v. Phillips* has been followed by so many of the courts of this country, and that the principle announced by one judge in that case has been followed in only one English case and in one court of this country, it seems clear to me that the weight of authority is strongly in favor of the rule as announced by Quain, J., in *Foxall v. Phillips*. The failure by an employer to communicate to a surety of his servant or agent his knowledge of any misconduct by such servant or agent will discharge the surety from further liability on the bond only when such misconduct is of a character that if it had occurred before the giving of the bond it would have been a fraud by the employer not to disclose it to the proposed surety. It seems to follow from the opinion in the case of *Dinsmore Trustees v. Tidball*, 34 Ohio St., 418, that such misconduct must be misconduct involving dishonesty on the part of the servant.

It is to be remarked that that which imposes a duty upon the employer to communicate misconduct of agent to his surety, is not what the misconduct of a servant really is, but what in the light of the circumstances surrounding the act within the knowledge of the employer, at the time it would reasonably appear to a sensible man to be. Where an act, though a breach of duty, may reasonably consist with moral integrity, both the presumption of innocence, and the assurance of the bond itself, justify the employer in putting that construction upon the misconduct as a reasonable one which will make the misconduct only a breach of duty and not an act or course of dishonesty. It would certainly be unjust to the employer to require him, as between himself and the surety, to be on his guard against every act which might possibly proceed from dishonest intentions when the surety has vouched for the absence of any such dishonest intention. For this reason the rule as to

what knowledge the employer may be charged with in a case of alleged fraudulent concealment of dishonesty of servant before giving the bond should be more stringent against the employer and obligee of the bond than in a case of failure to communicate after the bond has been given, because in the latter case the bond itself seems to estop the surety from claiming that the employer should have been prompt to suspect and on his guard to infer an act which would bear another construction. We come now to apply these rules to the case at bar.

There is nowhere in the evidence anything which would indicate to the agents of the plaintiff any attempt at concealment by Olhaber of his debt to the company. There is no testimony tending to show that the reports which Olhaber made did not truly state the account between him and the company. The February report showed that he owed the company one hundred and five dollars, which he promised to remit by the fifteenth of the month. He was then prostrated for five weeks with typhoid fever, which prevented a report for March and increased his debt to one hundred and seventy-six dollars. But in May he reduced the indebtedness, and still more in June. In July he increased it some fifty-three dollars. He remitted a large sum in June and a large sum in July. After July he complained of illness and the excessive heat, and for that reason made no reports. He remitted \$250 in August, and \$250 in September. Nothing was sent to Olhaber after the twenty-third of September. He was not trusted after that date. He had given the excuse of illness and heat for his delinquencies of August and September. He had remitted \$500 in those two months. It seems to me too much to charge the plaintiff from these facts with knowledge of a dishonest and criminal intent on the part of Olhaber, which they were bound to disclose to the defendants. So far as the plaintiffs knew on the twenty-third of September, when they last sent policy and renewal receipts to Olhaber, he was no more indebted to the company than he was when he reported in July, *i. e.*, one hundred and twenty-six dollars. To test his case by the rule laid down above, suppose that on his October assessment Olhaber had made full report and paid to the company all he owed in July as in his letters of excuse he may be presumed to have promised to do, and as the company believed he would do, and suppose that thereafter he had offered a new bond, would this state of fact have been such that the plaintiffs would have committed a fraud in not revealing it to the new bondsman? I do not think so.

In the case of *Home Ins. Co. v. Holloway et al.*, 55 Iowa, 571, the fact that an insurance company did not notify the sureties who signed the bond of an agent that such agent had been delinquent in making remittances under a former agency, was held not to release the sureties from liability, it appearing that they signed the bond at the request of the agent, without solicitation or knowledge of the company, and that the former delinquency was not of a criminal character and had been made good.

That such a default as occurred in this case is to be distinguished from criminal embezzlement, and does not necessarily involve that dishonesty of intention which appeared in *Foxall v. Phillips*, is apparent from all the authorities whether supporting the rule now contended for or the more stringent one urged by the defendant. In *Sanderson v. Aston*, which was much like the case at bar, *Kelly C. B.*, says: "It is said that no dishonesty is shown by the plea. That may well be; and yet the employed by failing to pay over money which he has received,

may commit a breach of duty which would entitle his employer to dismiss him." The distinction also appears in the Massachusetts case cited above, and is commented upon at some length in *Railroad Co. v. Gow*, 59 Georgia, 684, and in *Telegraph Co. v. Barnes*, 64 N. Y., 385.

For the reasons which have been given, judgment will be for the plaintiff for the full amount claimed in the petition.

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FIRE INSURANCE.

[Superior Court of Cincinnati, General Term.]

† *WESTERN INSURANCE CO. V. ENOCH T. CARSON ET AL.*

1. A landlord has an insurable interest in the permanent improvements, repairs and fixtures, added to his building by the tenant.
2. Where a policy of fire insurance contains a provision that the loss, if any, shall be paid to a person other than the insured, it is not sufficient in an action on the policy for such beneficiary to allege and prove that he complied with the terms thereof and suffered loss by fire, but it should have been alleged and proved that the insured had complied with the terms of the policy and had suffered loss.
3. Pleadings in a case pending on error in general term cannot then be amended.

PETITION in error to reverse a judgment at special term.

PECK, J.

The original action was brought by defendants, as trustees of a Masonic lodge known as the Gibulum Lodge of Perfection, to recover on a policy of insurance issued by plaintiff in error to another lodge known as the Nova Cæsarea Harmony Lodge, No. 2, whereby the company insured the last named lodge against loss or damage by fire, on "all permanent improvements, fixtures and repairs," made in the Masonic Temple (a building owned by the Harmony Lodge), by the various bodies of Scottish Rite Masons occupying the same, the loss, if any, to be payable to the trustees of the Gibulum Lodge, who were lessees of that portion of the building under a lease from the Harmony Lodge, made in 1881, for a term of five years, with the privilege of renewal for a term of five or ten years. The property insured was destroyed by fire in December, 1884. Proofs of loss were tendered by plaintiffs to the company, which declined to pay, and thereupon the action was instituted, plaintiffs, in addition to the foregoing facts, alleging in the petition that they had "observed all the terms and conditions of said policy of insurance incumbent upon them."

A demurrer to the petition was overruled at special term, whereupon the company answered, setting up certain defenses to which plaintiff demurred, and that demurrer was sustained. The company then filed an amended answer, the case was tried by the court, a jury having been waived, and judgment was rendered for the plaintiffs below, which the company now seeks to reverse.

The principal claim of plaintiff in error is that the court below erred in overruling the demurrer, or that the facts proved, which were those alleged in the petition, do not support the judgment which was rendered. Three propositions were relied upon:

† A subsequent decision in this case will be found post 23 B. 224. A petition in error to the circuit court was refused by the Supreme Court, in an action between these parties, March 2, 1892.

1. That the petition does not state and the proof does not show that the insured, the Harmony Lodge, had any insurable interest in the property covered by the policy—which consisted of permanent improvements, fixtures and repairs made by the Gibulum Lodge, the lessee. The lease reserved to lessee no right to remove such improvements, fixtures and repairs, and it appears that they consisted largely of stairways, partitions, frescoing, plastering and the like, which, from their nature, would constitute permanent additions to the building. The conclusion that seems to follow from those facts is that the lessor was necessarily interested as an owner in improvements of that sort made upon the building. Although made by the tenant, they became at once a part of the property of the landlord, and as such the latter had an insurable interest in them. Nor does it make any difference that they were made for the use and enjoyment of the tenant, or that their value may be much depreciated at the end of the term. From the fact that they constituted an irremovable part of its property, the landlord, the Harmony Lodge, necessarily had a property interest in them, which it might cause to be insured.

2. It is claimed that the allegation of the petition, to the effect that plaintiffs below tendered the proofs of loss, was not such an allegation as would support the cause of action, because it was the insured, and not the beneficiary, which should have made proof of loss. We do not regard that objection to the petition as well taken, for the loss being, by the terms of the policy, payable to the Gibulum Lodge, it may fairly be claimed that the parties had thereby authorized that lodge to take the necessary steps for its collection, and in any event the necessity for proofs of loss has been obviated by the action of the company in denying all liability under the policy, and refusing to pay.

3. The remaining objections to the petition may be taken together. The averments that the plaintiffs had observed all the conditions of the policy, and that the plaintiffs had suffered loss by the fire in the amount claimed, are objected to as defective, because the obligation of the policy to observe its conditions rested not upon the plaintiffs, but upon the insured, the Harmony Lodge, and that the contract of the company was not to indemnify the plaintiffs against loss by fire, but only to indemnify the insured.

In the case of *Sanford v. Mechanics' Insurance Company*, 12 Cush., 541, it was held that the obligation to observe the conditions of the policy rested upon the insured only, and that where the loss was made payable to a third party, who was a tenant in possession of the building insured, the action of the latter increasing the risk to the premises, contrary to the provisions of the policy, could not be pleaded as a defense to his claim for the loss, because the contract of the company is with the insured. See also *Fogg v. Middlesex Insurance Company*, 10 Cush., 377, and *Hale v. Mechanics' Insurance Company*, 6 Gray, 169.

Such being the law, it is obvious that the plaintiffs below could take nothing by reason of their claim that they had observed the conditions of the policy and had suffered loss. It should have been made to appear that the insured had complied with its contract, and had suffered loss by reason of the company's failure to comply. The policy contains various conditions incumbent upon the insured, and compliance with them was a necessary condition precedent to its right to recover. At common law each of such conditions would necessarily have been

averred, with an allegation of compliance; but the code, section 5091, provides that "it shall be sufficient to state that the party duly performed all the conditions upon his part." Such general averment can not, however, be dispensed with, because compliance is a necessary part of the case of any plaintiff suing up a contract; and in this case the ordinary averment was made, but the unusual conditions of the policy required that it should be varied so as to conform to them, and allege compliance by the insured instead of the plaintiffs. *Home Ins. Co. v. Lindsey*, 26 Ohio St., 348; *Lowe v. Phillips*, 14 O. S., 308.

For these reasons we deem the petition defective in the respects last mentioned, and the defects are not cured by the averments of the answer and reply, so that we can not say that the error in overruling the demurrer did not prejudice the company—as was held by the Supreme Court in *Dayton Insurance Co. v. Kelly*, 24 Ohio St., 345, 356. Nor can we, as suggested, permit an amendment in general term. The record is made up in the trial court, and we know of no statutory authority, nor any precedent, for permitting an amendment to be made in it while under review upon proceedings in error.

The judgment is reversed for error in overruling the demurrer to the petition, and the case will be remanded for further proceedings.

Taft and Moore, JJ., concur.

Follett, Hyman & Kelly, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, *contra*.

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ASSIGNMENT OF STOCK.

[Hamilton Common Pleas, May Term, 1887.]

†ESTATE OF ALFRED A. CLERKE.

Debtor designating and setting aside shares of stock, to take effect after his death, as collateral security to his creditor, without creditor's knowledge, and without actual delivery to him, and calling witness to the act, will pass the stock to creditor after debtor's death.

SHRODER, J.

This was an appeal from an order made by the probate court. On May 15, 1885, A. A. Clerke, being indebted to J. B. Davidson, gave him his promissory note for \$2,000 payable six months from date. Before the maturing of the note Clerke died. Among his papers were found, inclosed in an envelope, certain certificates of stock in the Jones Publishing Company, dated July, 1885, and of face value of \$4,000. They bore Clerke's indorsement in blank, witnessed by J. H. C. Smith. On the envelope, in Clerke's handwriting, was written: "J. B. Davidson; collateral for whatever I owe him; keep as long as possible; should be worth now fifty cents on a dollar; will be worth much more in a year."

Davidson petitioned for an order directing Clerke's executor to deliver the stock to him as security for this note. This was resisted upon the authority of *Phipps v. Hope*, 16 Ohio St., 586; *Gano v. Fisk*, 43 Ohio St., 462; *Flanders v. Blandy*, 45 Ohio St., 108; *Martin v. Funk*, 75 N. Y., 124.

† For probate decision affirmed by this opinion, see *Goebel* 259. The Supreme Court affirmed the opinion of the circuit court, without report, June 16, 1891. Whether circuit sustained or reversed the common pleas not stated.

The principles laid down in these cases are, that when the disposition of the property is to take effect after the decease of the donor, it is testamentary in character, and the statutory requirements as to last wills must be complied with; that when a gift is intended, a delivery either actual, constructive or symbolical is essential; that when a declaration of trust is intended, the intent must be clear and unequivocal. There is no evidence that Clerke intended to dispose of the stock by any of these modes. (80 N. Y., 422-437; 84 N. Y., 83; 91 N. Y., 297; 108 Mass., 522; 100 Mass., 581; 19 C. L. J., 471; 2 Pomeroy Equity, 996, *et seq.*) The indorsement of the stock shows an intention to make a transfer of it. But there must also be evidence of the carrying out of this intention, in order to vest title in the transferee. In this case both the indorsements on the stock and on the envelope must be considered together as explaining Clerke's act of setting the stock apart in a separate and marked envelope. They indicate his intention to transfer it as security for a claim. The employment of the word "collateral" in the context designates the stock as securities for the debt of another. The insertion of Davidson's name furnishes the person for whose claim the stock was to be "collateral." The whole act evinces a purpose to convey this stock as a collateral security for Davidson's note.

Clerke's retaining possession of the stock without any knowledge on the part of Davidson, leaves for determination the question: Was there any such a delivery of the stock as to effectuate Clerke's intention, and thereby transfer the title to the stock to Davidson? In cases of this kind the decisions have mainly turned upon the sufficiency of the evidence and the degree of proof requisite to establish the fact of the delivery. When it was sought to be done by parol evidence clear proof was required, because of the facility which this means afforded for the practice of fraud. But when the intent of the assignor was found under his own hand, the delivery, in support of the transfer was inferred from slight evidence. (*Brinckerhoff v. Lawrence*, 2 Sandf. ch., 400). And no case has been found where the calling of a witness to the written assignment was not taken as evidence of the carrying out of the intention. (16 Q. B., 751n; 9 Allen, 106; 1 Johns. ch., 329; 3 Ohio St., 377; 4 Hare, 79; 40 Johns., 292; 15 Wend., 545.)

In *Eaton v. Scott*, 6 Simour, 31, A, who had privately received and used moneys of B, prepared and executed, without communication with B, a mortgage for the amount. The execution was in A's private office, where no one was present but his clerk, who attested the execution. A kept it secret during his life, and died insolvent twelve years after its execution, the mortgage never having been out of his possession. The court held that there being no evidence that it was executed conditionally, it took effect from its execution and was good against A's creditors.

In *Grangiac v. Arden*, 10 Johns, 292, the father purchased a ticket in a lottery, on which he wrote the name of his daughter, then a child, and declared it was bought for her. The ticket drew a large prize, which he received and used in his trade. Neither the ticket nor its proceeds ever were in her possession. The court held that the jury might infer from the fact a delivery of the gift, and gave judgment accordingly.

In the case at bar the transfer was not a voluntary gift, but was intended as a security for the note. Clerke called Smith to witness the indorsement of the stock. He set it apart and marked the envelope with Davidson's name. The remarks as to keeping the stock for a year were suggestions rather to one possessing a pledgee's control than to one whose

control was limited by the statutory provisions governing executors. They are addressed rather to Davidson than to the executors, and seem to recognize a special ownership in the former.

The evidence, considered in the light of the rulings discussed, sustains Davidson's claim. The judgment will, therefore, be that the executor deliver the stock to Davidson as collateral security for his note.

Cowen & Ferris, attorneys for Davidson.

W. E. Jones, attorney for the executor.

370**HUSBAND AND WIFE.**

[Hamilton Common Pleas.]

ANN WELCH v. JAMES R. MORRISON.

1. A wife, whose husband has been injured, cannot recover of the person by whose negligence the injury was inflicted. Damages for the loss of his wages, nor as compensation for nursing him, or medicines furnished nor for mental distress suffered by her.
2. Neither husband nor wife have now any right to recover for the other's loss of earnings, and on the other items there is no privity between her and the defendant; any action she may have to recover them would be against her husband.

MAXWELL, J.

The plaintiff sues the defendant for damages growing out of the following state of facts: The husband of the plaintiff, named Thomas Welch, was in the employ of the defendant, as a man of all work about the defendant's place of residence in Clifton. While so employed he was injured by the explosion of a gas machine on the premises, and was laid up and unable to work for several months.

The wife, the plaintiff, claims, that by reason of this injury to her husband, she has suffered damages which she ought to recover. The defendant demurs to the petition, and the contention is whether or not the wife can recover for such alleged torts as she sets out in her petition.

I. The wife claims that by reason of her husband being laid up so long she lost his wages, which otherwise would have gone towards her support, and that she was damaged in the sum of \$300 thereby. Is she entitled to recover this sum? If the husband had not been injured, but had continued to earn wages, his wages would certainly have been his own. Formerly, the husband could have recovered damages in a proper case for the loss of his wife's services. On the same principle he could then and can now recover for the loss of the services of a minor child, for the same reason because the wages belonged to him. Suppose, for the sake of the argument, that the law has been so modified as to give a wife all her own earnings. It does not give her her husband's earnings. She is in the same position now as the former was. She could not recover then, because her husband's wages did not belong to her. She cannot recover now for the same reason. Both husband and wife own their own earnings, and neither can recover for the loss of the other. It must be admitted that the husband may recover for the loss of his earnings in a proper case, but there cannot be two recoveries. True she may suffer in her means of support by reason of her husband

not earning anything. But suppose the husband had money loaned out and the borrower did not pay the interest; that might be an injury to her means of support, but I do not think it would be claimed that she would therefore have the right to sue for the interest. Her claim on this ground is not well founded.

II. She claims she was put to great labor and care in nursing her husband, to her damage in the sum of \$800. The same reasoning applies to this as to the other. She might perhaps sue her husband and recover on this claim and he might sue the defendant and recover, if he had paid it or was responsible for it; but there is no privity between her and the defendant. To make the defendant liable for such thing there must be either a direct obligation cast upon him by reason of his negligence toward an injured person, or he must have agreed to pay it. This claim, like the other, may be tested by the inquiry whether she could have two rights to sue, one against her husband and one against the defendant existing at one and the same time. Not but that such a state of affairs may exist in a very few cases, where one is primarily liable. But this is not that case.

III. She claims \$50 for medicine. This might have been included in the second, and is subject to the same objection.

IV. She claims that she was put in great distress, anxiety and pain in nursing and caring for her husband, and that she ought to have \$1,000 for this. It is sufficient perhaps to apply the rule "*non remota*" to this. The husband might recover for his mental distress, and the injury might be called the proximate cause of that; but certainly the injury would not be the proximate cause of her distress, it might be the remote cause. But that would permit a recovery both by the one proximately injured, and the one remotely injured—would permit two recoveries for the same thing.

Demurrer sustained.

SALE OF REAL ESTATE.

389

[Superior Court of Cincinnati.]

† WM. C. PROCTER V. JOHN E. BELL.

Where a contract is to sell land at \$800.00 per acre, and refers to a flat showing ten acres, but the deed made in pursuance thereof calls for ten acres, more or less, and recites a gross consideration of \$8,000, and it is afterward ascertained that by reason of the encroachment of a creek the lot has but seven acres, the purchaser is entitled to compensation, for as the deed does not especially say that the sale is in gross, the contract may be looked to in construing the deed, because not varying it, and such contract shows the sale is by the acre.

Taft, J.

The petition states that on the twentieth day of April, 1885, plaintiff and defendant made a contract in writing, by which defendant agreed to convey to plaintiff ten and 80-100 acres of land known as Lot No. 15 in John Ludlow's Subdivision in Sec. 17, Tp. 3, F. R. 2, M. P. as designated on Plat 3, page 13, Hamilton County Records; it being the

† This judgment was affirmed by refusal of the Supreme Court to allow leave to file a petition in error, December 18, 1888.

expressed intention of defendant to convey all the land owned by defendant for said land at the rate of eight hundred dollars per acre.

The plat referred to, showed that defendant's part of lot 15 amounted to 10 80-100 acres. In pursuance of this agreement, defendant executed a deed to plaintiff conveying to him for the gross sum of \$8,640 lot 15, as shown on the plat above referred to, containing 12 80-100 acres, more or less, less two acres of the southermost portion of said lot deeded to another person. The consideration was paid one-third cash, and the balance in notes due in one and two years. The first note has been paid. Plaintiff has now ascertained that by the gradual encroachment of Mill Creek, which is the west boundary, the 10 80-100 acres as shown upon the plat, has been reduced to 7 20-100. This deficiency was known to neither party at the time of the contract of sale or deed. Plaintiff seeks to enjoin the negotiation by defendant of second purchase money note, or, if it has already been negotiated, compensation for the deficiency at the rate of \$800 an acre for 8 60-100 acres, or \$2,880.00.

Defendant demurs to the petition on two grounds: First, the description of the property as lot No. 15 in the deed, shows the sale of land in gross, and that, with the words "more or less," applied to land upon an encroaching creek, such sale must be held to be at the buyer's risk, in the absence of any allegation of misrepresentation by the vendor.

Second, that even if the deficiency is great enough to justify the intervention of a court of equity, on the ground of mistake, the only power a court of equity will exercise is to rescind the contract and place the parties *in statu quo*.

The first ground reaches to the merits of the action, and the second to the remedy prayed for. It is settled in *Ketchum v. Stout*, 20 Ohio, 453, 460, that where a tract of land is sold in gross by metes and bounds, followed by a statement of the number of acres, with the words "more or less," the statement of quantity is mere description and in the absence of misrepresentation by the vendor the buyer must lose a deficiency, or may retain a surplus. Whether this rule would be enforced in a case where the mistake is so great as the present, where one-third of the quantity of land described is wanting, it is not necessary in the view I take of the case, to discuss. Both claims of the defendant, necessarily rest on the premises that the sale at bar was a sale in gross. Perhaps if the deed were the only evidence admissible to show what the sale was, this premise must be granted; and it must be admitted that the deed is the controlling evidence of the contract of sale, and cannot be contradicted. The question at bar is a question of construction. The deed does not say expressly that it is a sale in gross, or that it shall be so considered; only rules of legal construction say that, without other aid, the language in the deed at bar shall be held to import a sale in gross. We have at bar, however, a very material aid, in the contract of sale, in pursuance of which the deed was executed. In the case of *Wilson v. Randall*, 67 N. Y., 338, it is held that in such a case the contract of sale may be used to explain and aid in the construction of the deed. In the case of *Leggott v. Barrett*, 15 Ch. D., 809, where the question was one of construing a deed of partnership, all the judges said that while the deed was controlling, the preliminary contract of partnership, in pursuance of which the deed was signed, might be used as an assistance to the construction of the deed, just as if the contract had been recited in the deed. So, in the case at bar; it seems to me the contract of sale may be used in construing the deed as if the contract were part of the recitals of the deed.

They do not contradict the deed, they only explain the real nature of the sale. Using the contract for this purpose and considering that the consideration of the deed named is \$800 multiplied into the estimated number of acres, is there any doubt that the sale at bar was not a sale in gross, but a sale of the tract by the acre? The contract does not even name a gross sum. The deed very properly does; but the contract shows just how it was arrived at. In such a case, the New York case cited above shows that the words "more or less" may be held to refer to very small variations from the quantity stated.

"If an estate be sold at so much per acre and there be a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey." 1 Sugden on Vendors, 372. This is expressly as the law by Judge Hitchcock in *Ketchum v. Stout*, cited above. With the construction of the deed I have given, the right of the plaintiff to compensation follows as a matter of course. The demurrer will, therefore, be overruled.

Counsel for the defendant object that plaintiff has no right to the injunction now granted against defendant's negotiation of the second note, because the injury might be fully recompensed by money judgment. In *Kerr on Injunctions in Equity*, page 595, I find the following: "If there is danger that a negotiable instrument fraudulently, or improperly, or illegally obtained, or which ought not to be negotiated, will get into the hands of a *bona fide* holder without notice, and for valuable consideration, to the prejudice of the maker or acceptor, or persons interested in it, the court will interfere to restrain the negotiation, assignment, or endorsement of the instrument, and will order it to be delivered up." Now if the plaintiff is entitled to the compensation claimed for the deficiency, then certainly the note which just covers that deficiency ought not to be negotiated, and in the event of plaintiff's recovery, the note should be delivered up. The injunction heretofore granted, therefore, should not be dissolved until the issues made are decided.

Ramsey, Maxwell & Matthews, for plaintiff.

E. W. Kittredge, Oliver B. Jones, for defendant.

RIPARIAN RIGHTS.

398

[Clark Common Pleas.]

WARDER & BARNETT ET AL. V. SPRINGFIELD (CITY) ET AL.

1. Riparian proprietors are entitled, in the absence of grant or prescription limiting their rights therein, to the usufruct of the waters of a water-course, which washes their lands, in its substantially natural, uninterrupted, undiminished and undefiled flow and current.
2. Such use and flow of the waters of a stream is a private property right in the owner of the land through which it passes, as an incident, convenience or easement, which separately connects itself therewith as a part thereof and frequently gives or adds value thereto; and is protected by the 19th section of the Bill of Rights of the constitution of Ohio.
3. A municipal corporation does not, by the mere fact of owning in fee-simple a tract of land adjacent to a water-course, acquire the rights of a riparian proprietor therein, so as to enable it to lawfully divert the waters thereof to the individual domestic and other uses and benefits of its citizens.

- 4 The law recognizes no natural, correlative rights in waters spread over or percolating beneath the surface of the ground, or oozing through or suspended in the soil, or the result of rainfall. If not flowing in any defined channel, water does not constitute a water-course, is not subject to the principles regulating the rights of riparian proprietors, and is not property.
5. The rights of the plaintiffs as riparian proprietors and mill-owners to the use and flow of the waters of Buck Creek by means of their dam therein, through their race, at and as power for their mills and factory is established by grant and prescription.
7. The city of Springfield, a municipal corporation under the laws of Ohio, by becoming the owner in fee-simple of a tract of land adjacent to said Buck Creek at a point above said dam and race, and by constructing a reservoir thereon, and connecting the same with its water-works for the purpose of supplying the inhabitants and the manufactories of said city with water, does not, in the absence of grant or condemnation according to law, acquire the right to withdraw the waters flowing in Buck Creek and its tributaries, either directly or indirectly, to the prejudice of plaintiffs said rights therein. But it may, if it can without invading such rights, on its own land in such manner and for such purpose, take surface, subterranean and percolating waters not flowing in any defined channel.

WHITE, J.

The plaintiffs by this action seek to enjoin the defendants from an alleged wrongful appropriation of their water power.

The petition herein was filed August 4, 1885, and thereon a preliminary injunction issued, which is now universally conceded to have been properly allowed against the then proposed unlawful appropriation of plaintiff's said water power. The case was tried and submitted at the present term. The questions involved are not only of the highest importance, but are new and intricate. It is a subject of regret that the case could only be considered during the intermission of official duties in the constant trial of other and important causes.

Warder & Barnett, a co-partnership, are the proprietors of extensive flouring mills, fully equipped with the most approved modern machinery, located in the city of Springfield, on the north bank of Buck Creek. P. P. Mast & Co., a corporation, own and operate a large manufactory, with machinery, tools and fixtures, of agricultural implements, on the north bank of the same stream. These plaintiffs severally own the land upon which said mill and factory are respectively so located in fee-simple and are each conducting thereon considerable and profitable business. They are the owners and in possession and use as tenants in common of a certain head race or canal, known as the Barnett hydraulic, extending from their said premises east and along and to Buck Creek about 480 rods to where the plaintiff's dam across Buck Creek is now located, with the right to maintain the same as an hydraulic. Buck Creek is a natural, living water-course, flowing in an easterly and westerly course through said city, fed largely by natural streams, brooks and springs of living water. It is conceded that plaintiffs have the exclusive right to erect and maintain said dam across Buck Creek at the place it now occupies, and the exclusive right to flow the waters of Buck Creek at that place into said race or canal, and to conduct the same therein to and upon their said premises for the purpose of furnishing power to operate their said mill and factory aforesaid, and that they have been in the occupancy and use thereof for that purpose by themselves and their grantor for more than forty years. Warder & Barnett operate their mills solely, and P. P. Mast & Co. operate its factory largely by the water-power aforesaid, and they claim that for a very considerable part of the year, all the water flowing in Buck Creek is diverted by said dam into said race or canal, and

is required and used in propelling the machinery of said mill and factory.

The city of Springfield is a municipal corporation of the second class under the laws of Ohio, having a population of more than twenty thousand. It has heretofore erected and maintained a system of water works, under the direction of the defendant Board of Trustees, who were duly elected and qualified as such. The supply from the present system has become wholly inadequate to the demands of its growing population.

At the time of filing the petition herein (August 4, 1885) it was alleged therein that the defendants were proposing to lay pipe under said head race (which the plaintiffs then claimed to own in fee, but in which it is now conceded they have only an easement to occupy, use and maintain as an hydraulic) to a point about 800 rods above the said dam, and there construct filter galleries and draw the waters of said Buck Creek and its tributaries thereinto and convey the same by means of said pipes to its pumping house for the purpose of furnishing said city with the additional needed supply of water. At such point the waters of Buck Creek are augmented by the waters of Beaver Creek, a tributary natural water-course, containing never failing living water, and between these streams is a well-defined, plainly marked channel of a spring branch or stream of living water which empties into said Beaver Creek near its confluence with Buck Creek.

At the confluence of said creeks and spring branch the city of Springfield, as appears from its answer filed herein January 13, 1883, and the evidence in support thereof, after the commencement of this action, purchased nearly seven acres of ground in fee-simple substantially in the form of a parallelogram, through the west end of which all said surface streams and spring branch flow in well-defined channels, and the whole of which and the surrounding land is seemingly filled with water, and is claimed to be honeycombed with subterranean streams, and percolating waters from the higher lands surrounding.

The answer alleges "the defendants admit that when the petition was filed in this court it was their plan and purpose to dig a well or trench or gallery upon the lands hereinbefore described, across said spring branch and thereby to cut off the water flowing in the same, and to appropriate it to the use of said water-works. They aver that such action, if accomplished, would not have resulted in material damages to the plaintiffs, or either of them. But upon the advice of counsel that their right to interfere as proposed, with the flow of water already in the channel of said spring branch, was doubtful, the defendants have, since the commencement of this suit entirely changed their plans."

Such new and changed plan consists in sinking a large reservoir across the extreme east end of their said tract of land, entirely thereon at a point about 400 to 600 feet at the nearest point from Beaver and Buck Creek and about seventy feet from said spring branch, without, as claimed by defendant, in any way interfering with the flow of water as it is accustomed to flow, in said streams or branches, or with any water-course flowing in any defined channels by filtration or otherwise, or to affect in any manner the water flowing in said channels.

It further appears that full right and privilege has been accorded the defendants to lay and maintain pipes through the intervening lands to their pumping house, a distance of about two miles, crossing under both said Buck Creek and said race by the owners of the fee thereof, and that in accordance therewith they have at this time so laid said pipes and constructed said reservoir, except under said race. Such reservoir has

since been constructed, and is two hundred feet long, fifty feet wide, and sixteen feet deep, and the pipes leading therefrom to the city pumping house are twenty inches in diameter, with a fall of about thirty-three feet between the reservoir and the wells at the pumping house.

During the process of construction, water has been flowing into said reservoir so rapidly and in such quantities that the contractor has found great difficulty in prosecuting the work. He has been compelled to keep two portable engines, with a combined capacity of one and one-half million gallons per day, constantly at work to their full capacity, in order to clear the excavation of water sufficiently to enable the work to proceed.

At the time of the trial the reservoir was substantially completed and has since been wholly so.

The water in the spring branch referred to in the answer disappeared during the process of such pumping, and standing water in the vicinity in the marshes has also disappeared.

The said seven acres so purchased and now owned by the city in fee is located at the confluence and west of Buck and north of Beaver Creeks. Immediately opposite and over the west end thereof Buck Creek flows almost directly north and south, with a considerable continuous fall at a lower level than the water in the reservoir. But above the reservoir at considerable distance its course is from north, then easterly, turning westerly in a crescent curve above the north and west side of the reservoir at a very much higher level than the reservoir. The lands from the upper curve of Buck Creek to the reservoir fall gradually from four to nine feet, ranging according to the points of departure, and were before the sinking of the reservoir, marshy and wet. Since then, these lands, although not dry, are considerably drained, and in some places entirely so.

Through this tract of land crossing Buck Creek twice by bridges, the C., C., C. & I. Railway runs in a northeasterly and southwesterly direction part of the distance between the reservoir and Buck Creek, across an old channel of the creek where the water ran many years past, which has since been apparently largely abandoned by the creek, and a new channel made by it, as above described. Below the railroad next the city mills in this channel water now runs, and is claimed by plaintiffs to be water from Buck Creek, which passing below the surface under the railroad reappears in the old channel, while the defendants claim it is the spring branch referred to in their answer.

The lands to the east of Buck Creek and north of Beaver Creek, and northeasterly from the defendants' said tract of land are higher than at the reservoir and the water in the two wells thereon known as the Haley and Merritt wells, stands higher than in the reservoir. While the reservoir was in process of construction and during the pumping therefrom the water in these wells disappeared, but on the cessation of pumping therefrom reappeared therein.

The underlying soil so far as investigated and disclosed by digging of reservoir and wells is a bed of gravel, except that between the reservoir and Buck Creek, and near one of said wells there seems to be two separate beds of hardpan of unknown extent.

During the pumping in the reservoir as appears from the testimony of the contractor in charge of the work the water seemed to flow into the reservoir from all sides, and largely from the bottom of the well, and at the time of inspecting it by court and counsel at the commencement of

this trial the water was oozing and percolating into the reservoir at the east end near the bottom thereof.

It is not proposed to wall the reservoir, but only to cover it.

No condemnation of the water rights of the plaintiffs has been made and no agreement with the plaintiffs has been effected by which permission has been obtained to lay said pipes or take said water or any part thereof.

The principal questions to be considered here, are, to what extent, if at all, have the plaintiffs a right to waters which the city will take by reason of the construction and maintainance of said reservoir and pipes in connection with its water-works; and how far, if at all, they are entitled to be protected therein.

It is admitted to be the law of this case, and is too well settled as a principle to require citation of authorities to sustain it, that riparian proprietors are entitled, in the absence of contract or prescription limiting their rights, to the usufruct of a stream, which washes their lands in its substantially natural, undiminished and undefiled current, and to insist that it shall flow into and through their lands, and from and onto their neighbors, in its accustomed place and at its usual level. Gould on Waters, sec. 204 *et seq.* Frazer v. Brown, 12 Ohio St., 294, 299.

A stream is essentially indivisible. The flow of its waters is continuous and a diversion or break thereof is a destruction *pro tanto* of the current. No riparian proprietor owns an integral part of or has absolute property in such waters; but each has only the use of their flow past his lands for ordinary domestic, agricultural, manufacturing and other lawful purposes. An upper proprietor cannot, except for such uses, therefore, lawfully abstract, divert or withdraw any portion thereof to the prejudice or injury of a lower proprietor. The rights of each therein are, however, largely measured by the necessities and character of his use thereof. If there is abundance and to spare, no rights are invaded if one, without destroying the stream, takes that only which others do not require or use. Gould on Waters, sec. 205; Cooper v. Williams, 4 Ohio, 253, 287; Atkinson v. Jordan, 5 Ohio, 293; Gardner v. Newbury, 2 Johns. ch., 161; City of Emporia v. Soden, 37 Am., 365; Halle v. Ionia, 38 Mich., 493; Acton v. Blundell, 12 M. & W., 324; Garwood v. N. Y. C. R. R. Co., 83 N. Y., 400; Godard on Easement, 41, 55 and 66; Corning v. Troy Iron and Nail Factory, 40 N. Y., 161; Nadler v. Lee, 66 Georgia.

No man can rightfully dig a channel from a running stream, and thus divert the waters thereof to the injury of a lower proprietor. What he cannot do directly, he cannot do indirectly. He therefore has no right to construct a well, trench or reservoir upon his own land, in such manner that by filtration or creating artificial underground channels, he will withdraw water through the soil from a running stream, to the injury of a lower proprietor. Grand Junction Canal Co. v. Shugar, L. 7, R. 6, ch., 483; City of Emporia v. Soden, 25 Kas., 588, S. C., 37, Am. R., 269; Ætna Mills v. Brookline, 126 Mass., 69, 71; Gardner v. Newburg, 2 John., ch. 161; Earl of Ripon v. Hobart, 3 Myn & Keen, 198.

It is thus apparent that, in the absence of grant or license, the waters of a stream cannot be lawfully withdrawn or diverted therefrom to the prejudice of a lower riparian proprietor by either direct or indirect means. It is the fact, and not the manner of abstraction that works the injury.

Such flow and use of the waters of a stream belong to the land through which it passes as an incident, convenience or easement, which

inseparably connects itself therewith as a part thereof and frequently gives or adds value thereto, and is a private property right in the proprietor thereof. Gould on Waters, secs. 148, 294; Cooper v. Williams, *supra*.

Such private property right is protected by the 19th section of the bill of rights of the constitution of Ohio, which ordains that: "Private property shall ever be held inviolate, but subject to the public welfare. * * * Where private property shall be taken for public use, a compensation therefor shall first be made in money or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner," Crawford v. The Village of Delaware, 7 Ohio St., 523, 459; Street Railway v. Cummins ville, 14 Ohio St., 523, 546.

The right of the plaintiffs, Warder & Barnett and P. P. Mast & Co., to construct and maintain their dam across Buck Creek as now located, and to carry the waters thereof through their said race to operate said mill and factory as aforesaid is established by grant and prescription and is not denied in this case. Conceding then the rights of the plaintiffs to the water at their mill and factory for use as power in the operation thereof, it follows that they have the right to insist that such right shall not be injured or destroyed by diverting the waters of said creeks and tributaries at a point above them, without compensating them therefor. The evidence clearly shows that while at certain seasons of the year the water supply is more than enough for the plaintiffs uses, and that during such seasons the consumption of water by the city would work no present injury, yet in dry seasons there is now sufficient water flowing in the race from Buck Creek at said dam to barely sustain their said required power. Hence any abstraction thereof during such seasons would be a substantial injury. No individual can lawfully appropriate this power, and deprive plaintiffs thereof without their consent. But the city of Springfield, as a municipal corporation, under the laws of Ohio can take such power by condemnation, without plaintiff's consent and even against their protest and objection, for the public good, where a great public necessity, as here, exists therefor. Not, however, until "a compensation therefor shall first be made in money or first secured by a deposit of money" in accordance with the constitutional guarantee already quoted.

The mere fact that the city of Springfield purchased and owns said seven acres of land on the banks of these streams does not confer any right to abstract the waters flowing therein. Judge Brewer in a very able and exhaustive opinion in City of Emporia v. Soden, 25 Kas., 588; s. c., 37 Am. R., 265, a case resembling this in many respects, says: "A city cannot be considered a riparian owner within the scope of the exception named. The amount of water which an individual living on the banks of a stream will use for domestic purposes, is comparatively trifling. Such use may be tolerated upon the principle *de minimis non curat lex*. It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Everyone proposing to utilize the power of running water should reasonably expect that the stream is chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water for the supply of a populous and growing city, stands upon an entirely different basis. No man can foresee this; and if it were tolerated, no one would dare to expend money in utilizing this power for fear of

its being soon taken from him without compensation, and with total loss to his investment. The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes; it is not an individual; it has no natural wants; it is not taken for its own use, but to supply a multitude of individuals; it takes to sell. * * * It would be strange if a city could destroy plaintiff's water power without compensation, and then sell it to other manufacturers, and thus build up rival establishments. This same question was before the Supreme Court of Alabama, and in a well considered case the same conclusion was reached. We quote from the opinion in that case:

"The city of Mobile is not located upon the creek; it is from three to five miles distant. To hold that a municipal corporation can, from the mere fact of owning land upon a water-course, acquire the right to divert the water in sufficient quantities to supply the domestic wants of its inhabitants, residing at a distance of from three to five miles, to the injury of other proprietors, would be unreasonable in itself and unjust to those who have an equal right to participate in the benefits of the stream. *Stein v. Burden*, 24 Ala., 180. See also *Garwood v. N. Y. C. & H. R. R. Co.*, 88 N. Y., 400.

On the other hand, it is equally well settled, that water spread over or percolating beneath the surface of the ground, or oozing through or suspended in the soil, or the result of rainfall, if not flowing in any defined channel, does not constitute a water-course, and it is not subject to the principles of the law regulating the rights of riparian proprietors, *Gould on Waters*, secs. 263, 280.

Such waters, coming from no one knows where and flowing no one knows whence, are not property. The law recognizes no natural correlative rights therein.

"By the common law, no right can be claimed *jure natura* in the flow of surface water, and its detention, expulsion or diversion is not an actionable injury." *Gould on Waters*, sec. 263.

Our Supreme Court has declared in the case of *Frazer v. Brown*, 12 Ohio St., 294, that:

"1. In the absence of express contract and positive legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing or filtrating through the earth; hence, where a landowner digs a "hole" on his own land for purposes connected with the use of his own land, thereby cutting off or diverting underground waters which have always been accustomed to percolate and ooze through his land to the land of an adjoining proprietor, and there to form the source of a spring and rivulet, any damages thereby occasioned to such adjoining proprietor is *damnum absque injuria*.

"2. The act—to-wit: the use of his own property—being lawful in itself, the motive with which the act was done is, in law, a matter of indifference.

* * * "4. The doctrine of prescription, or presumption of grant from lapse of time, can have no application to a case of this kind."

See also: *Acton v. Blundell*, 12 M. & W., 852; *Chasemore v. Richards*, 7 H. L. cases, 349; *Wheatly v. Bangle*, 25 Penn. Stat., 528; 64 Ind., 168; 42 Am., 52; 27 Conn., 84; *Lewis v. Railway Co.*, 7 Dec. Re., 566; *City of Emporia v. Sodon*, *supra*.

Neither the digging of the reservoir on its own land, nor accumulating surface percolating or subterranean waters not flowing in a defined channel therein, nor conveying same to its water-works by the pipes laid thereto, and thence distributing it to individual consumers by the defendants, is in itself unlawful. In so doing, however, they cannot rightfully impair or destroy plaintiff's right to the waters in either Buck or Beaver Creeks, or their tributaries, by either direct or indirect abstraction therefrom, without compensating them therefor.

The substantial question in the case arises upon the respective claims of the parties herein, as to the effect of such operations by the defendants.

The theory of the plaintiffs is that all the water in or on the large territory, estimated by the witnesses to be from a half section to a section of land, which will supply the said reservoir, will be drawn directly or by filtration from the said creeks, its tributaries or the waters supporting them.

While the theory of the defendants is, that no water will flow into said reservoir from the creeks, but the same will be wholly supplied and fed by surface, subterranean, percolating and other waters not flowing in any defined channels to which plaintiffs have any rights whatever.

The issue thus made raises novel, intricate and important questions, seriously affecting the rights of the parties herein. It seems clear, however, that in order that the defendants may pump out and carry away to the full capacity of their pipes with the velocity and volume they propose, without drawing on the waters of Buck or Beaver Creeks, it would be absolutely necessary there should be constantly pouring into the bed of gravel into which their reservoir is sunk, a subterranean stream of water disconnected in source from such creeks, substantially equally in velocity or head with the stream of water which they propose to conduct away from the reservoir to their pumping house.

No evidence of such a stream has appeared, as it should before this, if existing, in said reservoir in the shape of a rushing current or boiling spring; but there appears rather a strong, steady flow of water into the bottom thereof, indicating a large store or body of water pressing into it through the gravel as from a supply basin. This supply is doubtless largely furnished from the water suspended in the extensive gravel beds and drawn from the higher lands off to the east toward the Merritt and Haley wells, as shown by their becoming dry during the pumping at the excavation of the reservoir, and the topography of the country; and also, in part, from the marsh or swamp, which before the pumping and excavating at the reservoir commenced, was continuously filled with standing water, but has since become practically dry. If it were not for future rainfall, this supply would under the enormous drain of nearly two millions gallons per day, made by the reservoir and pipes connected with the city pumping house, become ultimately exhausted. The draft would then inevitably begin upon the waters sustaining the waters in the creeks and then quickly upon the waters of the creeks themselves. But rainfall will replenish a considerable exhaustion. The creeks thus far show no appreciable, if any diminution in current or flow, notwithstanding the enormous drain made by the pumps of the contractor. The conclusion to be logically drawn from this condition of affairs is, that the water in the creeks cannot rightfully be withdrawn therefrom by the city to the prejudice of the plaintiffs and that ultimately it will be, if such a draft as is proposed, should be maintained as already shown; and further that

there is a supply of water upon the surface of ground and percolating in the soil, not in defined channels, to which plaintiffs have no right, and which defendants may lawfully take. It now becomes the duty of the court to determine how much thereof the city may rightfully appropriate without invading the plaintiff's property rights therein. This would be an almost impossible task, if nature had not herself furnished a guide on the ground, and even with its aid it can only be measured approximately.

The spring branch, already referred to, is located between Buck and Beaver Creeks, and nearer to the reservoir than either. If there is no sufficient supply of surface or subterranean water to sustain the draft proposed to be made thereon, the spring branch will be first affected. It is practically conceded in the allegation of the answer hereinbefore quoted, that the defendants have no right to take the water therefrom, and that concession is still maintained in argument by their counsel, and is the unquestioned law of the case. The pumping by the contractor while excavating the reservoir, completely exhausted this spring branch. The same result will follow a drain on the reservoir from the pumping house. To escape the logical effect thereof, it is ingeniously argued that such drying of the spring branch is not occasioned by the withdrawal of the water after it is within the channel thereof, but is accomplished by intercepting the subterranean sources thereof before the waters reach such channel. Without determining what would be the legal effect thereof if such theory were true, it is sufficient answer to say that the drying of the spring branch being admitted in consequence of the excavation, the burden is upon the defendants to show that the water is not abstracted therefrom. Such burden has not been maintained in the conflict of expert and other testimony, especially as the cessation of pumping by the contractor and the suspension of the draft has restored the water in such spring branch. The answer to this claim of defendants is perhaps best stated further, in addition to the fact so found, in the language of Chancellor Hatherly in *Grand Junction Canal Co. v. Slugar supra*, to-wit: "If you are simply using what you have a right to use, and leaving your neighbor to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is *ex concessis* a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the local Board have made.

* * * "If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself but for your neighbors also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity." Of course in compensating plaintiff, only the water in the stream is to be paid for, not this other water to which they have no right, but which defendants cannot reach for reasons stated.

It is, and has always been considered the highest duty of a court of chancery to protect by injunction the citizen in the enjoyment of his property from the unlawful encroachments of others thereon whether attempted by municipal or private corporations or in aid of public or private enterprise.

The decree of the court herein, therefore, is that the defendants be and are permanently enjoined from so laying their pipes as to injure or

destroy the easement of plaintiffs in said race, and from withdrawing water flowing in the channels of Buck or Beaver Creek or said spring branch, through said reservoir, pipes and water-works, so as to reduce the waters of Buck Creek at plaintiff's dam below their ordinary level. And as a guide in determining when such withdrawal so operates, the defendants are enjoined from withdrawing water from their reservoir when the waters of said spring branch are thereby reduced below their ordinary level, and in no event are defendants to withdraw from said reservoir through said pipes in connection with said water-works, to exceed a half million gallons of water per day.

Either party may on motion and on ten days notice make application for an enlargement or modification of this decree if the practical operation thereof is claimed to work injustice.

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Section 4367 gives no power to officials to contract for insertion in more than two papers, and no recovery can be had by the owners of the additional papers. *Elliott v. Commissioners.* 644

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1. The next friend of an infant, can, in that capacity, make an affidavit for an attachment. *McDowell v. Nims.* 624

2. The affidavit for attachment must allege that the property is exempt from execution. *Slough v. Cosgrove.* 311

3. An allegation in an affidavit to obtain an attachment that defendant fraudulently or criminally contracted the debt is in the disjunctive, and is insufficient to support an attachment. *Brownell & Co. v. Heating Co.* 413

AGENCY—

1. A contract employing an insurance agent, fixing no term, the compensation to be twenty-five per cent. on all first premiums collected by them, and ten per cent. for each year for four years on the subsequent or general premium thereon: *Held*, that after the termination of the agency by the act of the company the agent was not entitled to such commissions on renewals. *Trimble v. Insurance Co.* 414

2. If a seller's agent procured a continuing guaranty of payment, the guarantor, on being sued, may show that a subsequent guaranty given by him to the agent was on condition that the prior guaranty be cancelled, there being nothing to put the guarantor on inquiry as to any limitation on the agent's power. *Wolf v. Shillits & Co.* 273

3. Notice to an agent, proved or admitted to be employed to purchase goods for his principal, of the falsity of the representations of the seller concerning the goods, and the agent's omission to rescind the contract, is notice to and omission by the principal. *Mehner v. Schmidlapp.* 87

4. Where an agent, acting within the scope of his agency, signs his own name to an instrument as agent, without designating his principal, and without indicating, by some form of words, that the writing is the act of the principal, he will be personally liable thereon, and evidence cannot be admitted to ascribe to it a purpose different from that which its language imports. *Bank v. Robinson.* 222

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2. Words written on the back of a note are no part of the body thereof *prima facie*, but are presumed to be done after the note is completed. *Ib.*

3. And hence, an erasure or interlineation need not be explained before pursuing a remedy solely connected with the body of the note. *Ib.*

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5. That the alteration was not, either upon its face, or in connection with accompanying circumstances, peculiarly suspicious, or beneficial to the holder. *Ib.*

6. That upon the issue the burden of proof was on defendant. *Ib.*

7. That it was error to charge the jury, "The burden of proof of showing when, how, and by whom such alteration in the date of the check in controversy was made, such

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alteration being apparent on the face of the instrument, is upon the plaintiff, such alteration being one that would be beneficial to the holder." *Ib.*

APPEALS—

1. An assignee, who has given bond within the state for the faithful discharge of his duties, need not give bond on appeal from a justice of the peace. *Terry Clock Co. v. Mussey.*

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2. And in such case, where the assignee files his transcript in the common pleas within ten days, the appeal held good, although no written notice of the intention to appeal was given to the justice. *Ib.*

3. In an action before a justice of the peace against two defendants where judgment is rendered against only one, and the other dismissed, and the cause appealed to the common pleas, where petition is filed against the two, and both answer without objection, it is too late after judgment to except to the jurisdiction of the court. *Carle v. Beckman.*

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4. A certified check received and approved by a justice as bond is not an appeal bond, nor an insufficient undertaking so as to be capable of amendment or new bond under sec. 6595, and therefore, the appeal must be dismissed. *Allen v. Turnpike Co.*

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5. As the law was before the amendment of sec. 6407, by the act of April 15, 1882, if the probate court neither increased nor diminished the allowance set off by the appraisers for the year's support of the widow and minor children, but confirmed it, there is no right of appeal from said order to the court of common pleas. *Reidermann v. Tafel.*

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6. Where an appeal from the probate court to the court of common pleas is dismissed by the latter court for want of jurisdiction, no costs can be recovered. *Ib.*

ARBITRATION AND AWARD—

1. The law relating to awards at common law is in force in this state. When the parties proceed at common law, the statute is not applicable to any part of the proceedings. *Hassenpflug v. Rice.*

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2. At common law the arbitrators and witnesses need not be sworn. *Ib.*

3. The allowance of usurious interest in the award was not illegal,

there being a new and distinct consideration for it in this case. Besides the agreement to arbitrate furnished a new consideration. *Ib.*

4. At common law it is not necessary that the award should show on its face that the parties were notified, or that they met at the place designated, or that witnesses were examined, evidence offered, or that the award was published from the office of the arbitrator. *Ib.*

5. Under sec. 6093, Rev. Stat., for the arbitration of doubtful claims by executors and administrators, it is not necessary that an action be brought on the award, but the court may enter judgment on the award when made. *Bradstreet v. Pross.*

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6. The parties may waive an objection to the manner of swearing the arbitrators. As where oath to be by a judge or justice of the peace was administered by a notary public, but defendant, an attorney at law, was present and made no objection to the proceeding. *Held:* that defendant had waived the objection. *Ib.*

7. Where the alleged misconduct of one of the arbitrators is not shown to have influenced his decision or prejudiced the interests of defendant, and defendant moreover with knowledge of the facts made no objection at the time. *Held:* Such misconduct was not sufficient to set aside the award. *Ib.*

8. Where the action was originally brought in the superior court, and afterwards by the terms of arbitration became an action in the court of common pleas, and the facts showed that it was the intention of the parties to discontinue the suit in the superior court, it was not error on the part of the lower court to find that such suit in said court had been abandoned. *Ib.*

9. To sustain the objection to the introduction of certain evidence admitted with the consent of a party, but subject to his objection, a motion must be afterwards made to rule out such testimony. *Ib.*

10. The fact that an executor has rejected a claim on which suit had been brought, does not estop him from submitting it to arbitration. As part of the claim may have been good and the executor could not be compelled to separate the good from the bad, but might reject it *in toto*. *Ib.*

11. Notwithstanding the parties to a statutory arbitration may have agreed that the award of the arbitrators upon questions of fact, should

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be final and conclusive upon both parties, such an agreement cannot deprive the court of jurisdiction to order a *remittitur*, where in the opinion of the court, the sum awarded by the arbitrators was excessive. *Ib.*

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ASSESSMENTS—

1. When a city has agreed to pay a contractor by giving him an assessment on property abutting improvement, and the assessment is invalid, the *Worthington Law*, 71 O. L., 80, does not govern the city's liability, for the expenditure is not by making the contract but by breaking it. *Kirchner v Cincinnati.* 463

2. A valid assessment would have avoided the liability and a city must deliver a valid assessment if the contractor agrees to take pay in assessments and not look to the city. *Ib.*

3. The damage for failure to deliver such assessment are: The difference between the amount which he should have received and the amount which he collected. *Ib.*

4. Costs taxed in the actions which he brought upon the invalid assessment. A reasonable allowance for counsel fees in those actions. Payment of invalid assessment by part of the lot owners is *pro tanto* satisfaction. *Ib.*

5. An item of \$10,000 for sheeting which was not in the bid cannot be recovered as part of the damages. *Ib.*

6. To maintain an action to enjoin the collection of an assessment for a road improvement under the "Two-Mile Act," sec. 4829, *et seq.*, Rev. Stat., it is not sufficient to show irregularities or errors, if there be no defect in the proceedings in respect to matters upon which it was the intention of the legislature to make the power of the county commissioners depend. *Muchmore v. Meller.* 176

7. The fact that one of the viewers owned lands liable to be assessed is not of itself such defect; nor the fact that the notice required by sec. 4843 was not given; nor the fact that the commissioners made the contract instead of the engineer; nor the fact that it was not let in sections. *Ib.*

8. The surveyor is not required to find or report as to the necessity of the improvement. *Ib.*

9. There is no presumption that the owner of land reported by the viewers for assessment lived thereon or in the county. *Ib.*

10. In the absence of fraud or collusion the approval of the work by the commissioners and engineer is conclusive. *Ib.*

11. Property owners may enjoin an illegal street assessment without first applying to the city solicitor, for they do not sue as taxpayers. *Moore v. Cincinnati.* 587

12. When the owner of adjoining lots in a recorded subdivision has permanently improved the land included in them so as to make lots fronting on a street on which only the side of one of the lots, according to the plat, abutted, the property is assessable as lots fronting on such street. *Matthews v. Cincinnati.* 673

13. Collusion between city officers and a bidder, by which the latter was falsely made to appear the lowest bidder, and thereby obtained the contract for building a sewer, is a good defense to an action to enforce an assessment therefor. *Cincinnati v. Kemper.* 742

14. It is error for the trial court to refuse to pass on an issue made by the pleadings as to the existence of such collusion, when evidence is offered tending to prove it. *Ib.*

ASSIGNMENTS—

1. An assignee who has given bond within the state for the faithful discharge of his duties, need not give bond on appeal from a justice of the peace. *Terry Clock Co. v. Mussey.* 449

2. A draft for the exact balance remaining in the hands of the drawee to the credit of the drawer, constitutes an equitable assignment of such fund to the party in whose favor the draft is drawn. *Saylor v. Bank.* 752

3. A draft, drawn by a consignor upon the consignee of goods for the exact balance expected to arise from the sale of the goods, etc., when made and delivered to the holder in payment of pre-existing indebtedness, constitutes an equitable assignment of the claim of the consignor against the consignee for proceeds of the goods. *Ib.*

4. A written instrument purporting to be a general assignment of real and personal property for the

Assignment for Creditors—Attachment.

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payment of debts under the insolvent laws of the state, but not acknowledged as required by the statute governing deeds and conveyances, does not pass title to real estate. *Pfeiffer v. Cook.* 290

5. Nor does it create in the assignee an equity for the conveyance. *Ib.*

ASSIGNMENT FOR CREDITORS—

1. In this state the assignee of an insolvent debtor not only represents the assignor, but the creditors. *Spangenberg v. Schwartz.* 244

2. If an assignment in another state with preferences must yield to an attachment here by a citizen of Ohio, this is not so where the attaching creditor is a citizen of the other state. *Bank v. Werk.* 770

3. An assignment for creditors including in general terms all the debtor's land, is sufficient to convey all without particular descriptions. *Ib.*

4. An objection that the deed of assignment must be recorded in recorder's office to effect third persons, is available only to a purchaser for value, and cannot be made by a mere attaching creditor. *Ib.*

5. Where a person gives a lease with privilege of purchase, and then assigns all his property for benefit of creditors, and the lessee elects to purchase, if there is a controversy as to right to purchase money between assignee and attaching creditor of assignor, the lessee is entitled to pay the money into court and have his title quieted against both, or to try the matter in an adversary suit. *Ib.*

6. An assignee who causes loss and expense by mal-administration will not be allowed compensation. *Purcell's Assignment.* 602

7. An assignee who delays, unreasonably, to file his account, as required by law, will be charged with interest from the date his account became due. *Ib.*

8. A delay of six years to account, after the date at which the account became due, is an unreasonable delay and sufficient to charge him with such interest. *Ib.*

9. On mingling two insolvent estates by the assignee of both, the court, after removing him, may itself separate the account, and if accurate division of expenses is impossible, may adopt such arbitrary apportionment as seems most fair. *Ib.*

10. The statute of limitations does not run in favor of an assignee of the debtor under the insolvent laws of this state. *Bettman v. Hunt.* 396

11. The failure of a creditor to present his claim within six months to the assignee is not a bar to an action against the assignee for its allowance. *Ib.*

12. The discharge in bankruptcy of the debtor does not affect the rights of creditors under the assignment, it having been made long prior to the "bankrupt act." *Ib.*

ATTACHMENT—

1. An allegation in an affidavit to obtain an attachment that defendant fraudulently or criminally contracted the debt is in the disjunctive, and is insufficient to support an attachment. *Brownell & Co. v. Heating Co.* 413

2. The statute requires that an attachment on the ground that defendant is a non-resident must be upon a claim arising upon a contract, judgment or decree, and not otherwise. *Slough v. Cosgrove.* 311

3. The affidavit for attachment must allege that the property is exempt from execution. *Ib.*

4. Averments in the petition in an action, may, by express reference, be incorporated in an affidavit for attachment. *Stifel v. Bank.* 700

5. Allegations amounting to an averment of wilful imposition constituting fraud. *Ib.*

6. Where the court granted a motion to discharge an attachment, a motion for a new trial was not necessary in order that the action of the court upon the motion discharging the attachment may be reviewed on error. *Beitman & Co. v. McKenzie.* 403

7. The reviewing court will not reverse the action of the lower court upon a motion to discharge an attachment, where questions of fact are involved, unless the action of the lower court was clearly erroneous. *Ib.*

8. Petitions in error to orders discharging attachments may be filed "as in other cases," and within the time allowed by the statute in other cases. *Sibley v. Oil Co.* 399

9. A foreign insurance company which does business in this state may be made a garnishee by serving copies of the order of attachment and notice upon a resident managing agent of such company. *Rocke v. Raney.* 617

10. Converting a business into a corporation with the reasonable be-

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lief and intent of being better able thereby to provide for creditors, is not a fraudulent disposition, and does not afford ground for an attachment. *Beitman & Co. v. McKenzie.* 241

11. It was not made fraudulent by the fact that if he had done nothing, the first creditors who obtained judgments might have secured payment in full by levying execution. *Ib.*

12. And to corroborate such intent, settlement with many creditors on the basis that assets were not diminished in value by change of form may be shown. *Ib.*

13. The next friend of an infant, can, in that capacity, make an affidavit for an attachment, in the cause, and the statement in the affidavit that S. deposes that she has commenced an action as next friend for M., sufficiently avers the agency. *McDowell v. Nima.* 624

14. A finding that at the time the debt sued on was incurred, the debtor represented that he owed \$800 for borrowed money, whereas, he owed \$1,400, is not sufficient to sustain an attachment for fraudulently incurring the debt, where there is no finding that the debtor knew the statement to be false, or knew, or had reason to know, that the creditor would rely upon it. *Bullock v. Mitchell.* 687

15. Nor can these findings be supplied by intendment; like a special verdict, omitted facts cannot be inserted by presumption, nor will a general finding that the debt was fraudulently contracted help the special finding. *Ib.*

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1. The authority of an attorney-at-law, in the conduct of a suit, does not extend to remitting a part of the claim. *Countee v. Armstrong.* 62

2. Where the relation of attorney and client exists, the law will not permit an extortionate contract for compensation for services to be made. *Carlton v. Dustin.* 51

3. When funds of a client are in the hands of the county, and are tied up by claims and liens, but, by mistake of the auditor's clerk, a warrant for the full amount is handed to the attorney, who knows this, but being threatened by injunction by the lienholders, promises to hold the fund, but instead, pays the fund to the client, who appropriates it, he is guilty of unprofessional conduct, the punishment to be mitigated upon restoration of the money, and general good charac-

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1. The discharge in bankruptcy of the debtor does not affect the rights of creditors under the assignment, it having been made long prior to the "bankrupt act." *Bettman v. Hunt.* 396

2. The requirement in sec. 5, U. S. Bankruptcy Act of 1841, that every deed by an assignee in bankruptcy shall recite the order of sale is merely directory, as shown by the words that it shall supersede other proof to validate the deed, and it may be validated by other proof. *Herbst v. Bates.* 444

3. Confirmation of sale was not required by the U. S. Bankruptcy Act of 1841, and, hence, was not essential. *Ib.*

4. A discharge granted in individual proceedings in bankruptcy by or against one who is a member of a partnership firm, discharges him from partnership as well as individual liabilities. *Hamilton v. Cutler.* 187

BANKS AND BANKING—

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When a depositor in a bank becomes insolvent, the bank holding notes not yet due, which it had discounted for him, and the proceeds of which notes had gone into his deposit account, the bank can withhold enough of the deposits to protect such notes as against the insolvent or his general assignee, though not against *bona fide* holders of checks for value. *Shunk v. Bank.* 684

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1. It is no defense to a proceeding in bastardy that the complainant was a married woman, if the said marriage was void. *Briscoe v. Reed.* 360

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2. Where one of the considerations for an agreement by the father of a bastard to its mother to pay money for its support and education, was the promise of the mother to continue to cohabit with the father, such agreement is void whatever the other considerations were. *Crawford v. Gordon*. 160

BIGAMY—

1. Indictment for bigamy need not aver that the defendant at his second marriage knew his first wife was alive, or that she was not divorced. *State v. Stank*. 8

2. It is competent for a defendant to give evidence to show that at time of second marriage he believed and had reasonable ground for believing that his first wife was dead or divorced, and if he satisfies the jury of either of these things he is entitled to an acquittal. *Ib.*

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1. Papers not set out in, or attached to the bill of exceptions or in some way connected therewith so as to make them a part thereof, cannot be taken as a part of the bill of exceptions. *Kerr v. Burns*. 294

2. If the court has no power to sign a bill of exceptions as presented, it has none to sign an appendix which is a part of the same bill of exceptions. *Carlton v. Dustin*. 51

3. A bill of exceptions signed and allowed within thirty days after the trial term, but not entered upon the journal of that term is to be disregarded. *Bettman v. Hunt*. 396

4. Signing a bill of exceptions in forcible entry proceedings is a useless act, and will not be compelled if there is no reversible error. *State ex rel. v. Paul*. 228

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1. A promissory note in payment of a pre-existing debt is not payment in Ohio unless affirmative evidence is also offered that it was so taken. *Victoria Bldg. Assn. v. Kelsey*. 123

2. In a controversy between the holder of a mechanic's lien and a mortgagee, a note given before the taking out of a mechanic's lien does not discharge but suspends the lien. *Ib.*

3. A Bohemian oats note is wholly void, regardless of the guilt or innocence of the holder, or want of notice of defects to any purchaser. *Williams v. Keel*. 746

4. Such a note is on a gambling consideration and the maker of the note having to pay it to a purchaser in good faith and without notice of its defects, may recover from the payee. *Ib.*

5. A valid patent is a sufficient consideration for a promissory note. *Ohio Forging Co. v. Lamb*. 199

6. Fraudulent representations as to utility of patent or cost of manufacture will not, in absence of proof of tender, by assignee to assignor of written assignment, avail as a defense to such note. *Ib.*

7. In an action on notes in payment for labor and material, the defense that since notes were given, defendant discovered that the material and labor were not worth as much as the notes called for, and offering to confess judgment: *Held*, in the absence of misrepresentation, fraud or imposition, a demurrer to the answer was properly sustained. *Dieringer v. Kle-Kamp*. 164

8. Where a note given for purchase of a chattel recites that title shall remain in vendor until note is paid, and also recites that it is negotiable without offset at a certain bank, it is a negotiable note. *Mansfield Sav. Bk. v. Flowers*. 169

9. The endorsement of a partial payment on a note by the holder is an executed contract which cancels the note *pro tanto*, unless a contrary intention appear. *Keys v. Baldwin*. 737

10. When such endorsement is voluntarily made, with intention of discharging in full an obligation of the holder to the maker, which had been discharged by a composition in bankruptcy, the holder can not afterward erase it and sue for the full amount of the note. *Ib.*

11. The rule respecting notice to endorsers is merely that reasonable effort be made to give notice. *Luckett v. Goodrich*. 328

12. Notice by mail to an endorser, so addressed as to denote the locality of the residence, although no post-office be at that place, and although in fact not received, will be held sufficient, upon it appearing that in ordinary course of mail the letters of the endorser reached her by that address, and that upon reasonable inquiry it was the only address to be ascertained. *Ib.*

13. In determining whether presentment and notice were within a reasonable time in an action against the endorser of an overdue note, all

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the circumstances known to the parties at the time of the endorsement are to be considered, and no delay will be held unreasonable which appears to have been contemplated by them. *Wilby v. Bassenhorst.* 407

14. Where a firm note made by one partner was sent by him to plaintiff to pay an individual debt, and was endorsed by plaintiff to a *bona fide* purchaser without notice, and not being paid when due was taken up by plaintiff, he cannot hold the partnership on such note. He does not hold the note as an innocent purchaser but because of his liability as endorser. *Bradley v. Nicola.* 82

15. Under circumstances above stated, although it is not shown that plaintiff knew the note was misapplied by one partner yet being appropriated to pay a private debt due him he is presumed to know that it is a diversion of the firm's property and he cannot hold the firm. *Ib.*

16. An order in writing for \$100 in factory work, accepted "payable in new, manufactured work in our line," is not a bill of exchange, and in an action upon it the consideration must be alleged and proved. *Greenless—Ransom Co. v. Berne.* 298

17. A bank check, payable in blank, on which the drawer had endorsed "Pay Fourth National, or order," and signed his name, but afterward struck out the endorsement, leaving only his name, was left by him upon a desk, at which he and his partner did business. The partner took the check, without authority in fact, and caused it to be presented on the bank on which drawn, the person presenting it being known to the officers of the bank, and informing them it had been handed him for that purpose by the partner: *Heid*, that as between the bank and the drawer, the payment of the check was properly charged to his deposit account. *Bowden v. Bank.* 333

18. The change of securities of a pre-existing debt constitutes one a "holder for value" of negotiable paper, taken on account of such debt. *Jaspers v. Mallon.* 184

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1. To constitute the offense of blackmail, it matters not whether the charge is true or false; it must be made for the purpose of extorting money. *English v. English.* 167

2. In determining whether the words spoken are actionable *per se*, they are to be taken in the sense in

which they would naturally be understood by those who heard them, and it is for the jury to decide what meaning is truly ascribed to them. *Ib.*

3. Whether the language will bear the meaning ascribed to it by innuendo, it is the duty of the court to determine; and if it will, then the question whether such meaning was intended must be submitted to the jury. *Ib.*

BOARD OF EQUALIZATION—

The county commissioners have no power to provide for the board of equalization "additional help," by way of clerical assistance, etc., under the existing statutes. *State v. Wilson.* 39

BUILDING ASSOCIATIONS—

1. The shares in building associations, as they are now organized, are not necessarily of equal value, but the value of each is to be determined by adding together the dues properly credited upon it. *Seibel v. Building Assn.* 422

2. The provision requiring an annual rebate of interest to be made by building associations upon dues paid in during the year by borrowing members, found in sec. 3835, as amended (77 O. L., 208), is, in effect, the same as if the association were required to credit the dues so paid, upon the loans previously made to such borrowing members. *Ib.*

3. The effect of such rebate, or credit, is such that the amount so credited can not thereafter be treated as a part of the dues standing to the credit of the borrowing member, in computing the value of his stock for the purpose of ascertaining the ratable share of the earnings of the association, to which he may be entitled upon the same. *Ib.*

4. Borrowing members of a building association who become such after the passage of the amendment to sec. 3835, are subject to its provisions, and an amendment to the constitution of the association, made necessary by, and in conformity to said amended section, is binding upon such members, although adopted after they had become borrowers. *Ib.*

5. Where members of a building association resolve that if each will pay dues to June 2, they can dissolve and each be paid off and many do so and go out, but it is found that a deficit results, those not paid off can recover of those gone out, on the ground of mutual mistake, though the plan was not according to the consti-

Burglary—Chattel Mortgage.

BUILDING ASSNS.—Continued.

tution. *McKeown v. Irish Building Assn.* 257

6. To equalize the assessment all must pay to June 2d, and if that is not sufficient, those who have received the most profits are reduced to those who have received a lesser amount. *Ib.*

BURGLARY—

Under an indictment for breaking into a warehouse with intent to steal, proof that defendant entered simply to destroy a kit of gambling tools in revenge for having been cheated in gambling, does not sustain the indictment. *State v. Wilmore.* 61

CANALS—

1. A lessee from the state, of surplus water from a canal, has a vested property right in the flow of water therein, and a right of action against any one who interferes with such flow to his damage. *Canal Elevator, etc., Co. v. Cincinnati.* 744

2. The city, in building a sewer under the M. & E. canal by permission of the state authorities, granted on condition that the city protect the canal and the rights of lessees of water power, let the work to an independent contractor by whose negligence the flow of water in the canal was interrupted to the injury of plaintiff. The city is liable. *Ib.*

CARRIERS—

1. Where there was a rule of the company that an express car should be unloaded outside of the depot and not in the depot, a violation of that rule by an employee of the express company would be an act for which the railroad company would not be liable. *Ferrell v. Railroad Co.* 361

2. A consignee who purchased at a fixed price, deliverable, including freight, at destination is not the proper person to sue for the penalty under sec. 3373, Rev. Stat., for discrimination. The seller alone can complain. *Thompson & Co. v. Railroad Co.* 209

2. Where a carrier receives corn in bulk for shipment in a certain designated car, and by its proper agents receipts therefor and issues a bill of lading thereon at fixed price for shipment to a certain point, it is a contract to carry that specific car of corn, and it is a breach of contract for the carrier thereafter to unload and refuse to ship it, and substitute therefor another car load of corn, though it may presumably be of the same grade and

quality—no fact appearing in proof showing assent of the shipper thereto. *Railroad Co. v. Parrott.* 252

4. The shipper or consignee is not bound to accept such substituted corn, nor if it arrive at its destination in a damaged condition to bring his action therefor as to such substituted corn, but has a right of action against the carrier for the breach of the contract of shipment of the corn named in his bill of lading. *Ib.*

CHARGE OF COURT—

1. Where a general exception is taken to the charge of the court upon the matter of damages, the question whether a particular portion was erroneous, it not being claimed that the whole charge was erroneous, cannot be raised. *Street Ry. Co. v. Meyer.* 256

2. In the absence of counsel it is error to charge the jury as to the form of their verdict, given at their request after submission. *Moravec v. Buckley.* 226

3. In an action against a railroad company for injuries to a passenger alighting from a railroad car by being struck by a bag thrown from the baggage car, a charge that "if it was somebody employed in the postal service of the United States, or somebody in the service of the express company that did it, then the government or the express company and not the defendant would be liable," is erroneous. *Ferrell v. Railroad Co.* 361

4. A charge that "until plaintiff had left the depot, she remained a passenger and defendant owed her the degree of care due to passengers," is too indefinite and misleading as to degree of care, and is properly refused. *Ib.*

5. It is not error for the court in a proper case to say to the jury that the testimony of a witness to a certain fact is contradicted by other witnesses, but leaving the question of fact to the jury. *Jaspers v. Mallon.* 184

CHATTEL MORTGAGE—

1. For filing a chattel mortgage (made to a partnership in the firm name of A. & B.) the recorder, under sec. 1157, is entitled to charge for each name in the firm style capable of being indexed. *State v. Anderson.* 691

2. The right to charge for searching a paper does not refer to examining the paper offered for filing, for he must do that in order to index at all, but refers to a charge in looking

Conflict of Law—Contempts.

for, or exhibiting a paper on request.

Ib.

3. Where a husband gives a chattel mortgage to his creditor and the creditor gets judgment on the debt and levies on the chattels, the wife cannot claim an exemption from execution in them. *Hiser v. Dawson*. 827

4. The chattel mortgage is not a mere waiver by the husband alone of the exemption but is a conveyance, and she cannot claim the exemption any more than if he had sold the chattel. Ib.

CONFLICT OF LAW—

1. The laws of New York authorize a suit to be brought in that state by a non-resident against a foreign corporation when the cause of action arose in that state, and authorize service to be made upon the president of the foreign corporation. *Railroad Co. v. Emery*. 756

2. A judgment valid in N. Y., must be respected accordingly in this state. Ib.

CONSTITUTION OF LAW—

1. Buying and selling at wholesale is "traffic" and the Dow law contemplates a tax upon wholesale dealers. Said act is not in conflict with the state constitution. *Senior & Son v. Ratterman*. 741

2. A statute requiring all places wherein liquor is sold in a city of the first grade, first class (82 O. L., 185) to be closed at midnight, being a statute punishing an act which is *malum prohibitum* only, and not *malum in se* is not a violation of the constitution, art. 2, sec. 28. *Massa v. State*. 772

3. The Act of April 6, 1885 (82 O. L., 283), authorizing the erection of a town hall in the western precinct of Columbia township, Hamilton county, Ohio, is a special act. *Langdon v. Trustees*. 536

4. This special act, not being expressly inhibited, was entirely within the grant of legislative power to the General Assembly; and that Assembly having already passed a general law investing township trustees with certain functions, some of which are of a *quasi* corporate character, it had the power to pass special and local laws on the same subject. Ib.

5. The purpose for which the tax was levied being a public one, the township trustees had power under the constitution to levy it. Ib.

6. The legislature cannot authorize a municipal corporation to discrim-

inate against articles manufactured without the state, and an ordinance requiring those who canvass for the sale of such articles first to pay for a license is void. *Ex parte Clamp*. 672

7. Compelling hawkers and peddlers to pay a license before pursuing business, sec. 2869, is, in so far as applicable to goods manufactured outside the state, void as a regulation of commerce and a dealer who has been required to pay it, may recover it back. *Burkhart & Co. v. Columbus*. 839

8. Authorizing a city of a particular class to borrow money to pay deficiencies in certain funds, or for a particular year, can only apply to the city then so classified, and hence is special. *Simpkinson v. Public Works*. 453

9. The acts of March 24, 1885, and April 27, 1885, authorizing the board of public works of Cincinnati to borrow money "to pay deficiencies existing, and that may exist, in the infirmity fund of said city, for the years 1884 and 1885," etc., and to borrow money "to pay deficiencies existing in the board of health of said city," and "to pay deficiencies existing in the general fund of said city," are special acts conferring corporate powers, and, therefore, invalid. Ib.

10. That portion of the act of April 27, 1885, authorizing the board of public works to borrow money "to be applied to the street cleaning fund," is not a special act, and is valid without regard to the question whether it confers corporate powers. Ib.

11. In so far as the deficiency consists in arrearages of salaries which the city is liable for, it is merely a change in the form of the indebtedness and not a conferring of corporate power, and money may be borrowed for this deficiency if affirmatively shown to exist. Ib.

CONTEMPTS—

1. The notary need not commit a witness refusing to answer a question, but may consult the court and obtain a ruling upon the question. *Shaw v. Installation Co*. 809

2. A notary public has the power and authority to commit a witness for contempt in refusing to answer questions pertinent to the issues in a case where he is properly taking depositions. *Burnside v. Dewstoe*. 589

3. There is no contempt until an order has been lawfully made by the notary, and a refusal on the part of the witness to obey that order. Ib.

Contracts.

CONTEMPTS—Continued.

4. The mere putting a question to the witness by the attorney for the party taking the deposition and a failure to answer the question at the request of the attorney, the notary making no command, request, or order to witness, constitutes no contempt, and a committal therefor is illegal. *Ib.*

5. Where a deposition is being taken by a notary, and a witness is committed for refusing to answer a question, the return of the officer and the record must clearly show that every preliminary step has been taken, by way of notice or otherwise, to authorize the notary to take the deposition. *Ib.*

6. There is no implication in favor of the return or record; everything requisite or necessary for the exercise of the authority by the notary, must appear upon the face of the record. *Ib.*

7. The record of a commitment for contempt by a notary public is only *prima facie* evidence of the legality of such commitment, and in a hearing on a writ of *habeas corpus*, parol evidence is admissible to dispute such record. *Ib.*

8. A physician is punishable as for contempt, for refusing to testify as an expert without being paid for his testimony as for his professional opinion. *State v. Darby.* 725

CONTRACTS—

1. General considerations in ascertaining damages, for breach of contract of dissolution, by solicitation of old customers, after the decision in this case. *Burckhardt v. Burckhardt.* 477

2. Where one party to a contract pursuant to its terms expends money or incurs liability in preparing to perform it and the expenditures, etc., are of such a nature as to be entirely lost unless the contract is fully performed, he may recover the full amount thereof from the other party, upon the latter's wrongful refusal to perform, upon mere proof that they were reasonable and proper. *Kiralfy v. Macauley.* 833

3. While such amount is liable to be reduced by any loss which would have been incurred had the contract been fully performed, the burden is on the party in fault to show there would have been such loss. *Ib.*

4. When an oral contract is made with a provision that it shall

afterward be reduced to writing, which is never done, such contract is enforceable unless it affirmatively appear that both parties understood the performance of such provision to be a condition to the contract taking effect. *Ib.*

5. An advertisement for fire department hose, merely stating the required diameter, is not specific enough, though a particular hose need not be adapted beforehand. *Wing v. Cleveland.* 507

6. In an agreement in restraint of trade the fact that the agreement is indefinite or unlimited as to time does not necessarily invalidate it, if it is valid and limited in all other respects. *Gordon v. Deckebach.* 324

7. A contract to pave a street with granite up to the standard of Richmond granite in quality, the engineer to decide on the quality as the work progressed, can not be affected by proof that the engineer five months before reported the granite from the same quarries to be up to the standard. *Bristol v. Hussey.* 680

8. Neither can the board forbid such granite by its own decisions as to quality. *Ib.*

9. By the terms of the contract the engineer must decide the disputes as the work progresses. *Ib.*

10. When bidders for granite paving are required, by specifications furnished in advance, to accompany their bids by specimen blocks of granite, etc., the specimen so filed becomes part of the bid, and when accepted, becomes part of the contract which stipulate for blocks according to specifications which it adopts by reference, and the use of blocks like the specimen and from the same quarry will not be enjoined in absence of any charge of fraud, collusion or mistake on the part either of city officers or contractors. *Cincinnati v. Folz.* 665

11. Such clause in the specifications is in furtherance of, not repugnant to, another clause stating that the blocks required must be equal in quality to a certain granite named. *Ib.*

12. The board of public works has no authority to require from bidders, in addition to the guaranty required by sec. 2303, that they will enter into the contract and properly secure its performance, a written statement by resident freeholders that they are qualified to and will become such sureties, and to reject a bid for failure to comply with such requirement. *Moore v. Cincinnati.* 587

Conversion—Corporations.

13. Where a written contract was entered into to furnish defendants with a yearly supply of coal from August 2, 1880, and at the expiration of that time only 17,000 bushels were delivered, an oral agreement to extend the time of delivery, unsupported by a consideration other than that mentioned in the written contract, will not support an action for the delivery of the remainder. *Cincinnati Coal & Coke Co. v. Stephens*, 58

14. Written agreement describing Coal Company on one part and C. H., supt. R. R. Co. on the other, and signed C. H., supt. for R. R. Co., when road is in hands of receiver but C. H. acts for receiver as supt., and agreement was by order of receiver, to whom proposals to furnish coal had been made, is evidence of intention to contract with receiver and admissible to identify parties. *Con. Coal & Mining Co. v. C. S. & C. R. R. Co.*, 15

15. An agreement with the receiver to supply coal for the use of the railroad for a certain time, is not binding in favor of the railroad company, upon discharge of the receiver, and surrender of the road to the company during the time. *Con. Coal & Mining Co. v. C. S. & C. R. R. Co.* *Ib.*

16. The seller of goods deliverable at any time during the year, at his own option, notified the buyer before the expiration of the year that he would not deliver them: *Held*, that in the absence of evidence of election by the buyer to treat such refusal as a breach, he is entitled as damage to the difference between the contract and market prices on the last day of the year; and that mere silence is not evidence of such election. *Goyert v. Stoner*, 125

17. To an offer by letter to sell certain stock at a price named, saying nothing as to how or when the contract should be carried out, the plaintiff accepted the offer, adding "Send transferred certificate here. Draw or will remit." *Held*, that this was an absolute acceptance. *Livingston v. Klopfer*, 185

18. The acceptance was not qualified by the language added, which was merely a suggestion as to the mode of executing the contract already closed *Ib.*

19. The sale of stock by defendant to another without revoking his offer to plaintiff, such sale being unknown to plaintiff until after his acceptance, did not prevent the acceptance from closing the contract. *Ib.*

Defendant having thereby disabled himself from performance, plaintiff was not obliged to tender performance. *Ib.*

Where there is no market price at the place of delivery, evidence of such price at the nearest place where there is such, is competent. *Ib.*

CONVERSION—

Refusal of a corporation to transfer on the books stock held by plaintiff renders it liable for conversion, though the holder is only a pledgee and the power of attorney on the back is signed in blank. *Railroad Co. v. Rawson*, 709

CORPORATIONS—

1. A corporation comes into existence with all powers necessary to carry out the purposes for which it was organized, as soon as the articles of incorporation are filed with the secretary of state. *State v. Robinson*, 383

2. When in existence, the corporation must organize and carry on its business in accordance with the provisions of the statutes prescribed therefor; otherwise it is liable to ouster for misuse or non-use of its franchise or privileges, or for usurping franchises or privileges not conferred upon it. *Ib.*

3. The existence of the corporation being shown, it is a necessary party in an action of ouster for a misuse, non-use or usurpation of corporate powers. *Ib.*

4. Where a certificate of incorporation is duly approved, etc., and a corporation proceeds to act as a corporation, and the state does not question its existence, the obligations of that corporation cannot be defeated by showing that the corporation was never duly incorporated. *Union Trust Co. v. Railroad Co.*, 773

5. An excessive issue of stock and bonds to third persons, without an equivalent is unlawful, contrary to public policy and statutes of Ohio. *Ib.*

6. By the statutes of Ohio bonds and stocks issued in this manner are absolutely void. *Ib.*

7. Although the bonds may be enforceable by *bona fide* holders of the same, yet the mortgage is not negotiable, and it is void, although owned by a *bona fide* holder. *Ib.*

8. Where a corporation avails itself of the labors and contracts of its promoters before organization and ratifies the same, it becomes liable

Corporations.

CORPORATIONS—Continued.

therefor. *Building Assn. v. Lotze.* 248

9. But evidence is admissible to show that the services were gratuitously rendered. *Ib.*

10. An agreement by which the stockholders of a railway company confer the power to vote upon their shares, for a lawful purpose, is not illegal, or against public policy, but such agreement may be revoked at any time by any one of the subscribing shareholders, notwithstanding it is in terms irrevocable. *Griffith v. Jewett.* 627

11. A contract by a majority of stockholders to convey their right to vote to a person acting in the interest of another corporation in consideration of its guaranty of six per cent. dividends to them, is illegal, as giving one corporation the rights of a stockholder in another and as ignoring the rights of the minority, and as a stockholder cannot part with the right to vote. *Hafer v. Railroad Co.* 470

12. Acquiescence by part of the minority is not an estoppel, nor admission that the contract is executed. Nor must pecuniary injury be shown in order to obtain an injunction. *Ib.*

13. That the beneficiary railroad was a party to the contract will not prevent its seeking injunction, there being a *locus poenitentiae*. *Ib.*

14. A pledgee of shares of stock in a corporation, when authorized by a blank power of attorney endorsed on the certificate thereof, and signed by the pledgor, may cause such shares to be transferred on the books of the company into his own name. *Railroad Co. v. Rawson.* 709

15. Upon the refusal of the proper officers of such company to make the transfer when duly requested, the pledgee may maintain an action against the company for damages as for a conversion of the shares to its own use. *Ib.*

16. A witness may testify that he sold shares of stock and delivered the certificates thereof to a person named without producing the certificates for inspection. *Ib.*

17. The books of a corporation are admissible as evidence to show that one is not a stockholder therein who claims to be such. *Ib.*

18. If the secretary who had issued the disputed certificate was then owner of more than such number of genuine shares it will be deemed,

until disproved, that he surrendered a valid certificate for the disputed one, and that the latter represents the genuine shares. *Ib.*

19. Certificates of stock with genuine signatures and the corporate seal are presumed to be genuine, but this is rebuttable, and the burden is on the corporation to prove them to be an overissue. *Ib.*

20. Where a party receives certificates of stock from one he knows to be the secretary appearing to have issued such certificates, in consideration of a loan made to such secretary as an individual, and without making any inquiry of the officers of the company as to such certificates, such person cannot recover against the company on the ground that its officers fraudulently or negligently caused or permitted the issue of such certificates, if it appear that they are void as part of an overissue of the stock of the company. *Perin v. Railroad Co.* 800

21. Where certificates of stock bear the genuine signatures of the president and secretary of the company and the corporate seal, they are presumed to be genuine, and the burden of proving them spurious rests upon the company. *Ib.*

22. Such certificates are presumed to have been duly issued, and if they could have been lawfully issued only upon the surrender of other certificates of equal amount, such surrender will be presumed to have been made when the certificates were issued. *Ib.*

23. The books of the company are admissible as evidence in its behalf upon the question of the validity of certificates purporting to be certificates of stock of the company. *Ib.*

24. In suing a corporation for refusal to transfer stock into the name of a buyer of a certificate, it is not proper to set out copies of the certificate and power of attorney endorsed to transfer it, and they will be struck out on motion. *Bank v. Railroad Co.* 702

25. A purchaser of stock of a corporation who is refused a transfer of his stock on the books of the company has, as a rule, an adequate remedy in an action for the value of the shares of stock at time of refusal, and if such stock have any peculiar elements of value making it incapable of compensation in damages, then the proper remedy is by suit in equity for a decree transferring the same. *Mandamus* to compel the company to place his

Corporations.

name on the books of the company as a shareholder, is not, therefore, the proper remedy. *State ex rel. v. Carriage Co.* 152

26. A denial of knowledge, in an action to enforce stockholder's liability, is too indefinite, for the defendant is presumed to know whether he is a stockholder. *Hardman v. Railroad Co.* 544

27. A denial that he is a stockholder now, or when the notes were made, is demurrable, for it does not deny as to the time when the debt was incurred. *Ib.*

28. A denial of ever having subscribed to stock, or had any in his possession, is demurrable, for he may have been a stockholder in other ways, as by transfer. *Ib.*

29. In actions upon stockholder's liability the statute of limitations commences to run as against any claim, when the company is insolvent, and the claim is determined and enforceable against stockholders. *Hardman v. Railroad Co.* 578

30. Both elements must concur for six years before the claim is barred. *Ib.*

31. A general denial will sustain evidence that the defendant was not a stockholder, because his payment was a donation and not a purchase. *Ib.*

32. A defendant holder can not set off his claims against the corporation against his liability as stockholder. *Ib.*

33. A defense that there are stockholders who have not been made parties or paid their subscriptions, should disclose the names of such. *Ib.*

34. Where the record shows the names of such persons to have been omitted, the objection can be taken before the referee when an assessment is made. *Ib.*

35. In such actions against stockholders, a defense that a creditor compromised his claim "before he obtained judgment," is demurrable. *Ib.*

36. So a defense that the creditor filed his claim and asserted a lien in another case, without averring its payment or allowance, is demurrable. *Ib.*

37. A sale of stock with an indemnity to the vendor against assessment on his liability, is no defense. *Ib.*

38. A regular sale and transfer on the books to a solvent person would avail the vendor however. *Ib.*

39. An infant purchasing stock, and holding the same after his majority, and after the insolvency of the company, is liable, *semble*. *Ib.*

40. Action for statutory liability of stockholders is not "rightly brought" in county within secs. 5038 and 5030, Rev. Stat., when none of the defendants resided or could be or were summoned here, although one of them endorsed upon a summons issued for him to the sheriff of the county and mailed to him by plaintiff's attorney at his residence in another county, his acceptance of service and entry of appearance. *Lamont v. Home Ins. Co.* 93

41. In an action brought against a corporation, by the holder of a certificate of stock issued to the secretary of the corporation, for the repudiation of such certificate, two causes of action are stated. In the first, the certificate is averred to be genuine and valid. In the second, it is stated that if the certificate is, as claimed by the defendant, an overissue, it was such by the fraud and neglect of the corporation. *Held*: The plaintiff may attempt to sustain either or both said causes of action. *Citizens' Nat. Bk. v. C., N. O. & T. P. Ry. Co.* 147

42. No particular fraud being charged, the second cause of action alleges no fraud against the defendant other than that the overissue, if there were such, was the act of the corporation. *Ib.*

43. Such certificate may be made by the corporation by accident, or mistake, without wilful wrong; but it could hardly be made without wilful wrong by the unauthorized act of the secretary, who not only signs certificates, but has charge of the stock books, receives, surrenders and makes transfers. *Ib.*

44. The general presumption is against wilful wrong. Hence, when no evidence upon the point is offered but the production of the certificate in regular form, signed by the genuine signatures of the president and secretary and attested by the seal of the corporation, the presumption is that the certificate was issued by the corporation even if it be an overissue. *Ib.*

45. A certificate of stock is not a negotiable instrument. Still, the defendant may in such case be liable, because a certificate of stock issued by a corporation is a representation by the corporation to every person who

Costs—Damages.

CORPORATIONS—Continued.

proposes to purchase the certificate, that he to whom the certificate is issued has upon the books of the corporation the shares of stock named in the certificate. *Ib.*

COSTS—

Where an appeal from the probate court to the court of common pleas is dismissed by the latter court for want of jurisdiction, no costs can be recovered. *Reidermann v. Taffel.* 393

COUNTY—

1. Special acts authorizing county commissioners to construct designated bridges and roads are to be construed with the prior general law requiring the concurrence of the board of control. *State v. Commissioners.* 243

2. County commissioners may be enjoined from improving water courses or ditches in such a way as to increase the body of water which overflows a lower proprietor in freshets, until he has been heard and his rights ascertained and settled, for this is an unlawful appropriation of private property. *Neff v. Sullivan.* 765

3. The commissioners to rebuild, enlarge and improve the courthouse of Hamilton county, appointed under the act of April 14, 1884, are not restricted in their adoption of plans for that work to such as may be entirely completed out of the fund provided by said act. *State v. Urner.* 277

4. Whether the auditor or commissioners can appoint a janitor for the auditor's office is a question not raised by mandamus for a warrant to pay such janitor appointed by the commissioners and board of control, since they have power to appoint a janitor, he must be paid, wherever he is assigned for duty. *State ex rel. v. Brewster.* 227

COURTS—

1. The probate court has the power to pass on the validity of the claims of legatees' and order their payment before final distribution of the estate. *Disney v. Hawes.* 406

2. The probate court has no jurisdiction to determine the amount of the claims against an insolvent company, or to determine the validity of certain preferential mortgages executed to certain creditors, as they are equitable issues. *In re Simpson & Gault Mfg. Co.* 637

3. On the hearing of exceptions properly taken to the account of an assignee of an insolvent estate, the probate court has jurisdiction to determine the effect upon title, of the deed of assignment and precedent conveyances of real estate, as far as the same is involved in the disputed items of such account. *Purcell's Assignment.* 602

4. Where the rules of the court of common pleas, provide for joint session at end of term shall be held, and it has been the custom at such session to formally declare the preceding term adjourned, an adjournment by one of the judges of his separate session does not end the term. *Walters v. Commissioners.* 5

CRIMINAL LAW—

1. On an indictment under sec. 6820, Rev. Stat., for stabbing with intent to kill, the prisoner cannot be convicted of stabbing with intent to wound. *Bailey v. State.* 164

2. Where the verdict of the jury was: "We, the jury find the defendant guilty of stabbing with intent to wound, and not guilty of stabbing with intent to kill, as charged in the indictment," and the indictment was for maliciously stabbing with intent to kill, the verdict is a nullity, and the prisoner is entitled to a discharge. *Ib.*

CURTESY—

1. On petition of an executor to sell real estate of a deceased wife to pay debts, the probate court has jurisdiction to allow the surviving husband to be made a party, and to act on his consent to sell free of his curtesy and award him curtesy out of proceeds. *Clark v. Harlan.* 830

2. A grand-child of the wife by a former husband takes free of curtesy. *Ib.*

3. The status of an adopted child of a man and wife is now such as that on his death and her remarriage and death the second husband is deprived of curtesy in the estate inherited by the child from the mother, but the second husband is entitled to such curtesy. *Ib.*

DAMAGES—

1. Whether in any case of negligence, however gross, the jury are warranted in giving exemplary damages, may be in dispute in this state. *Kuchenmeister v. O'Connor.* 159

2. The trial court charged, "that if his (defendant's) negligence was so gross as to show a reckless indifference to the rights and safety of

Dedication—Devise.

other persons, regardless of all social duty, and it was wilful, the jury are authorized, in addition to the damages that would be a compensation for the injury, to give exemplary damages." Without passing upon the question whether or not the charge should have been given, there was evidence sufficient to show that the jury were not misled by it. *Ib.*

3. The rule of damages where a change of an established grade has been made, is the difference in the value of the property as a whole, and not for injury to or suspension of trade carried on upon the premises. *Cincinnati v. Whetstone.* 368

4. Physicians' bills, though not specially contracted for and still unpaid, are a proper element of damages in an action for loss of services. *Cincinnati Omnibus Co. v. Kunnell.* 197

DEDICATION—

A deed, made by the owner of property through which a street had been laid out by the city "platting commission," referring to the street and calling for it as laid out, constitutes a dedication to public use by the owner of all his property within the lines of the street in accordance with the provisions of sec. 2834. *Boyce v. Cincinnati.* 763

DEEDS—

1. Parol testimony is not admissible to vary the kind of consideration mentioned in a deed for land. If it is a voluntary conveyance for "love and affection, and one dollar in hand paid," the parties will not be permitted to show that the conveyance was for a valuable consideration. *Holmes v. Sullivan.* 499

2. The naming of one dollar consideration in connection with that of natural love and affection, where the property is of great value, does not make it a valuable consideration. *Ib.*

3. A grant of a right of way eighty feet wide to a railroad which already has a right of way and tracks "which said eighty feet is to include the Mill Creek road on the west where said road is contiguous to said railroad" does not mean a grant measuring from the existing track as a center line and including so much of said road as lies within forty feet, but it means to measure eighty feet wide from the west side of the road eastwardly and thus include the whole road. *Belmer v. C. H. & D. R. R. Co.* 45

4. In an action by a divorced wife to revive a decree for alimony, a

release was pleaded. The testimony tended to show that the release was prepared by the father who delivered it to his son to take to his mother and get her to sign it, that she signed it on condition that she was to receive the balance of alimony then due and the condition was not performed: *Held*, that the relation of the son as agent of the father did not prevent him from holding the release as an escrow from the mother. *Walter v. Walter.* 351

DEPOSITIONS—

1. A resident witness, not a party to the case, who is in good health and not intending to depart, and will be able to attend trial, cannot be compelled to give his deposition. *Ex parte Langford.* 597

2. A witness is not excused from giving his deposition under secs. 5265 and 5266, on the ground that he is not interested in the action; that he is within the county in which the action is pending, and that he does not intend to depart; that he is in good health, and will be able to attend court as a witness when the case is reached for trial. *Shaw v. Installation Co.* 809

3. The competency of a deposition is to be determined by the rules applicable to the witness himself if present and although he was competent as a witness when it was taken, yet being a party and the adverse party having since died, it is incompetent against the executor or administrator. *Bettman v. Hunt.* 396

DEVISE—

1. A devise of property from wife to husband does not render him liable, after her death, for her antinuptial debts. *Hina v. Rath.* 586

2. A bequest "to my youngest child . . . and to the heirs of her body forever," creates at common law an estate tail and the issue of such youngest child who is the first donee in tail takes an inheritance in fee in said estate under our laws. *Wolf v. Stout.* 231

3. A legacy to a daughter, the only provision for her, "to be paid to her or her heirs as soon as practicable by my executors"—the "remaining property or money and credits" being devised to be equally divided after death of the widow of testator, among his three sons—constitutes, in case of deficiency of personal assets, a charge upon the real estate. *Longley v. Stump.* 234

4. The lapse of six years from the time the right to payment of the

Ditches—Divorce and Alimony.

DEVISE—Continued.

legacy accrues, and the deficiency of personal assets is ascertained, constitutes a bar to an action by the administrator *debonis non*, with the will annexed, to sell the real estate for payment of the legacy. *Ib.*

DITCHES—

1. A ditch made by two adjoining proprietors to dispose of surface water, and used by them for twenty-two years, does not become a water course under sec. 4500, unless there was such a design in its establishment, which must be shown by convincing proof. *Burton v. Jensen.* 120

2. When such ditch does not run to a creek but merely empties itself on low land, and has to cross the land of another before reaching a creek, it does not have the outlet required by sec. 4448, and is not such a ditch as can become a public water course. *Ib.*

3. Section 4449, providing that no ditch improvement shall be made unless a sufficient outlet is provided, would seem to be violated by a proposed straightening, etc., of water courses, the effect of which would be to create back-water above, or overflow upon lower proprietors. *Neff v. Sullivan.* 765

4. The persons entitled to personal service of notice of a proposed ditch improvement because "affected" thereby (sec. 4457; 81 O. L., 211) are not merely those who are to be assessed, but include those lower proprietors whose lands may be flooded. *Ib.*

5. And the personal knowledge of such persons is not equivalent to notice where they have not created an estoppel by not objecting to expensive improvements. *Ib.*

6. County commissioners may be enjoined from improving water courses or ditches in such a way as to increase the body of water which overflows a lower proprietor in freshets, until he has been heard and his rights ascertained and settled, for this is an unlawful appropriation of private property. *Ib.*

7. The county ditch statutes in force in 1881 are unconstitutional as they do not provide that compensation for land appropriated shall first be paid in money or secured by a deposit in money, as required by the constitution. *Beck v. Comrs.* 108

8. The requirement that a yeas and nays vote shall appear on the record

of the county commissioners on all questions involving the levying of taxes and expenditures of money applies to the establishment of ditches requiring expenses to be incurred, and is not satisfied by a record merely showing unanimous consent. The record should show full compliance with law where lands or taxes are involved. *Ib.*

9. Section 4457, Rev. Stat., is mandatory, and where in establishing a ditch the service of notice on the landowners is not returned under oath, nor filed with the auditor, nor is the publication of notice to non-residents verified nor filed with the auditor, these are defects of substance and jurisdictional, and the proceedings thereafter are void and cannot be cured by the probate court. *Ib.*

DIVORCE AND ALIMONY—

1. A decree of divorce obtained by a wife who was imbecile, but never so adjudged, and having no guardian, will not be set aside after the term and after her death, upon the petition of the late husband, the wife residing when she filed her petition, within the jurisdiction of the court, the husband having been served by publication, and the fact of imbecility not having been brought to the attention of the court. *Rine v. Hodgson.* 104

2. Fraud in obtaining a decree of divorce will not authorize the court to set it aside after the term upon original bill. *Ib.*

3. While fraud in obtaining a decree of divorce may not, for reasons of public policy, be ground for setting it aside, the question of jurisdiction is open; and upon bill to set aside such decree by a husband who had no actual notice, the only service on him being by publication, and it being admitted by demurrer that the petition for divorce was filed by relatives of the wife without her knowledge and that she was kept away from the trial and never informed of the proceeding, the cause of action is made out. *Rine v. Hodgson.* 275

4. Upon such bill by the husband, the wife being dead and the controversy being as to the inheritance of the property, no other parties are necessary but the next relatives of the wife, who would be her heirs if she died unmarried. *Ib.*

5. Ratification, after divorce has been announced, of an agreement as to alimony previously made, renders such agreement valid and binding. *Neely v. Neely.* 201

Easements—Eminent Domain.

6. To make a case of extreme cruelty under our divorce statute, it is not necessary that the facts shall show "personal violence," or "bodily harm," or "reasonable ground to apprehend it if cohabitation should continue." *Green v. Green*. 564

7. Mental suffering, if impaired health result therefrom, either mentally or physically, as the result of profane and abusive language, or from charges of a want of chastity, made in the presence of, or coming to the hearing of the party complaining, that were made to others, is insufficient. *Ib*.

EASEMENTS—

1. A person who sells a freehold interest in coal under the surface without reservation of any rights does not have a way of necessity to reach what lies under the coal from the surface by sinking a well through the mines. *Jefferson Iron Works v. Gill Bros*. 481

2. Where a person owning two adjoining houses so constructed that the only watercloset of one house was in the second story of the other, its only door being from the former house, the sale of the former carries as an appurtenant easement the use of the watercloset as against a subsequent grantee of the latter. *Burnet v. Helker*. 600

3. To acquire a right of way by prescription there must have been adverse user for more than twenty-one years, and to constitute adverse user there must have been a continuous use under such circumstances or accompanied by such declarations as to manifest a claim of right. *Haimerger v. Tietig*. 438

EJECTMENT—

1. Rents collected by a receiver in an ejectment suit are not, as such, the money of the plaintiff. *Countee v. Armstrong*. 62

2. The plaintiff in simple ejectment may show that defendant's deed from an assignee in bankruptcy is void, but cannot show that it is fraudulent without amending. *Herbat v. Bates*. 444

3. A purchaser from an assignee in bankruptcy alleged by the bankrupt's heirs to be void, cannot add the assignee's possession to his own to make title by adverse possession. *Ib*.

ELECTIONS—

1. Ballots purporting to be those of one political party, and conforming to requirements, save for

words in small type beneath the leading "except for sheriff" and inserting the name of the candidates for sheriff on the other ticket should not be counted for the name so printed thereon. *Beresford v. Hawkins*. 100

2. Injunction against counting illegal returns by a clerk and justices, and issuing certificates upon them, is within the jurisdiction of courts, especially, as to legislative offices, where a remedy by contest is not adequate, and the legislature cannot consider the case until it is in session, and the contestees have become members of it. *Hardacre v. Dalton*. 527

3. Electors and candidates, in the capacity of electors, may join as plaintiffs. *Ib*.

EMBEZZLEMENT—

1. An assignee for creditors is embraced in the term assignee in insolvency in the act of 1885, but only as to money received after the act passed. *State v. Mannix*. 667

2. If the assignee uses the trust money, intending to benefit the estate it is not embezzlement, for it is not for his own use. He cannot use any part for compensation until allowed by court. *Ib*.

3. Unauthorized investments are prima facie for his own use, and he must prove the contrary. So of investments on margins, or in futures, since the statute forbidding it. *Ib*.

EMINENT DOMAIN—

1. The judgment having been reversed, the probate court is necessarily concluded by the judgment of reversal. *Cincinnati So. Ry. v. Banning*. 828

2. Appropriation by plaintiffs is under the state's power of eminent domain delegated by the legislature to the municipality. *Ib*.

3. The constitution contemplates a judicial proceeding to make the condemnation effective. *Ib*.

4. The appropriation is not complete until there is a verdict and a judgment of the court confirming the verdict, and no title passes until the judicial proceeding is ended. *Ib*.

5. Whenever the corporation is entitled to take the land its former owner is equally entitled to the money. *Ib*.

6. The deposit of money in court is in legal effect for the land owner's use, and it belongs to him as soon as the land becomes the property of the corporation. *Ib*.

Entails—Error.

EMINENT DOMAIN—Continued.

7. The final judgment of the probate court completes the appropriation for the purpose of transferring title, whether the money be paid into court or paid to the parties, it makes no difference so far as the result of the error proceedings are concerned. *Ib.*

8. If the judgment be reversed on error there is then no verdict and no judgment—both of which are essential. *Ib.*

9. Each party is left to the risk of any recovery, to which one may be entitled against the other, as the result of the new trial. *Ib.*

10. The rule that the power of a railway company to appropriate property is not exhausted by one exercise, but may be exercised for side tracks, depots, etc., as its necessities may require, is not confined to private property. *Railroad Co. v. Spring Grove Ave. Co.* 625

11. Under the amendment of the act of 1852, providing that railroads may condemn lands for the purposes of side tracks, depots, etc., as the necessities of its business may require, a railroad may appropriate a right-of-way across a turnpike for its side tracks. *Ib.*

12. Pipes for natural gas for fuel as distinguished from lighting, are an additional servitude as to the owner of the fee, but not to one owning only to the street line, except where a proper method of joining pipes to prevent leakage is adopted. *Webb v. Ohio Fuel Gas Co.* 662

14. In appropriation under the law relating to municipal corporations, sec. 2260, failure to pay compensation within six months, is to be regarded as final upon the question of the necessity for the taking, as between the parties, in the absence at least of any showing that the failure was by mistake, or otherwise unintentional. *Trustees Cin. Southern Ry. Co. v. Haas.* 33

ENTAILS—

1. A bequest "to my youngest child * * * and to the heirs of her body forever," creates at common law an estate tail, and the issue of such youngest child who is the first donee in tail takes an inheritance in fee in said estate under our laws. *Wolf v. Stout.* 231

2. Foreclose of mortgage on an entailed estate. *Ib.*

EQUITY—

In a foreclosure proceeding an issue of fact may be referred to a jury. *Fleming v. Fleming.* 382

ERROR—

1. Petitions in error to orders discharging attachments may be filed "as in other cases," and within the time allowed by the statute in other cases. *Sibley v. Oil Co.* 399

2. Under the supplementary sec. 5563, *a, b, c*, the limitations of time for the filing of petitions in error in attachment proceedings is solely for the purpose of retaining the attached property. *Ib.*

3. In order that the lien on such property may be retained, the petition in error must be filed and bond given within the time prescribed by the trial court. *Ib.*

4. The question of error of record, in an entry, is to be determined by transcript of the entry itself and not by what is shown from the appearance docket. *Marks v. Harris,* 332

5. A judgment reversing the judgment of a justice of the peace and retaining the cause for trial is not a final order. *Bishop v. Bascoe.* 350

6. A decree granted to a defendant on his cross-petition for want of reply, without notice to plaintiff, is not an interlocutory but a final decree. *Flidner v. Rockefeller.* 266

7. Where injunction is the object of the action, and the merits of the cause remain to be determined by the judgment, the refusal to dissolve a temporary injunction is not a final order to which a petition in error will lie. *Dustin v. Bauer.* 200

8. On reversing a judgment rendered on a draft payable in goods, for want of a finding of consideration, the court can not enter judgment for defendant, but must remand for retail. *Greenless Ransom Co. v. Berne.* 298

9. A misdirection in the charge not objected to, will not be reviewed unless a different verdict might reasonable have been expected under a different charge. *Young v. Langdon.* 367

10. In the absence of counsel it is error to charge the jury as to the form of their verdict, given at their request after submission. *Moravec v. Buckley.* 226

11. It is error for the court, for the purpose of proving a date to permit the petition in a slander suit upon which the judgment under which

Evidence—Executors and Administrators.

defendant justified to be given in evidence and to go to the jury. *Ib.*

12. A refusal of a justice to give to the jury any charge upon the law of the case is not error where the bill of exceptions does not show that there was any law in the case. *Dougherty v. O'Connell.* 380

13. The reviewing court will not reverse the action of the lower court upon a motion to discharge an attachment, where questions of fact are involved, unless the action of the lower court was clearly erroneous. *Beitman v. McKenzie.* 403

14. Where upon inquiry of damages, as upon a default, the only evidence consisted of a written paper signed by defendants after the suit, to the effect that it was agreed by them that a certain amount was owing to plaintiffs, and the court thereupon rendered judgment, refusing to permit defendants to show that they had signed the paper under a mistake of facts relying upon plaintiffs' representations that they had done a certain quantity of work, which could not then be inspected, and of which mistake, plaintiffs were notified by defendants with notice at the same time that the paper would not be regarded binding: *Held*, the refusal was error. *Dewey v. Sloan.* *Ib.*

15. Where on overruling demurrer to a petition, time was given to answer, and after expiration, time was given to a further day to prepare and submit an answer and ask leave to file it, and on that day an answer making a defense to part of the amount claimed and by way of setoff praying damages was submitted for filing, but leave was refused by the court except on condition of payment of the difference between the claim as made by the petition and the partial defense and setoff pleaded by the answer: *Held*, the refusal was error. *Dewey v. Sloan.* *Ib.*

16. The granting by the trial court of a new trial is not reviewable by petition in error, upon judgment against plaintiff in error at such new trial. *Jaspers v. Mallon.* 184

17. It is not error for the court in a proper case to say to the jury that the testimony of a witness is contradicted by others as to a fact, but leaving the question of fact to the jury. *Ib.*

EVIDENCE—

1. Parol testimony is not admissible to vary the kind of consideration

mentioned in a deed of land. *Holmes v. Sullivan.* 499

2. The books of a corporation are admissible as evidence to show that one is not a stockholder who claims to be such. *Railroad Co. v. Rawson.* 709

3. The books of a corporation are admissible as evidence in its behalf upon the question of the validity of certificates purporting to be certificates of stock of the company. *Perin v. Railroad Co.* 800

4. Witnesses may be asked their opinions as to testator's capacity to transact business. This does not involve capacity to make a will. *Brockmeier v. Buck.* 353

5. Plaintiff cannot testify that he relied on defendant's sending him orders and directions as an assurance of continued employment after the year of hiring, for it is an opinion only. *Creasey v. Insurance Co.* 315

6. A physician who made a post mortem, testified to facts, but refused as to matters of opinion without extra compensation: *Held*, that there is no difference between witnesses in Ohio, and he is in contempt for refusing to answer. *State v. Darby.* 725

7. In an action under the statute for wrongfully causing death, dying declarations of deceased are not admissible, although defendant admits killing deceased, and the evidence tends to show facts sufficient to justify a charge of homicide. *Cosgrove v. Schafer.* 550

EXECUTORS AND ADMINISTRATORS—

1. Where a decree is rendered for payment of money against an individual in a case wherein he has answered, setting out that he holds the funds as administrator, the estate of the decedent will be bound equally with defendant. *Ten Eick v. Dye.* 511

2. An approval by the court of an executor's sale of stock, privately, without an order or a minimum price, is equivalent to such previous order; and where all the debts of the estate are paid and no one is interested except the executor, as restricting legatee, his successor as administrator *de bonis non* cannot attack the sale. *Hicks v. Stone.* 132

3. The sale of shares, of stock belonging to an estate by an executor to his confidential friend and advisor, who has just resigned as co-executor of the same estate, is valid, if for full value, without fraud, and no one else

Findings by Court—Good Will.

EXECUTORS, ETC.—Continued.

could be found who would give as much for the stock and the sale was not of the seeking of the purchaser.

Ib.

4. That executors sold shares of stock belonging to the estate in payment of a debt and *bona fide*, and on the same day one of the executors became purchaser of them from the buyer, the other executor being residuary legatee, and as such a person most interested, such sale being at a proper price and designed as a means of transferring the stock to such executor, the sale is valid.

Ib.

FINDINGS BY COURT—

The general findings of fact common in equity decrees cannot be considered as special findings of fact on which a reviewing court will enter a new judgment, but a new trial will be ordered. *Cavanaugh v. Jenkins*. 34

FIRE ESCAPES—

The owner in fee of a lot and building which is leased to a firm which occupies and uses the same as a "rag factory," is not the "owner of any factory, workshop," etc., within the meaning of the act relating to fire escapes, passed April 19, 1893. (80 O. L., 187.) *Lee v. Kirby*. 184

FIXTURES—

1. As between an execution creditor and a mortgagee of the realty, chandeliers and other gas fixtures are not fixtures, but personalty, so of a mantel mirror held to the wall by iron clasps. *Insurance v. Kneisley*. 432

2. Book cases which if removed would also remove a part of the baseboards around the floor, and a hatrack built into the room are a part of the realty. Ib.

3. Machinery, essential and necessary to a mill, after being placed in the building and permanently fastened to the same, becomes a part of the real estate, and is covered by a real estate mortgage on the mill property. *Garven v. Hogue*. 501

4. Such party should have taken a real estate mortgage or a mechanic's lien to secure his claim after fastening the machinery to the building. Ib.

FRAUD—

1. Fraud or imposition in effecting the voluntary character of an act, may defeat any interference of intention. *Corwin v. Cook*. 321

2. But it is not fraud or imposition when a married woman voluntarily

signs a note, that she did not know it would bind her separate property. Ib.

FRAUDULENT CONVEYANCES—

1. A preferential mortgage by a debtor, on the eve of insolvency, to a trustee, for his wife and infant son, creditors, is not equivalent to an assignment for creditors generally, under sec. 6343. *Bates v. Bennett*. 727

2. It is not so in the case of the wife because he could not have conveyed directly to her. Ib.

3. A mortgage to one, as collecting agent of a society, is not necessarily a trust equivalent to an assignment for creditors, the collector being responsible for money in his hands. Ib.

4. Inasmuch as the probate court has no jurisdiction to set aside fraudulent conveyances, or to declare transfers to be preferential, it follows that, the fact of the probate court being engaged in administering an assignment for creditors does not prevent the common pleas from having jurisdiction to declare an earlier preferential transfer to be equivalent to an assignment for the general benefit of creditors. Ib.

5. A court of equity will not assist a person to recover the title to property which has been held in the name of another for the purpose of seeking it from the creditors of the real owner, and which property has afterwards been conveyed by such holder to another. *O'Connor v. Ryan*. 575

FIRE ESCAPES—

The owner in fee of a lot and building thereon which he does not in any way himself use or occupy, but which is let to a firm which occupies and uses the same as factory or workshop, is not the "owner of any factory, workshop," etc., within the meaning of the act relating to fire escapes. 80 O. L., 187. *Lee v. Kirby*. 99

FORCIBLE ENTRY AND DETENTION.

1. An equitable title cannot be set up in forcible detainer proceedings before a justice to divest him of jurisdiction thereto, nor is proof thereof competent in such proceeding. *State ex rel. v. Paul*. 226

2. Signing a bill of exceptions in forcible entry proceedings is a useless act, and will not be compelled if there is no reversible error. Ib.

GOOD WILL—

Good will of an establishment is inseparable from it. *Jung v. Weyand*. 485

Guaranty—Husband and Wife.

GUARANTY—

A guaranty in substance in the following words: "Please let G. have such goods as he may purchase in person or order from time to time, to the amount of \$500, and I hereby guarantee the prompt payment of same," is a continuing guaranty. *Wolf v. Shillito & Co.* 278

GUARDIAN AND WARD—

1. Exception may be filed to the guardian's account, though no statute expressly gives the right. It exists by necessity, analogy and usage. *Porter v. Brown.* 646

2. The sureties of a guardian may, on their own motion, become parties to the settlement of final account, for the purpose of correcting errors in that or a former account. *Ib.*

3. Where a guardian's sureties have filed exceptions to his final account, alleging mistake and error, to the prejudice of the guardian, in both final and former accounts, it is error for the probate court to strike such exceptions from the files. *Ib.*

4. Although a delinquent guardian, whose debt to his ward has not been ascertained by the probate court, is absent from the state and his residence is not known, yet this does not constitute an exception to the rule that his bond cannot be sued without such ascertainment until the court has made an attempt to compel him to account or put him in default for failing to account by citing him. *Schwab v. Rappold.* 340

5. Although the provisions of the act of 1857 (S. & C., 620), in so far as they relate to citing non-resident guardians, were omitted from the Rev. Stat., yet citation may be made under sec. 6406, Rev. Stat. *Ib.*

HABEAS CORPUS—

Where a municipal ordinance is wholly void, a conviction under it may be declared void, and the prisoner released on habeas corpus. *Ex parte Clamp.* 672

2. The writ of *habeas corpus* can only be issued in cases where "a person is unlawfully restrained of his liberty," or where a person, entitled to the custody of another, is unlawfully deprived of the same. In re *Curd alias Jenkins.* 192

3. In cases other than those of controverted custody, the allegation of unlawful "restraint of liberty," or words of precisely the same import, is essential in the application or petition to give the court jurisdiction. *Ib.*

4. Where an application or petition is defective with respect to such essential and jurisdictional allegation, no amendment will be allowed. *Ib.*

5. Such a defect in the application or petition is not waived by the appearance of the respondent, and a trial. *Ib.*

HOMESTEAD—

1. A homestead exemption may be claimed in lands held by a husband as tenant in common with his wife and his conveyance through a third person of his individual share, not exceeding \$1,000 in value to her, is, therefore, not in fraud of creditors. *Prosek v. Kuchta.* 129

2. A wife being separate from her husband and not on the property, cannot claim exemption in lieu, out of the proceeds, against judgment against him, he not claiming exemption. *Lugauer v. Weisgerber.* 458

3. Where, at the time the land of a judgment debtor was levied upon and ordered to be sold, he was unmarried and was not living with an unmarried daughter, nor an unmarried minor son; but previous to the day fixed for the sale of the land, he married. *Held:* He was entitled to the benefit of the homestead law. *Nixon v. Van Dyke.* 622

4. That a foreclosure of one of the mortgages on a homestead encumbered for more than its value, is pending, no decree having been taken, does not entitle the owner to \$500 in lieu of homestead. *Olding v. Kemker.* 601

HUSBAND AND WIFE—

1. A wife, whose husband has been injured, cannot recover of the person by whose negligence the injury was inflicted. *Welch v. Morrison.* 852

2. Damages for the loss of his wages, nor as compensation for nursing him, or medicines furnished nor for mental distress suffered by her. *Ib.*

3. Neither husband nor wife have now any right to recover for the other's loss of earnings, and on the other items there is no priority between her and the defendant; any action she may have to recover them would be against her husband. *Ib.*

4. Section 3110 limits the liability of the husband for antenuptial debts of the wife, to the amount and value of her separate property acquired by him before or during coverture. *Hina v. Rath.* 586

Indictment—Injunction.

HUSBAND AND WIFE—Continued.

5. A devise of property from wife to husband does not render him liable, after her death, for her antenuptial debts. *Ib.*

6. A wife being separate from her husband and not on the property, can not claim exemption in lieu, out of the proceeds, against judgments against him, he not claiming exemption. *Lugauer v. Wersgerber.* 458

7. A married woman, under sec. 3109, as amended in 1884, (81 O. L., 65 and 209), may be sued at law upon her indorsement of her husband's note, made since that date. *Dunkham v. Bruce.* 682

8. Since the amendment of 1884, a married woman can bind herself, by contract, in the same manner and to the same extent if unmarried. *Bank v. Holden.* 546

9. A petition need not, therefore, aver coverture, a separate estate, or that contract was with reference thereto, but may be declared on as against a *feme sole*, and personal judgment may be rendered and enforced. *Ib.*

10. A married woman may now bind herself to the same extent and in the same manner, by contract, as though she were unmarried. *Koch v. Seifert & Co.* 411

11. The amendments of 1884 do not retroact so as to give a justice jurisdiction of an action on a married woman's prior contract. *Ib.*

12. Where a married woman having separate property, executes a promissory note as surety for her husband or for a stranger, a presumption arises that she thereby intended to charge here separate property with the payment. *Corwin v. Cook.* 321

13. Such presumption is not rebutted by her want of knowledge of the legal consequence of so signing. *Ib.*

14. A married woman is incapacitated, in respect to binding herself personally by contract, but not in any other respect. *Ib.*

15. She is charged with the knowledge of legal consequences, and the same inferences of intention follow, as in the case of any other intelligent being. *Ib.*

16. When in the purchase of a chattel by the husband, one of the conditions is, that the wife, owner of a separate estate upon which she resides, shall become security upon the deferred payments, and the sale is

made upon such security and estate, and the note is signed in Ohio, although dated and payable in Indiana, the wife is liable thereon, and a personal judgment may be taken against her. *Mansfield Sav. Bk. v. Flowers.* 169

INDICTMENT—

1. An indictment against a township trustee under sec. 6909, which, as the only description of the offense, avers that defendant charged and received "a fee more and greater" than allowed by law for doing his official duty, is essentially insufficient, and not within sec. 7215. *State v. Williamson.* 761

2. To charge a crime against the increasing or decreasing of tallies, under sec. 7061, (as amended, 78 O. L., 30) the indictment should aver that defendants did falsify and mark upon the tally-sheet in this, to-wit: by increasing or decreasing the tallies. *State v. Granville.* 798

3. To aver that the tallies were changed, altered, erased or tampered with, charges no crime under this statute. *Ib.*

4. Such indictment should set out a copy of the poll-book or tally-sheet, on which the alleged offense was committed. *Ib.*

INNKEEPER—

1. An innkeeper who has complied with sec. 4427, by having an iron safe and posting notices of the fact, is not liable to a guest for loss by theft of jewelry and money, which the latter retained in his possession, in absence of any proof of negligence on part of innkeeper or his servants. *Lang v. Arcade Hotel Co.* 372

2. The fact of the loss is not presumptive evidence of such negligence. *Ib.*

3. A person residing in the city came to a hotel at 2 o'clock in the morning and called for a room, which the night clerk promised to give him. He then deposited with the clerk a package containing money, for which he took a receipt, and, without registering his name, left the hotel, returning at 4 o'clock in the morning, when he found the money and clerk had disappeared: *Held*, in an action to recover the money, that he was a guest, and the hotel keeper was liable for the loss. *Arcade Hotel Co. v. Wiatt.* 55

INJUNCTION—

1. Where injunction is the object of the action, and the merits of the cause remain to be determined by the

Insurance, Fire.

judgment, the refusal to dissolve a temporary injunction is not a final order, and is therefore not reviewable on error. *Dustin v. Bauer.* 200

2. The dismissal of a petition upon which an injunction has been obtained dissolves the injunction, and a cause of action arises against the obligors on the injunction bond. *Krug v. Bishop.* 250

3. Persons whose property is to be assessed for a street improvement, may, without first applying to the solicitor, sue to enjoin the proceedings at any stage where illegality appears. *Moore v. Cincinnati.* 587

4. A property holder cannot enjoin the construction of a street cable railway half a mile distant from his property on the ground that his access is impaired. *Harrison v. Cable Ry. Co.* 805

5. Tax payers have no right under sec. 1777, to complain of want of consents to the construction of a street railway; abutting lot owners alone are interested in the subject. *Ib.*

6. An abutting owner can not enjoin laying pipe for natural gas in a street because not first submitted to a popular vote under sec. 4551. *Webb v. Ohio Gas Fuel Co.* 662.

7. Only the public and not a private citizen can right a wrong of this kind. *Ib.*

8. Injunction against counting illegal returns by a clerk and justices, and issuing certificates upon them, is within the jurisdiction of court, especially, as to legislative officers, where a remedy by contest is not adequate, and the legislature cannot consider the case until it is in session, and the contestees have become members of it. *Hardacre v. Dalton.* 527

9. Electors, and candidates, in the capacity of electors, may join as plaintiffs. *Ib.*

10. An injunction will lie to prevent a trespass. *Railroad Co. v. Wenger.* 815

11. An injunction to restrain the publication of an anticipated libel or slander, can not be given by a court of equity. *Dopp v. Doll.* 428

12. An injunction beforehand in such a case would be an abridgment of the freedom of speech and of the press, guaranteed by art. 1, sec. 11 of the Bill of Rights in the constitution of Ohio. *Ib.*

13. A theater contract for a theater, attendants, orchestra, etc., for

a week cannot be enforced by the actor by mandatory injunction, because the court cannot supervise services. *Lacy v. Heuck.* 347

14. But injunction against use of theater during such week for any other play will be granted if the contract is plain and the proposed breach is not disputed. *Ib.*

15. In the present state of knowledge of controlling natural gas it is so probable that its perils cannot be mastered, that the owner of a freehold in subsurface coal can enjoin the surface owner from sinking a gas well from its surface through the mine into the gas region below the mine. *Jefferson Iron Works v. Gill Bros.* 481

16. An injunction will not be granted against a mere act of trespass. *Ib.*

17. An electric light company will not be enjoined from putting wires within three or four feet of plaintiff's wires, if the bulk of evidence is against sensible diminution of current by induction, and the linemen will not be in danger, if careful, except certain work, when defendant's current must, on notice, be stopped. *W. U. Telegraph Co. v. Champion Electric Light Co.* 540

18. The danger from breaks, etc., during storms, is too uncertain to consider. But the injunction must be with these limitations, and with leave to move to modify if actual experiment shows injury. *Ib.*

19. Fire commissioners required to advertise for bids on contracts for \$500 or over, on being enjoined from contracting for \$4,000 worth of hose under an improper advertisement, divided up the amount into successive purchases of less than \$500 each from the accepted bidder: *Held*, an evasion and violation of the injunction and a contempt, and they will be compelled to repay into the treasury the amount paid out. *Wing v. Cleveland.* 551

INSURANCE, FIRE—

1. The market value of goods at the date of the loss is not merely the cost of replacing them. Anonymous. (*Chatfield & Woods v. Insurance Co.*) 442

2. A landlord has an insurable interest in the permanent improvements, repairs and fixtures, added to his building by the tenant. *Insurance Co. v. Carson.* 848

3. Where a policy contains a provision that the loss, if any, shall be paid to a person other than the in-

Insurance, Life—Judgments.

INSURANCE, FIRE—Continued.

sured, it is not sufficient for such beneficiary to allege and prove that he complied with the terms thereof and suffered loss by fire, but it should have been alleged and proved that the insured had complied with the terms of the policy and had suffered loss. *Ib.*

4. Where the sworn preliminary proofs allege an amount and value more than double what the jury find them to be, and no explanation is attempted, such finding is so far proof of fraud, that the court will set aside the verdict, the defense of false swearing having been made. *Ferris v. Insurance Co.* 634

INSURANCE, LIFE—

1. The policy is the sole contract of insurance, and statements by the agent to the assured, before it is issued, are not admissible in evidence, no reformation of contract being asked. *Odell v. Life Ins. Co.* 589

2. Where a policy of life insurance was taken out by a husband in behalf of his wife, and the contract of the company was with the latter, the former continuing to act as her agent, receiving notices and paying premiums up to a certain time, when he ceased to act for or in her behalf, and so notified the company, the latter could not thereafter deal with the husband as agent of the wife, nor make any agreement with him with respect to the policy, which would bind the wife. *Smith v. Life Ins. Co.* 583

3. In such case notice of the approaching maturity of a premium given to the husband would not be notice to the wife. *Ib.*

4. Where the right to participate in the profits of the company is secured to the beneficiary of a policy of life insurance, with the right to apply dividends to the reduction of premiums, the company is bound to notify the beneficiary of the amount of the annual dividend to be applied in reduction of the premium before it can forfeit the policy for non-payment of such premium. *Ib.*

INTEREST AND USURY—

A change of interest to a usurious rate as between the original parties to a mortgage, will not discharge a subsequent purchaser. *Stanbery v. O'Neil.* 238

INTOXICATING LIQUORS—

1. Buying and selling at wholesale is "traffic" and the Dow law contemplates a *tertium quid* wholesale deal-

era. Said act is not in conflict with the constitution of the state. *Senior & Son v. Ratterman.* 741

2. Paying the "Scott Law" taxes under protest and bringing a suit within the year's limitation does not entitle the party to a refund. *Snodgrass v. Treasurer of Franklin Co.* 414

3. The midnight closing law for cities of the first grade, first class, being a statute punishing an act which is *malum prohibitum* only, and not *malum in se* is not a violation of art. 1, sec. 26, of the constitution. *Massa v. State.* 772

4. The provision of sec. 4364, authorizing proceedings against owners to the subject property used for the sale of intoxicating liquors with their assent to the payment of judgments against their tenants so using it, is not invalid. *Blakeny v. Green.* 570

5. The result of such proceedings is not to deprive owners of their property without due process of law. *Ib.*

In such proceedings the judgment against the tenant, to which the owners were not parties, is at least *prima facie* evidence against them. *Ib.*

JUDICIAL SALE—

1. That the order did not describe the lands is a mere irregularity, and not ground for collateral impeachment as in ejectment by the heirs against the buyer. *Herbst v. Bates* 444

2. Confirmation of sale was not required by the U. S. Bankruptcy Act of 1841, and, hence, was not essential. *Ib.*

3. Where a purchaser at judicial sale has mistaken the identity of the property to be sold, supposing it to be the next door house, and sends his agent to bid under that supposition, and receives the property, such purchaser has sufficient standing in court to show the fact and will be released from such bid or payment of costs of sale and judicial proceedings. *Fallis v. Loughhead.* 128

JUDGMENTS—

1. Signature of the judge to the order or journal entry thereof is not essential to the validity of the order. *Herbst v. Bates.* 444

2. A foreign judgment recovered in a court of record, is a specialty within the meaning of our statutes of limitation. *Reynolds v. Drake.* 246

Jury—Landlord and Tenant.

3. A judgment by default in N. Y. by a resident of Ohio against an Ohio corporation, upon an action arising in N. Y., where service was made upon the president, will be valid in Ohio, irrespective of whether the corporation was doing business in N. Y., and whether its president when served with a summons, was in N. Y. upon business of the corporation. *Railroad Co. v. Emery.* 756

4. Such judgment being valid in N. Y., must be respected accordingly in this state. *Ib.*

6. A reviewing court cannot reverse a judgment on the ground that it is against the law of evidence, unless there has been a motion for a new trial on that ground, the motion overruled and an exception taken to the overruling the motion. *Celtic Building Assn. v. Regan.* 364

6. Judgment obtained in violation of any of the rules of the court; as for example requiring notice, is an irregularity under this section. *Fliedner v. Rockefeller.* 266

7. In a petition to vacate a judgment, the party should show not merely a good defense, but, first, that he was without negligence on his own part and that of his attorney; and, second, that he exercised due diligence in attempting his defense; and, third, the unavoidable casualty. *Ib.*

8. A judgment will not be reversed for permitting papers not in the case to be taken by the jury in their retirement, where it could not have prejudiced the party. *Jaspers v. Mallon.* 184

JURY—

1. That a juror has worked as a day laborer for a party when ever sent for, but is not on the pay roll, nor then in its employ, is not ground of challenge as an employee. *Thompson & Co. v. Railroad Co.* 209

2. Amendment to jury law held not to be *ex post facto* as to a pending case. *Palmer v. State* 377

JUSTICE OF THE PEACE—

1. A refusal of a justice to give the jury any charge upon the law of the case is not error where the bill of exceptions does not show that there was any law in the case. *Dougherty v. O'Connell.* 380

2. It is not error in an action of trespass before a justice for destroying a fence, to exhibit to the jury a plat, showing the location and size of plaintiff's and defendant's lots, and the subdivision, such plat being not to show title but to explain the testimony. *Ib.*

3. A justice may set aside a judgment void for want of service of summons on defendants, may issue a new summons in the same action, and upon due service thereof may proceed again to judgment. *Wehlen v. Macke.* 565

4. Constable fees and other costs stand upon the same footing as money due a party as damages on a judgment claim and when paid to the justice are payable to the party entitled thereto on demand. *Linderman v. Ziegler.* 401

5. Hence, there is no breach of a justice's bond by the mere detention of money, no demand therefor having been made. *Ib.*

6. But a demand upon the justice's administrator, whose duty it is to distribute trust funds on hand, and a refusal to pay, constitutes a breach of the bond. *Ib.*

LANDLORD AND TENANT—

1. A tenant of business property has the right to use for his business sign, the outside of the part of the building occupied by him. *Law v. Haley.* 785

When the sign space, to which several tenants have the right, is for their business purpose properly and reasonably used by some of them to the exclusion of the remainder, the former having prior possession will not be enjoined from such exclusive use at the suit of the latter. *Ib.*

2. A landlord can not bring an action of replevin against a tenant, of land rented on shares, for his share of the crop before a sufficient time has elapsed to allow the tenant to deliver it. *Mouser v. Davis.* 237

3. Where a person who is rightfully in the prosecution of his business in the rooms of a tenant, and there meets death through the negligence of the landlord in not properly propping up his house while the adjoining owner is excavating a cellar; such landlord is liable in damages for such death. *Kuhn v. Remmler.* 693

4. A landlord has an insurable interest in the permanent improvements, repairs and fixtures, added to his building by the tenant. *Insurance Co. v. Carson.* 848

5. The destruction of leased premises by fire, gives an option to both lessor and lessee to terminate a lease, and a re-entry by lessor to rebuild such premises without any agreement is presumed to have been in his rightful exercise of his option

Larceny—Limitations.

LANDLORD, ETC.—Continued.

to re-occupy and terminate the lease.
Davie v. Gay. 418

6. Rental for one year, with the privilege of renewing for one or two years, at discretion, the holding over for one entire year and a portion of second year, indicated by payment of the rent according to the terms in original agreement, without objection on the part of the landlord and without notification by the tenant that he was not in for the term, constituted an election to continue for an entire year. *Powell v. Harrison.* 38

7. The condition of forfeiture being, that if any installment of rent remained unpaid by the space of thirty days after due the lease should be void, the day for making the demand was the last or thirteenth day; if that fell upon Sunday, the following Monday was the proper day. The demand being by agent, it was not essential that his authority should have been in writing. *Countee v. Armstrong.* 62

8. Where a landlord agrees to furnish tenant with power, the destruction of the building from whence the power is supplied and the temporary cutting off of the supply of power does not render the premises of the tenant "unfit for occupancy," which under sec. 4113, terminates the lease. *Crown Mfg Co. v. Gay.* 420

9. Eviction from part of the premises, entitles tenant to a proportionate reduction of rent, where such eviction is by a stranger under a paramount title to the landlord. *Ib.*

10. Eviction by landlord, not acquiesced in by tenant, relieves tenant from payment of all rent while so evicted. *Ib.*

11. A re-renting after lessee has claimed to abandon is not an assent, for the lessor may re-rent as agent of the lessee. *Ib.*

LARCENY—

There can be no larceny of implements made and kept solely for gambling, for there is no property in them, although the material of which they are made might have a value. *State v. Wilmore.* 61

LEGACIES—

1. The probate court has the power to pass on the validity of the claims of legatees, and order their payment before final distribution of the estate. *Disney v. Hawes.* 406

2. Legatees are entitled to demand payment of their legacies, within the four years limited for the presentation of the claims of creditors,

upon a satisfactory showing to the probate court, and the giving of the undertakings to the executor, if any be required by the court. *Ib.*

LEGISLATIVE AGENT—

1. Unless expressly authorized, an action will not lie against an agent of the legislature, as such agent, for damages sustained by private parties through the negligence of such agent in the performance of the duties imposed by the legislature. *Daley v. Bd. of Public Works.* 118

2. Where, under an act of the legislature, a fund is produced by the levy of a tax, to be used and applied to purposes specified, and for no other, such fund cannot be subjected to the payment of consequential damages to private parties, caused by the negligent prosecution of the work. *Ib.*

LICENSE—

1. The legislature cannot authorize a municipal corporation to discriminate against articles manufactured without the state, and an ordinance requiring those who canvass for the sale of such articles first to pay for a license is void. *Ex parte Clamp.* 672

2. Compelling hawkers and peddlers to pay a license before pursuing business, sec. 2669, is, in so far as applicable to goods manufactured outside the state, void as a regulation of commerce, and a dealer who has been required to pay it, may recover it back. *Burkhart & Co. v. Columbus.* 839

LIFE ESTATE—

A life estate given by will is not enlarged to a fee by a power of sale coupled with it, unless such appears to have been the intention of the testator. *Stokes v. Stokes.* 309

LIMITATIONS—

1. A foreign judgment recovered in a court of record, is a specialty within the meaning of our statutes of limitation. *Reynolds v. Drake.* 246

2. And an action rounded upon such judgment recovered more than eighteen years prior thereto, after deducting such time as defendant was absent from the state of Ohio, is barred. *Ib.*

3. The statute of limitations does not run in favor of an assignee of the debtor under the insolvent laws of this state. *Bettman v. Hunt.* 896

4. In actions upon stockholder's liability, the statute of limitations commences to run as against any

Lost Instruments—Mortgages.

claim, when the company is insolvent, and the claim determined and enforceable against stockholders. *Hardman v. Railroad Co.* 578

5. When it appears upon the face of the petition that the statute of limitations would be a bar to action, the better practice is to state the ground of the demurrer specifically. *Spangenberg v. Schwartz.* 241

6. The bar of the statute cannot be made available by a demurrer that the plaintiff has not legal capacity to sue. *Ib.*

A mortgagee's action for injury to his security and also the owner's right of action rising from a railroad belonging to a city, using a street lawfully taken, is an injury not arising in contract under sec. 4982, and is barred in four years. *Cameron v. Cincinnati.* 754

8. A party relying solely on possession and the state of limitations as his title to real estate, must show that he has had exclusive possession of the same for twenty-one years. *Haimeyer v. Tietig.* 438

9. Where it appears that he has used the property in dispute as a way to his premises for more than that length of time, while the holder of the record title has used it during the same time to furnish light and air to his buildings, the former cannot be said to have been in exclusive possession. *Ib.*

LOST INSTRUMENTS—

1. A petition to recover upon certificate of deposit, which avers the certificate to have been lost without having been endorsed, and makes no tender of indemnity to defendant, is bad on demurrer. *Brown v. Bank.* 707

2. Indemnity against future liability on a national bank's certificate of deposit lost by the payer without indorsement is not necessary. *Bank v. Brown.* 215

LUNACY—

1. Notice to a lunatic of an application to the probate court to appoint a guardian is not required. *Davidson v. Tipton.* 60

2. The court may try an application to declare one a lunatic, in part by inspection, and having so tried the case, it being impossible to put such evidence on the bill of exceptions, and the judge below having certified that it was impossible to report the lunatic's answers to questions the reviewing court will not attempt

to examine the weight of evidence, for it is evident that all the evidence is not in the bill. *Ib.*

MALICIOUS PROSECUTION—

1. In an action for malicious prosecutions a grand juror's evidence of what defendant testified to before the grand jury is not competent. *Barr v. Riley.* 828

2. Such evidence could only be taken in a case where the petition averred that the indictment was procured by the false, malicious and corrupt testimony of the party against whom damages are claimed. *Ib.*

MANDAMUS—

Signing a bill of exceptions in forcible entry proceedings is a useless act, and will not be compelled by mandamus if there is no reversible error. *State ex rel. v. Paul.* 228

MARRIAGE—

The consent of parents is not essential to the validity of a marriage by parties under age when it has been ratified by the parties cohabiting together after arriving of age. *Vernon v. Vernon.* 365

MASTER AND SERVANT—

The act of "striking," or discontinuing work, terminates the contract relation between employer and employe, when the contract is not for specified time. *Railroad Co. v. Wegner.* 815

MECHANICS' LIENS—

1. Under the mechanics' lien law, the account filed is an entirety, whether the work done is under a contract or there is a running account for items furnished. *Ives v. Holbrook.* 96

2. Where a contractor, on the death of the owner, filed an account and took out a mechanic's lien and afterward filed a second account for work and materials, subsequently furnished for the same building: *Held*, that he could not secure a second mechanic's lien for said second account. *Ib.*

MORTGAGES—

1. Foreclosure of mortgage on an entailed estate. *Wolf v. Stout.* 231

2. In a foreclosure proceeding an issue of fact may be referred to a jury. *Fleming v. Fleming.* 332

3. Where, in foreclosure proceedings, the petition does not show that one of the parties named, interested at one time, has no further interest, he should be made a party defendant. *Knierim v. Zaengerle.* 47

Municipal Corporation.

MORTGAGES—Continued.

4. Where a mortgage as recorded stated the true amount of notes secured by it, and the condition contained a recital of that amount as well as the mortgage index: *Held*, this was sufficient to affect a subsequent purchaser with notice of the true amount, although the recorder had omitted to mention one of the notes in the body of the recorded mortgage. *Stanbery v. O'Neil*. 238

5. A court cannot reform a mortgage by inserting two additional tracks of lands merely on evidence that the mortgagor had just previously expressed an intention to include all his lands and had a list of them before the scrivener, and that there is a repetition in the description of two other lots by inserting them twice. *Bartlett v. Patterson*. 73

6. Where an assignor of a series of notes, who agrees with the assignee to be liable as indorser on all except the last due, and takes up two of the notes, he has no equity to have the notes he has taken up held as an incumbrance prior to the later notes of such assignee, and therefore his creditors cannot claim, that he has an interest superior to that of his assignee, and the fact that he became owner of the property does not affect the priorities. *Exchange Bank v. Eddy*. 85

7. A lease was made to A., with privilege of purchase, upon his paying \$19,000 before the expiration of the lease. He paid \$9,000, and was unable to pay more. His wife paid \$4,000, and by consent of all parties a subsequent lease was made to her, with privilege of purchase upon payment of \$8,000, which she paid, and the lessor conveyed to her with warranty. A., before the expiration of his lease, made a deed of the premises to plaintiff, absolute on its face, but in fact to secure payment of \$5,000, which deed was placed on record: *Held*: A., by paying \$9,000, acquired a contingent equity in the land, contingent upon complete payment being made. *Dodson v. Dodson*. 201

8. The deed to plaintiff was not a legal mortgage, but was a charge upon such equity. The record was not constructive notice. *Ib*.

9. A's wife had no knowledge of the charge in favor of plaintiff, but receiving A.'s contingent equity as a gift, she took it, subject to the charge. Plaintiff is entitled to a lien upon nine-nineteenths of the premises. *Ib*.

10. This charge is not a breach of the warranty in the conveyance by the lessor to A.'s wife. *Ib*.

MUNICIPAL CORPORATION—

1. Where a municipal ordinance is wholly void, a conviction under it may be declared void, and the prisoner released on habeas corpus. *Ex parte Clamp*. 672

2. Where a change of an established grade in front of a lot of ground, upon which improvements have been constructed in the faith that the grade would not be changed, injuriously affects the premises; the act of the corporate authorities is in the nature of a "taking" of the interest of the owner in the property, and compensation must be made. *Cincinnati v. Whetstone*. 368

3. The rule of damages in such case is the difference in the value of the property as a whole, and not for injury to or suspension of trade carried on upon the premises. *Ib*.

4. An ordinance requiring a railroad to erect gates at street crossings is invalid. The state alone can enact police laws. *Manafield v. Railroad Co*. 572

5. A municipal corporation has power to consent to the laying of a branch railroad track up a manufacturing street for the convenience of shippers, and branches therefrom to their private property. *Railroad Co. v. Cincinnati*. 695

6. An ordinance under which a branch railroad track is laid upon an unfinished street being ambiguous, as capable of two constructions, is not necessarily to be construed strictly as against the grant of a franchise, but the rule of construction by conduct applies to municipal contracts. *Ib*.

7. The track and such branches having been laid, such consent is not revocable. But the right to regulate its use continues. *Ib*.

8. Under legislative acts empowering city councils to make all needful regulations to promote the public health, etc., the city councils may enact ordinances prohibiting the removing or carrying through the public streets dead animals without a permit from the board of health; and may make contracts with persons for the removal of all dead animals from the public streets. *Morgan & Co. v. Cincinnati*. 280

9. A village, by its council, has power to borrow money for some purposes under sec. 2701, and the fact that the village desired the loan for the

Mutual Benefit Society.

illegal purpose of giving it as a bonus to secure the location of a mill will not prejudice the lender if he acted in good faith. *Insurance Co. v. New Philadelphia*. 793

10. The village may issue negotiable notes for its loan, being the usual form of security, and notes to evidence the loan are not required by sec. 2703 to express on their face the purpose of their issue. *Ib.*

11. Limitation of grant by ordinance to lay steam pipes in streets of a city. When mandamus will not lie. *State ex rel. v. Boyce*. 165

12. Cities and villages, in the absence of an express reservation by the owners of the soil, have, as against the abutting property-owners, a qualified fee in the streets, under which they may lay water and sewer pipes under the surface, without either obtaining the consent of the abutting property-owners, or compensating them. *Turnpike Co. v. Avondale*. 813

13. They, however do not have the right over a turnpike road. The surface of such a road is the private property of the turnpike company, and is subject to the same rules as other private property. *Ib.*

14. The use of the side of a public street as a hackney coach stand, under a city ordinance, so as to interfere with use of fronting store rooms is without authority of law. *Cincinnati Hotel Co. v. Branahan*. 22

15. An abutting owner can not enjoin laying pipe for natural gas in a street because not first submitted to a popular vote under sec. 4551. *Webb v. Ohio Gas Fuel Co.* 662

16. Only the public and not a private citizen can right a wrong of this kind. *Ib.*

17. A wharfmaster's election by the people under an old ordinance of Cincinnati is not inconsistent with sec. 2667, providing that council may appoint a wharfmaster, nor with sec. 1708, enumerating the offices of a city, not mentioning wharfmasters, but is lawful under sec. 1710, giving council power to provide for appointing or electing other officers, and sec. 1711 that appointments must be by the mayor. *State v. Mulvihill*. 450

18. Where the legislature provided for raising a fund to be used for opening and grading a certain street, said fund to be expended under the directions of a board of public works also created by the legislature, and a laborer while working on such street

under directions of such board, sustains injuries by reason of the board's negligence: *Held*, that the members of such board were agents of the state in the construction of such street, and as such agents were not liable individually, nor could said fund be subjected to satisfy plaintiff's claim for damages by reason of said injuries, no express statutory provision authorizing a recovery. *Daly v. Tucker*. 255

MUTUAL BENEFIT SOCIETY—

1. Courts will not review the expulsion of a member from a mutual order, on due notice and trial for irregularities, but will for fraud or collusion, *Kent v. Odd Fellows*. 522

2. It will not be presumed that the trial was while the party was insane, although he had been insane before, but insanity must be proven by a preponderance of evidence. *Ib.*

3. A reserved right to amend all by-laws gives no power to reduce the time for sick benefits to a member already on the sick list. His rights are vested and he is a creditor. *Pel-lazzino v. St. Joseph's Society*. 635

4. The right to amend a by-law is not a right to repudiate a debt. *Ib.*

5. The widow is the beneficiary of a policy of insurance in a mutual association upon the life of her husband payable to "his heirs," when he leaves brothers and sisters, but no children. *Jamieson v. Knights Templar*. 388

6. A member of a mutual benefit order, who has been expelled cannot appeal to the courts to reinstate him where he has not exhausted his right to appeal within the rules of the order. That the appellate officer is among those who voted to expel him is no reason why he should not appeal. *State ex rel. v. Knights Golden Rule*. 1

7. If appellate officer to hear an appeal, the remedy would be by mandamus against such officer. *Ib.*

8. A policy of insurance issued by a mutual life insurance association in favor of the wife of the insured, which reserves to the latter the right to change the beneficiary at any time, confers upon the wife no right or interest which can pass to the administrator, in a case where the death of the wife precedes that of the husband, and the latter dies without designating any other beneficiary. *Tafel v. Knights of Golden Rule*. 279

9. Under the by-laws of a mutual association for the payment to the widow of each member,

Indictment—Injunction.

HUSBAND AND WIFE—Continued.

5. A devise of property from wife to husband does not render him liable, after her death, for her antenuptial debts. *Ib.*

6. A wife being separate from her husband and not on the property, can not claim exemption in lieu, out of the proceeds, against judgments against him, he not claiming exemption. *Lugauer v. Wersgerber.* 458

7. A married woman, under sec. 8109, as amended in 1884, (81 O. L., 65 and 209), may be sued at law upon her indorsement of her husband's note, made since that date. *Dunkham v. Bruce.* 682

8. Since the amendment of 1884, a married woman can bind herself, by contract, in the same manner and to the same extent if unmarried. *Bank v. Holden.* 546

9. A petition need not, therefore, aver coverture, a separate estate, or that contract was with reference thereto, but may be declared on as against a *feme sole*, and personal judgment may be rendered and enforced. *Ib.*

10. A married woman may now bind herself to the same extent and in the same manner, by contract, as though she were unmarried. *Koch v. Seifert & Co.* 411

11. The amendments of 1884 do not retract so as to give a justice jurisdiction of an action on a married woman's prior contract. *Ib.*

12. Where a married woman having separate property, executes a promissory note as surety for her husband or for a stranger, a presumption arises that she thereby intended to charge here separate property with the payment. *Corwin v. Cook.* 321

13. Such presumption is not rebutted by her want of knowledge of the legal consequence of so signing. *Ib.*

14. A married woman is incapacitated, in respect to binding herself personally by contract, but not in any other respect. *Ib.*

15. She is charged with the knowledge of legal consequences, and the same inferences of intention follow, as in the case of any other intelligent being. *Ib.*

16. When in the purchase of a chattel by the husband, one of the conditions is, that the wife, owner of a separate estate upon which she resides, shall become security upon the deferred payments, and the sale is

made upon such security and estate, and the note is signed in Ohio, although dated and payable in Indiana, the wife is liable thereon, and a personal judgment may be taken against her. *Mansfield Sav. Bk. v. Flowers.* 169

INDICTMENT—

1. An indictment against a township trustee under sec. 6909, which, as the only description of the offense, avers that defendant charged and received "a fee more and greater" than allowed by law for doing his official duty, is essentially insufficient, and not within sec. 7215. *State v. Williamson.* 761

2. To charge a crime against the increasing or decreasing of tallies, under sec. 7061, (as amended, 78 O. L., 30) the indictment should aver that defendants did falsify and mark upon the tally-sheet in this, to-wit: by increasing or decreasing the tallies. *State v. Granville.* 798

3. To aver that the tallies were changed, altered, erased or tampered with, charges no crime under this statute. *Ib.*

4. Such indictment should set out a copy of the poll-book or tally-sheet, on which the alleged offense was committed. *Ib.*

INNKEEPER—

1. An innkeeper who has complied with sec. 4427, by having an iron safe and posting notices of the fact, is not liable to a guest for loss by theft of jewelry and money, which the latter retained in his possession, in absence of any proof of negligence on part of innkeeper or his servants. *Lang v. Arcade Hotel Co.* 372

2. The fact of the loss is not presumptive evidence of such negligence. *Ib.*

3. A person residing in the city came to a hotel at 2 o'clock in the morning and called for a room, which the night clerk promised to give him. He then deposited with the clerk a package containing money, for which he took a receipt, and, without registering his name, left the hotel, returning at 4 o'clock in the morning, when he found the money and clerk had disappeared: *Held*, in an action to recover the money, that he was a guest, and the hotel keeper was liable for the loss. *Arcade Hotel Co. v. Wiatt.* 55

INJUNCTION—

1. Where injunction is the object of the action, and the merits of the cause remain to be determined by the

Insurance, Fire.

judgment, the refusal to dissolve a temporary injunction is not a final order, and is therefore not reviewable on error. *Dustin v. Bauer.* 200

2. The dismissal of a petition upon which an injunction has been obtained dissolves the injunction, and a cause of action arises against the obligors on the injunction bond. *Krug v. Bishop.* 250

3. Persons whose property is to be assessed for a street improvement, may, without first applying to the solicitor, sue to enjoin the proceedings at any stage where illegality appears. *Moore v. Cincinnati.* 587

4. A property holder cannot enjoin the construction of a street cable railway half a mile distant from his property on the ground that his access is impaired. *Harrison v. Cable Ry. Co.* 805

5. Tax payers have no right under sec. 1777, to complain of want of consents to the construction of a street railway; abutting lot owners alone are interested in the subject. *Ib.*

6. An abutting owner can not enjoin laying pipe for natural gas in a street because not first submitted to a popular vote under sec. 4551. *Webb v. Ohio Gas Fuel Co.* 662.

7. Only the public and not a private citizen can right a wrong of this kind. *Ib.*

8. Injunction against counting illegal returns by a clerk and justices, and issuing certificates upon them, is within the jurisdiction of court, especially, as to legislative officers, where a remedy by contest is not adequate, and the legislature cannot consider the case until it is in session, and the contestees have become members of it. *Hardacre v. Dalton.* 527

9. Electors, and candidates, in the capacity of electors, may join as plaintiffs. *Ib.*

10. An injunction will lie to prevent a trespass. *Railroad Co. v. Wenger.* 815

11. An injunction to restrain the publication of an anticipated libel or slander, can not be given by a court of equity. *Dopp v. Doll.* 428

12. An injunction beforehand in such a case would be an abridgment of the freedom of speech and of the press, guaranteed by art. 1, sec. 11 of the Bill of Rights in the constitution of Ohio. *Ib.*

13. A theater contract for a theater, attendants, orchestra, etc., for

a week cannot be enforced by the actor by mandatory injunction, because the court cannot supervise services. *Lacy v. Heuck.* 347

14. But injunction against use of theater during such week for any other play will be granted if the contract is plain and the proposed breach is not disputed. *Ib.*

15. In the present state of knowledge of controlling natural gas it is so probable that its perils cannot be mastered, that the owner of a freehold in subsurface coal can enjoin the surface owner from sinking a gas well from its surface through the mine into the gas region below the mine. *Jefferson Iron Works v. Gill Bros.* 481

16. An injunction will not be granted against a mere act of trespass. *Ib.*

17. An electric light company will not be enjoined from putting wires within three or four feet of plaintiff's wires, if the bulk of evidence is against sensible diminution of current by induction, and the linemen will not be in danger, if careful, except certain work, when defendant's current must, on notice, be stopped. *W. U. Telegraph Co. v. Champion Electric Light Co.* 540

18. The danger from breaks, etc., during storms, is too uncertain to consider. But the injunction must be with these limitations, and with leave to move to modify if actual experiment shows injury. *Ib.*

19. Fire commissioners required to advertise for bids on contracts for \$500 or over, on being enjoined from contracting for \$4,000 worth of hose under an improper advertisement, divided up the amount into successive purchases of less than \$500 each from the accepted bidder: *Held*, an evasion and violation of the injunction and a contempt, and they will be compelled to repay into the treasury the amount paid out. *Wing v. Cleveland.* 551

INSURANCE, FIRE—

1. The market value of goods at the date of the loss is not merely the cost of replacing them. *Anonymous. (Chatfield & Woods v. Insurance Co.)* 442

2. A landlord has an insurable interest in the permanent improvements, repairs and fixtures, added to his building by the tenant. *Insurance Co. v. Carson.* 848

3. Where a policy contains a provision that the loss, if any, shall be paid to a person other than the in-

Insurance, Life—Judgments.

INSURANCE, FIRE—Continued.

sured, it is not sufficient for such beneficiary to allege and prove that he complied with the terms thereof and suffered loss by fire, but it should have been alleged and proved that the insured had complied with the terms of the policy and had suffered loss. *Ib.*

4. Where the sworn preliminary proofs allege an amount and value more than double what the jury find them to be, and no explanation is attempted, such finding is so far proof of fraud, that the court will set aside the verdict, the defense of false swearing having been made. *Ferris v. Insurance Co.* 634

INSURANCE, LIFE—

1. The policy is the sole contract of insurance, and statements by the agent to the assured, before it is issued, are not admissible in evidence, no reformation of contract being asked. *Odell v. Life Ins. Co.* 589

2. Where a policy of life insurance was taken out by a husband in behalf of his wife, and the contract of the company was with the latter, the former continuing to act as her agent, receiving notices and paying premiums up to a certain time, when he ceased to act for or in her behalf, and so notified the company, the latter could not thereafter deal with the husband as agent of the wife, nor make any agreement with him with respect to the policy, which would bind the wife. *Smith v. Life Ins. Co.* 583

3. In such case notice of the approaching maturity of a premium given to the husband would not be notice to the wife. *Ib.*

4. Where the right to participate in the profits of the company is secured to the beneficiary of a policy of life insurance, with the right to apply dividends to the reduction of premiums, the company is bound to notify the beneficiary of the amount of the annual dividend to be applied in reduction of the premium before it can forfeit the policy for non-payment of such premium. *Ib.*

INTEREST AND USURY—

A change of interest to a usurious rate as between the original parties to a mortgage, will not discharge a subsequent purchaser. *Stanbery v. O'Neil.* 238

INTOXICATING LIQUORS—

1. Buying and selling at wholesale is "traffic" and the Dow law contemplates a *retail* wholesale deal-

ers. Said act is not in conflict with the constitution of the state. *Senior & Son v. Ratterman.* 741

2. Paying the "Scott Law" taxes under protest and bringing a suit within the year's limitation does not entitle the party to a refund. *Snodgrass v. Treasurer of Franklin Co.* 414

3. The midnight closing law for cities of the first grade, first class, being a statute punishing an act which is *malum prohibitum* only, and not *malum in se* is not a violation of art. 1, sec. 26, of the constitution. *Massa v. State.* 772

4. The provision of sec. 4364, authorizing proceedings against owners to the subject property used for the sale of intoxicating liquors with their assent to the payment of judgments against their tenants so using it, is not invalid. *Blakeny v. Green.* 570

5. The result of such proceedings is not to deprive owners of their property without due process of law. *Ib.*

In such proceedings the judgment against the tenant, to which the owners were not parties, is at least *prima facie* evidence against them. *Ib.*

JUDICIAL SALE—

1. That the order did not describe the lands is a mere irregularity, and not ground for collateral impeachment as in ejectment by the heirs against the buyer. *Herbst v. Bates.* 444

2. Confirmation of sale was not required by the U. S. Bankruptcy Act of 1841, and, hence, was not essential. *Ib.*

3. Where a purchaser at judicial sale has mistaken the identity of the property to be sold, supposing it to be the next door house, and sends his agent to bid under that supposition, and receives the property, such purchaser has sufficient standing in court to show the fact and will be released from such bid or payment of costs of sale and judicial proceedings. *Fallis v. Loughhead.* 128

JUDGMENTS—

1. Signature of the judge to the order or journal entry thereof is not essential to the validity of the order. *Herbst v. Bates.* 444

2. A foreign judgment recovered in a court of record, is a specialty within the meaning of our statutes of limitation. *Reynolds v. Drake.* 246

Jury—Landlord and Tenant.

3. A judgment by default in N. Y. by a resident of Ohio against an Ohio corporation, upon an action arising in N. Y., where service was made upon the president, will be valid in Ohio, irrespective of whether the corporation was doing business in N. Y., and whether its president when served with a summons, was in N. Y. upon business of the corporation. *Railroad Co. v. Emery.* 756

4. Such judgment being valid in N. Y., must be respected accordingly in this state. *Ib.*

6. A reviewing court cannot reverse a judgment on the ground that it is against the law of evidence, unless there has been a motion for a new trial on that ground, the motion overruled and an exception taken to the overruling the motion. *Celtic Building Assn. v. Regan.* 364

6. Judgment obtained in violation of any of the rules of the court; as for example requiring notice, is an irregularity under this section. *Fliedner v. Rockefeller.* 266

7. In a petition to vacate a judgment, the party should show not merely a good defense, but, first, that he was without negligence on his own part and that of his attorney; and, second, that he exercised due diligence in attempting his defense; and, third, the unavoidable casualty. *Ib.*

8. A judgment will not be reversed for permitting papers not in the case to be taken by the jury in their retirement, where it could not have prejudiced the party. *Jaspers v. Mallon.* 184

JURY—

1. That a juror has worked as a day laborer for a party when ever sent for, but is not on the pay roll, nor then in its employ, is not ground of challenge as an employee. *Thompson & Co. v. Railroad Co.* 209

2. Amendment to jury law held not to be *ex post facto* as to a pending case. *Palmer v. State* 377

JUSTICE OF THE PEACE—

1. A refusal of a justice to give the jury any charge upon the law of the case is not error where the bill of exceptions does not show that there was any law in the case. *Dougherty v. O'Connell.* 380

2. It is not error in an action of trespass before a justice for destroying a fence, to exhibit to the jury a plat, showing the location and size of plaintiff's and defendant's lots, and the subdivision, such plat being not to show title but to explain the testimony. *Ib.*

3. A justice may set aside a judgment void for want of service of summons on defendants, may issue a new summons in the same action, and upon due service thereof may proceed again to judgment. *Wehlen v. Macke.* 565

4. Constable fees and other costs stand upon the same footing as money due a party as damages on a judgment claim and when paid to the justice are payable to the party entitled thereto on demand. *Linderman v. Ziegler.* 401

5. Hence, there is no breach of a justice's bond by the mere detention of money, no demand therefor having been made. *Ib.*

6. But a demand upon the justice's administrator, whose duty it is to distribute trust funds on hand, and a refusal to pay, constitutes a breach of the bond. *Ib.*

LANDLORD AND TENANT—

1. A tenant of business property has the right to use for his business sign, the outside of the part of the building occupied by him. *Law v. Haley.* 785

When the sign space, to which several tenants have the right, is for their business purpose properly and reasonably used by some of them to the exclusion of the remainder, the former having prior possession will not be enjoined from such exclusive use at the suit of the latter. *Ib.*

2. A landlord can not bring an action of replevin against a tenant, of land rented on shares, for his share of the crop before a sufficient time has elapsed to allow the tenant to deliver it. *Mouser v. Davis.* 237

3. Where a person who is rightfully in the prosecution of his business in the rooms of a tenant, and there meets death through the negligence of the landlord in not properly propping up his house while the adjoining owner is excavating a cellar; such landlord is liable in damages for such death. *Kuhn v. Remmler.* 693

4. A landlord has an insurable interest in the permanent improvements, repairs and fixtures, added to his building by the tenant. *Insurance Co. v. Carson.* 843

5. The destruction of leased premises by fire, gives an option to both lessor and lessee to terminate a lease, and a re-entry by lessor to rebuild such premises without any agreement is presumed to have been in his rightful exercise of his option

Larceny—Limitations.

LANDLORD, ETC.—Continued.

to re-occupy and terminate the lease.
Davie v. Gay. 418

6. Rental for one year, with the privilege of renewing for one or two years, at discretion, the holding over for one entire year and a portion of second year, indicated by payment of the rent according to the terms in original agreement, without objection on the part of the landlord and without notification by the tenant that he was not in for the term, constituted an election to continue for an entire year. *Powell v. Harrison.* 36

7. The condition of forfeiture being, that if any installment of rent remained unpaid by the space of thirty days after due the lease should be void, the day for making the demand was the last or thirteenth day; if that fell upon Sunday, the following Monday was the proper day. The demand being by agent, it was not essential that his authority should have been in writing. *Countee v. Armstrong.* 62

8. Where a landlord agrees to furnish tenant with power, the destruction of the building from whence the power is supplied and the temporary cutting off of the supply of power does not render the premises of the tenant "unfit for occupancy," which under sec. 4113, terminates the lease. *Crown Mfg Co. v. Gay.* 420

9. Eviction from part of the premises, entitles tenant to a proportionate reduction of rent, where such eviction is by a stranger under a paramount title to the landlord. *Ib.*

10. Eviction by landlord, not acquiesced in by tenant, relieves tenant from payment of all rent while so evicted. *Ib.*

11. A re-renting after lessee has claimed to abandon is not an assent, for the lessor may re-rent as agent of the lessee. *Ib.*

LARCENY—

There can be no larceny of implements made and kept solely for gambling, for there is no property in them, although the material of which they are made might have a value. *State v. Wilmore.* 61

LEGACIES—

1. The probate court has the power to pass on the validity of the claims of legatees, and order their payment before final distribution of the estate. *Disney v. Hawes.* 406

2. Legatees are entitled to demand payment of their legacies, within the four years limited for the presentation of the claims of creditors,

upon a satisfactory showing to the probate court, and the giving of the undertakings to the executor, if any be required by the court. *Ib.*

LEGISLATIVE AGENT—

1. Unless expressly authorized, an action will not lie against an agent of the legislature, as such agent, for damages sustained by private parties through the negligence of such agent in the performance of the duties imposed by the legislature. *Daley v. Bd. of Public Works.* 118

2. Where, under an act of the legislature, a fund is produced by the levy of a tax, to be used and applied to purposes specified, and for no other, such fund cannot be subjected to the payment of consequential damages to private parties, caused by the negligent prosecution of the work. *Ib.*

LICENSE—

1. The legislature cannot authorize a municipal corporation to discriminate against articles manufactured without the state, and an ordinance requiring those who canvass for the sale of such articles first to pay for a license is void. *Ex parte Clamp.* 672

2. Compelling hawkers and peddlers to pay a license before pursuing business, sec. 2669, is, in so far as applicable to goods manufactured outside the state, void as a regulation of commerce, and a dealer who has been required to pay it, may recover it back. *Burkhart & Co. v. Columbus.* 839

LIFE ESTATE—

A life estate given by will is not enlarged to a fee by a power of sale coupled with it, unless such appears to have been the intention of the testator. *Stokes v. Stokes.* 309

LIMITATIONS—

1. A foreign judgment recovered in a court of record, is a specialty within the meaning of our statutes of limitation. *Reynolds v. Drake.* 246

2. And an action rounded upon such judgment recovered more than eighteen years prior thereto, after deducting such time as defendant was absent from the state of Ohio, is barred. *Ib.*

3. The statute of limitations does not run in favor of an assignee of the debtor under the insolvent laws of this state. *Bettman v. Hunt.* 896

4. In actions upon stockholder's liability, the statute of limitations commences to run as against any

Lost Instruments—Mortgages.

claim, when the company is insolvent, and the claim determined and enforceable against stockholders. *Hardman v. Railroad Co.* 578

5. When it appears upon the face of the petition that the statute of limitations would be a bar to action, the better practice is to state the ground of the demurrer specifically. *Spangenberg v. Schwartz.* 241

6. The bar of the statute cannot be made available by a demurrer that the plaintiff has not legal capacity to sue. *Ib.*

A mortgagee's action for injury to his security and also the owner's right of action rising from a railroad belonging to a city, using a street lawfully taken, is an injury not arising in contract under sec. 4982, and is barred in four years. *Cameron v. Cincinnati.* 754

8. A party relying solely on possession and the state of limitations as his title to real estate, must show that he has had exclusive possession of the same for twenty-one years. *Haimeyer v. Tietig.* 438

9. Where it appears that he has used the property in dispute as a way to his premises for more than that length of time, while the holder of the record title has used it during the same time to furnish light and air to his buildings, the former cannot be said to have been in exclusive possession. *Ib.*

LOST INSTRUMENTS—

1. A petition to recover upon certificate of deposit, which avers the certificate to have been lost without having been endorsed, and makes no tender of indemnity to defendant, is bad on demurrer. *Brown v. Bank.* 707

2. Indemnity against future liability on a national bank's certificate of deposit lost by the payer without indorsement is not necessary. *Bank v. Brown.* 215

LUNACY—

1. Notice to a lunatic of an application to the probate court to appoint a guardian is not required. *Davidson v. Tipton.* 60

2. The court may try an application to declare one a lunatic, in part by inspection, and having so tried the case, it being impossible to put such evidence on the bill of exceptions, and the judge below having certified that it was impossible to report the lunatic's answers to questions the reviewing court will not attempt

to examine the weight of evidence, for it is evident that all the evidence is not in the bill. *Ib.*

MALICIOUS PROSECUTION—

1. In an action for malicious prosecutions a grand juror's evidence of what defendant testified to before the grand jury is not competent. *Barr v. Riley.* 826

2. Such evidence could only be taken in a case where the petition averred that the indictment was procured by the false, malicious and corrupt testimony of the party against whom damages are claimed. *Ib.*

MANDAMUS—

Signing a bill of exceptions in forcible entry proceedings is a useless act, and will not be compelled by mandamus if there is no reversible error. *State ex rel. v. Paul.* 226

MARRIAGE—

The consent of parents is not essential to the validity of a marriage by parties under age when it has been ratified by the parties cohabiting together after arriving of age. *Vernon v. Vernon.* 365

MASTER AND SERVANT—

The act of "striking," or discontinuing work, terminates the contract relation between employer and employe, when the contract is not for specified time. *Railroad Co. v. Wegner.* 815

MECHANICS' LIENS—

1. Under the mechanics' lien law, the account filed is an entirety, whether the work done is under a contract or there is a running account for items furnished. *Ives v. Holbrook.* 96

2. Where a contractor, on the death of the owner, filed an account and took out a mechanic's lien and afterward filed a second account for work and materials, subsequently furnished for the same building: *Held*, that he could not secure a second mechanic's lien for said second account. *Ib.*

MORTGAGES—

1. Foreclosure of mortgage on an entailed estate. *Wolf v. Stout.* 231

2. In a foreclosure proceeding an issue of fact may be referred to a jury. *Fleming v. Fleming.* 382

3. Where, in foreclosure proceedings, the petition does not show that one of the parties named, interested at one time, has no further interest, he should be made a party defendant. *Knierim v. Zaengerle.* 47

Municipal Corporation.

MORTGAGES—Continued.

4. Where a mortgage as recorded stated the true amount of notes secured by it, and the condition contained a recital of that amount as well as the mortgage index: *Held*, this was sufficient to affect a subsequent purchaser with notice of the true amount, although the recorder had omitted to mention one of the notes in the body of the recorded mortgage. *Stanbery v. O'Neil*. 238

5. A court cannot reform a mortgage by inserting two additional tracks of lands merely on evidence that the mortgagor had just previously expressed an intention to include all his lands and had a list of them before the scrivener, and that there is a repetition in the description of two other lots by inserting them twice. *Bartlett v. Patterson*. 73

6. Where an assignor of a series of notes, who agrees with the assignee to be liable as indorser on all except the last due, and takes up two of the notes, he has no equity to have the notes he has taken up held as an incumbrance prior to the later notes of such assignee, and therefore his creditors cannot claim, that he has an interest superior to that of his assignee, and the fact that he became owner of the property does not affect the priorities. *Exchange Bank v. Eddy*. 85

7. A lease was made to A., with privilege of purchase, upon his paying \$19,000 before the expiration of the lease. He paid \$9,000, and was unable to pay more. His wife paid \$4,000, and by consent of all parties a subsequent lease was made to her, with privilege of purchase upon payment of \$6,000, which she paid, and the lessor conveyed to her with warranty. A., before the expiration of his lease, made a deed of the premises to plaintiff, absolute on its face, but in fact to secure payment of \$5,000, which deed was placed on record: *Held*: A., by paying \$9,000, acquired a contingent equity in the land, contingent upon complete payment being made. *Dodson v. Dodson*. 201

8. The deed to plaintiff was not a legal mortgage, but was a charge upon such equity. The record was not constructive notice. *Ib*.

9. A's wife had no knowledge of the charge in favor of plaintiff, but receiving A.'s contingent equity as a gift, she took it, subject to the charge. Plaintiff is entitled to a lien upon nine-nineteenths of the premises. *Ib*.

10. This charge is not a breach of the warranty in the conveyance by the lessor to A.'s wife. *Ib*.

MUNICIPAL CORPORATION—

1. Where a municipal ordinance is wholly void, a conviction under it may be declared void, and the prisoner released on habeas corpus. *Ex parte Clamp*. 672

2. Where a change of an established grade in front of a lot of ground, upon which improvements have been constructed in the faith that the grade would not be changed, injuriously affects the premises; the act of the corporate authorities is in the nature of a "taking" of the interest of the owner in the property, and compensation must be made. *Cincinnati v. Whetstone*. 368

3. The rule of damages in such case is the difference in the value of the property as a whole, and not for injury to or suspension of trade carried on upon the premises. *Ib*.

4. An ordinance requiring a railroad to erect gates at street crossings is invalid. The state alone can enact police laws. *Mansfield v. Railroad Co*. 572

5. A municipal corporation has power to consent to the laying of a branch railroad track up a manufacturing street for the convenience of shippers, and branches therefrom to their private property. *Railroad Co. v. Cincinnati*. 695

6. An ordinance under which a branch railroad track is laid upon an unfinished street being ambiguous, as capable of two constructions, is not necessarily to be construed strictly as against the grant of a franchise, but the rule of construction by conduct applies to municipal contracts. *Ib*.

7. The track and such branches having been laid, such consent is not revocable. But the right to regulate its use continues. *Ib*.

8. Under legislative acts empowering city councils to make all needful regulations to promote the public health, etc., the city councils may enact ordinances prohibiting the removing or carrying through the public streets dead animals without a permit from the board of health; and may make contracts with persons for the removal of all dead animals from the public streets. *Morgan & Co. v. Cincinnati*. 280

9. A village, by its council, has power to borrow money for some purposes under sec. 2701, and the fact that the village desired the loan for the

Mutual Benefit Society.

illegal purpose of giving it as a bonus to secure the location of a mill will not prejudice the lender if he acted in good faith. *Insurance Co. v. New Philadelphia*. 793

10. The village may issue negotiable notes for its loan, being the usual form of security, and notes to evidence the loan are not required by sec. 2703 to express on their face the purpose of their issue. *Ib.*

11. Limitation of grant by ordinance to lay steam pipes in streets of a city. When mandamus will not lie. *State ex rel. v. Boyce*. 165

12. Cities and villages, in the absence of an express reservation by the owners of the soil, have, as against the abutting property-owners, a qualified fee in the streets, under which they may lay water and sewer pipes under the surface, without either obtaining the consent of the abutting property-owners, or compensating them. *Turnpike Co. v. Avondale*. 813

13. They, however do not have the right over a turnpike road. The surface of such a road is the private property of the turnpike company, and is subject to the same rules as other private property. *Ib.*

14. The use of the side of a public street as a hackney coach stand, under a city ordinance, so as to interfere with use of fronting store rooms is without authority of law. *Cincinnati Hotel Co. v. Branahan*. 22

15. An abutting owner can not enjoin laying pipe for natural gas in a street because not first submitted to a popular vote under sec. 4551. *Webb v. Ohio Gas Fuel Co.* 662

16. Only the public and not a private citizen can right a wrong of this kind. *Ib.*

17. A wharfmaster's election by the people under an old ordinance of Cincinnati is not inconsistent with sec. 2867, providing that council may appoint a wharfmaster, nor with sec. 1708, enumerating the offices of a city, not mentioning wharfmasters, but is lawful under sec. 1710, giving council power to provide for appointing or electing other officers, and sec. 1711 that appointments must be by the mayor. *State v. Mulvihill*. 450

18. Where the legislature provided for raising a fund to be used for opening and grading a certain street, said fund to be expended under the directions of a board of public works also created by the legislature, and a laborer while working on such street

under directions of such board, sustains injuries by reason of the board's negligence: *Held*, that the members of such board were agents of the state in the construction of such street, and as such agents were not liable individually, nor could said fund be subjected to satisfy plaintiff's claim for damages by reason of said injuries, no express statutory provision authorizing a recovery. *Daly v. Tucker*. 255

MUTUAL BENEFIT SOCIETY—

1. Courts will not review the expulsion of a member from a mutual order, on due notice and trial for irregularities, but will for fraud or collusion. *Kent v. Odd Fellows*. 522

2. It will not be presumed that the trial was while the party was insane, although he had been insane before, but insanity must be proven by a preponderance of evidence. *Ib.*

3. A reserved right to amend all by-laws gives no power to reduce the time for sick benefits to a member already on the sick list. His rights are vested and he is a creditor. *Pel-lazzino v. St. Joseph's Society*. 635

4. The right to amend a by-law is not a right to repudiate a debt. *Ib.*

5. The widow is the beneficiary of a policy of insurance in a mutual association upon the life of her husband payable to "his heirs," when he leaves brothers and sisters, but no children. *Jamieson v. Knights Templar*. 388

6. A member of a mutual benefit order, who has been expelled cannot appeal to the courts to reinstate him where he has not exhausted his right to appeal within the rules of the order. That the appellate officer is among those who voted to expel him is no reason why he should not appeal. *State ex rel. v. Knights Golden Rule*. 1

7. If appellate officer to hear an appeal, the remedy would be by mandamus against such officer. *Ib.*

8. A policy of insurance issued by a mutual life insurance association in favor of the wife of the insured, which reserves to the latter the right to change the beneficiary at any time, confers upon the wife no right or interest which can pass to the administrator, in a case where the death of the wife precedes that of the husband, and the latter dies without designating any other beneficiary. *Tafel v. Knights of Golden Rule*. 279

9. Under the by-laws of a mutual association for the payment to the widow of each member,

Negligence—Notice.

MUTUAL BENEFIT SOCIETY—Con.

upon his death, of a sum raised by assessment on the surviving members, the obligation is that of a contract of life insurance. *Odd Fellows Protective Association v. Hook.* 89

10. The by-laws providing that each applicant should be a member in good standing of a lodge of Odd Fellows, and that if dropped or expelled his membership should cease and the association not be bound to his widow, and the rules of the lodge providing that notice should be issued to members in arrears for dues, and if not paid within four weeks from the date, they should be dropped: *Held*, not sufficient to cause the forfeiture of his rights that the books contained an entry that he had been dropped, in the absence of evidence that he had received the required notice. *Ib.*

NEGLIGENCE—

1. Whether or not there was negligence on part of defendant or contributory negligence on part of plaintiff in any particular case, the testimony conflicting, is a question of fact for the jury under proper instructions from the court. *Street Ry. Co. v. Meyer.* 256

2. The rule applicable to steam railroads, in cases involving the question of negligence, does not apply to horse or street railroads. *Ib.*

3. Riding on a back platform of a street car by permission of a conductor, and in the absence of rules of the company being posted or brought to the knowledge of the passenger, is not contributory negligence as a matter of law, and is a question for the jury. *Cincinnati Omnibus Co. v. Kuhnell.* 197

4. Whether the driver of an omnibus is negligent in having his team unhitched and unguarded, merely wrapping the lines around the brake, may be a question for the jury. *Ib.*

5. Where a vehicle is driven along a highway with no evidence of want of ordinary care and prudence, and is run over by a train passing along the same highway at a high rate of speed, in an action to recover damages, plaintiff is not obliged to prove that he was cautious, and prudent, and it is error to non-suit plaintiff on the assumption of a positive rule of law requiring him to show affirmatively that the accident did not happen in part through his fault. *Tausky Cone Yeast Co. v. P., C. & St. L. Ry. Co.* 145

6. Where the excavation had been let by the owner to one contractor, and the masonry to another, each employing his own hands; and the two were at work at same time and together in control of the premises, although the owner was there daily to see that the contracts were complied with; and by reason of there being no barriers, or in sufficient ones at night, a person passing upon the sidewalk fell into the excavation and was injured: *Held*, the owner was not liable, if not appearing he had any notice of the unprotected condition of the excavation. *Viegel v. Lukenheimer.* 48

NEW TRIAL—

1. An expression by a juror, during the progress of a trial, that his opinion is formed, is not necessarily a ground for a new trial. *Strauss & Bro. v. Dashney.* 329

2. The granting by the trial court of a new trial is not reviewable by petition in error, upon judgment against plaintiff in error at such new trial. *Jaspers v. Mallon.* 184

NOTARY PUBLIC—

1. The notary need not commit a witness refusing to answer a question, but may consult the court and obtain a ruling upon the question. *Shaw v. Installation Co.* 309

2. A notary public has the power and authority to commit a witness for contempt in refusing to answer questions pertinent to the issues in a case where he is properly taking depositions. *Burnside v. Dewstoe.* 589

3. There is no contempt until an order has been lawfully made by the notary, and a refusal on the part of the witness to obey that order. *Ib.*

NOTICE—

1. The rule respecting notice to indorsers is merely that reasonable effort be made to give notice. *Luckett v. Goodrich.* 328

2. In a proceeding to lay out a county road, notice to John Miller of the meeting of the board of viewers, is held, to be notice to John E. Miller, if he in fact be the same land owner, and if he be not, then John E. Miller is not prejudiced by the record and order. *Miller v. Commissioners.* 312

3. The notice to the land owner if personally served on him by the principal petitioner, is good, even if it be not signed by such petitioner. *Ib.*

Nuisance—Parties.

NUISANCE—

1. A trade or business (a fertilizer) though in itself lawful, may be enjoined if in conducting it, a nuisance is created thereby, injurious to the health and comfort of an adjoining owner. *Barkau v. Knecht*. 66

2. An action at law for damages not a prerequisite. *Ib.*

3. An adjoining proprietor residing upon his property with his family thus injured sustains a damage different in kind from the public at large, and may maintain an action to enjoin in his individual right. *Ib.*

4. The owners of a property who are not the occupants of the same cannot properly complain of a nuisance created upon it when they, as owners, have suffered no special injuries thereby. *Dieringer v. Wehrman*. 355

5. As owners, the measure of damages would be whatever injuries they sustained in the diminution of rents, in the failure to rent the property, for injury to property or the cost of repairs. *Ib.*

6. Where various neighbors are alike deprived of the ordinary comforts of life in the occupancy of their homes, by a nuisance, they may properly be joined as plaintiffs in the same action to restrain its continuance, although they may own distinct property interests. *Schlueter v. Billingerheimer*. 513

7. Noise may become a private nuisance, and on the complaint of those specially injured may be restrained in a proper case. *Ib.*

8. Where the proprietor of a public resort located in an otherwise quiet neighborhood—occupied for years by dwellings, introduces extreme features of amusement, thereby creating a private nuisance, and the proof being clear, certain and satisfactory that he has wrongfully done these things working a serious injury, the court will restrain him from its continuance, without the intervention of a trial by jury. *Ib.*

9. The mere fact that the complainants waited until after the roller-coaster was constructed and in operation will not estop them, when they did know the character and degree of the noise, nor that it would be operated at unreasonable hours and times. *Ib.*

10. The injunction will be limited to nights and Sundays, if the noise is not clearly proved to be a nuisance at other hours, and when there

is extreme sickness certified to by two reputable physicians. *Ib.*

OFFICE AND OFFICER—

1. A township trustee is "an officer under the constitution and laws of this state" within the meaning of sec. 6909. *State v. Williamson*. 761

2. Said sec. 6909 read in connection with secs. 1530 and 1497, define three essentially distinct offenses, which may be committed by such "officer" in exacting compensation from the township treasury, to-wit: 1st, For services not performed; 2d, at a rate greater than \$1.50 per day; 3d, in the aggregate exceeding \$150 per year. *Ib.*

3. An indictment against such officer under sec. 6909 which, as the only description of the offense, avers that defendant charged and received "a fee more and greater" than allowed by law for doing his official duty, is essentially insufficient; and is not within sec. 7215. *Ib.*

4. Misfeasance, as a ground of removal from office,—of an infirmity director—is not doing a lawful act in a proper manner, as approving a bill, which ordinary care would have shown was improper, and misfeasance must be proved by a preponderance of evidence. *Colburn v. Neufarth*. 638

5. Malfeasance is doing a wrongful act, as approving fraudulent bills, purchasing for private use, or other acts involving fraud or known violation of law, and malfeasance must be proved beyond a reasonable doubt. *Ib.*

PARENT AND CHILD—

1. A father is not liable for an assault by a demented and dangerous son, seven years old, unless he knew his condition, and knowingly permitted him to be at large unwatched. *Cluthe v. Svendsen*. 458

2. A mother, undivorced but deserted by her husband, verbally gave her child to respondents to raise. The child was accordingly cared for and supported by respondents for four years, when the mother, revoking the gift, sought to reclaim the child: *Held*, that the gift was revocable and the mother, in the absence of any showing that she was not a proper person was entitled to the custody of her child. *Ex parte Field*. 286

PARTIES—

1. The existence of a corporation being shown, it is a necessary party in an action of ouster for a misuse, non-use or usurpation of corporate powers. *State v. Robinson*. 383

Partition—Partnership.

PARTIES—Continued.

2. The owners of separate mortgages upon the same chattels cannot be properly joined as plaintiffs in an action of replevin based upon the mortgages, but when so joined the court may render judgment against all. *Wehlen v. Macke*. 565

3. A consignee who purchased at a fixed price, deliverable, including freight, at destination is not the proper person to sue for the penalty under sec. 3373, Rev. Stat., for discrimination. The seller alone can complain. *Thompson & Co. v. Railroad Co.* 209

4. Where the administrator is sued in his individual capacity for a portion of the money received by such administrator out of decedent's estate, by another creditor of the estate, and he files an answer setting out that he holds the money as administrator and not as an individual, and a trial is had upon the merits, such defendant will not be granted a new trial because of defect of parties defendant, and be allowed to file an answer as administrator. *Ten Rick v. Dye*. 511

5. Where a contractor for the construction of a railroad mortgaged to the president of the company a large amount of property in order to obtain funds and the mortgagee brings suit to foreclose, sub-contractors who have not been paid are chief contractors and have a right to come into the suit to deny the *bona fides* of the mortgage. *Bartlett v. Patterson*. 73

6. But they cannot, in this suit ask that the railroad company be made a party and that they have judgment against it as chief contractors. Such a claim requires an independent suit. *Ib.*

7. The code cannot make a new party defendant and settle controversies between it and other defendants and charge it as equitable owner in favor of one whose claim is not in judgment. *Ib.*

PARTITION—

1. The existence of an ordinary lease for years, under which the tenant is in possession paying rent to the owners of the fee, is no obstacle to partition among such owners. *Werner v. Glass*. 686

2. It is not necessary or regular to insert in the entry of the order for partition the provision, "If the commissioners should be of opinion that the estate cannot be divided according to the command of the

writ without manifest injury to the value thereof, they shall return that fact to the court with a just valuation of the estate." *Ellis v. Hicks*. 240

3. After one tenant in common mortgaged her undivided share voluntarily, partition was made by deeds not reciting this purpose, and such tenant then mortgaged her share by metes and bounds to another who had no notice of the prior mortgage. The former mortgagee foreclosed, bought in the share as undivided, and now seeks partition: *Held*, partition will be made so as to set off to such purchaser his interest out of the part quit claimed to the mortgagor, as the co-tenants have an equity to have the lien of the mortgage marshaled on that part, and the subsequent mortgagee had constructive notice from the record. *Cincinnati Savings Society v. Thompson*. 41

PARTNERSHIP—

1. Record of names by individual and partnership traders, required by the act of 1884, does not apply to an individual carrying on business in his individual name. *Kell v. Vankirk*. 573

2. If the establishment has a good will, when taking in an experienced partner, on dissolution he takes his skill and experience, and the establishment takes a good will, it not having enhanced. *Jung v. Weyand*. 486

3. A managing partner cannot object that an excess of interest is charged against him, if he knew of it, and did not inform his copartners until after dissolution, and after yearly results have been reported to those who were not aware of the alleged overcharge, for they have a right to rely upon the reported results. *Ib.*

4. A partnership between debtors and their assignee for creditors, if it contemplates paying debts in full with less delay, is not illegal. *Ib.*

5. But if illegal such partnership would not defeat distribution of assets between partners, on winding up of affairs. *Ib.*

6. One partner is not entitled to compensation for his services to his firm, unless there is a special agreement for it. *Myers v. Kirby*. 297

7. In a settlement between partners, interest cannot be allowed on capital remaining in firm after dissolution, awaiting final settlement, although the partnership contract provides for payment of interest on capital during continuance of partnership. *Wayne v. Hinkle*. 389

Patents—Pleading.

8. But interest will be allowed on funds advanced by a partner, after dissolution, for the purpose of paying off the debts of the firm. *Ib.*

9. A provision for payment of interest on capital in a partnership agreement, which is to expire at the end of five years, or by mutual consent, ceases to be operative when a dissolution is had by consent, during the five years, although the partners may have unequal amounts of capital remaining after dissolution, invested in the undistributed assets of the firm. *Ib.*

10. One partner cannot sue another, upon an indebtedness due by the firm, even though the firm has been dissolved and all its business settled except said indebtedness, unless the amount of the same has been agreed upon between the partners, or unless there was a special promise by the partner, who is defendant, to pay the same. *Knight v. Hinton.* 204

PATENTS—

1. A valid patent is a sufficient consideration for a promissory note. *Ohio Forging Co. v. Lamb.* 199

2. Half owners of a patent licensed by their co-owner to enjoy exclusive right to manufacture, paying him a royalty, are estopped to deny the validity of the patent when sued for the royalties. *Clark v. Bentel.* 289

3. The fact that plaintiff would have a remedy in a circuit court of the United States for the infringement of a patent does not deprive him of his remedy in the state courts for the violation of the terms and conditions of a contract for the manufacture of such patent. *Gordon v. Deckebach.* 324

4. A party who purchases a patent on the seller's representation that it included all his discoveries thereto, and afterwards the seller filed an application for a patent for substantially the same device: *Held*, that the buyer is entitled to an assignment of the subsequent patent. *Standard Combustion Co. v. Farr.* 509

5. A suit to enjoin the seller from assigning the latter patent is not an infringement, but is on the contract, and state courts have jurisdiction. *Ib.*

PAYMENT—

1. Money paid under a mutual mistake of fact can be recovered back. *McKeown v. Irish Building Assn.* 257

2. Paying the "Scott Law" taxes under protest and bringing a suit within the year's limitation does not entitle the party to a refunder. *Snodgrass v. Treas. of Franklin Co.* 414

3. The endorsement of a partial payment on a note by the holder is an executed contract which cancels the note *pro tanto*, unless a contrary intention appear. *Keys v. Baldwin.* 737

PERPETUAL LEASEHOLD—

1. Upon a perpetual lease, although without covenant by lessee to pay taxes, so much of the taxes as are used on account of improvements put upon the lot by lessee are chargeable to him. *Joslyn v. Spellman.* 258.

2. If a lessor makes a breach of his covenants in a perpetual lease, working thereby a right of forfeiture, but not disturbing quiet enjoyment, the lessee to avail himself of his option to claim a forfeiture must tender the possession of the premises. *Dickson v. Hunt.* 408

3. The tender will not be good if subject to the title and possession of sub-lessees and sub-tenants. Their possession is the possession of lessee. *Ib.*

4. A suit in foreclosure and decree and order of sale as against lessor and lessee of premises upon a prior mortgage given by lessor is not an eviction of the lessee or tenant. *Ib.*

5. The lessee or tenant is not justified in abandoning the premises until sale had and decree of confirmation, and the title and right of possession by deed or otherwise has passed to the purchaser thereof. *Ib.*

6. In a perpetual lease with the usual covenants and with privilege of purchase lessors stipulated to pay off their mortgage incumbrance at maturity. *Held*, that without express words of forfeiture therefor, such agreement to pay mortgage is not a condition precedent but is an independent covenant, and its breach may be satisfied by payment thereafter, or by payment of damages for such breach. *Ib.*

PHYSICIANS AND SURGEONS—

Physicians' bills, though not specially contracted for and still unpaid, are a proper element of damages in an action for loss of services. *Cincinnati Omnibus Co. v. Kuhnell.* 197

PLEADING—

1. Pleadings in a case pending on error in general term cannot be amended. *Insurance Co. v. Carson.* 848

Pledge—Quo Warranto.

PLEADING—Continued.

2. In a suit on account, the petition must allege that there is due on the account, etc., it is not sufficient to allege that defendant is indebted thereon. *Archer v. Desk Co.* 225

3. A petition to recover upon certificate of deposit, which avers the certificate to have been lost without having been endorsed, and makes no tender of indemnity to defendant is bad on demurrer. *Brown v. Bank.* 707

4. When it appears upon the face of the petition that the statute of limitations would be a bar to an action, the better practice is to state the ground of the demurrer specifically. *Spangenberg v. Schwartz.* 244

5. A denial of knowledge, in an action to enforce stockholder's liability, is too indefinite, for the defendant is presumed to know whether he is a stockholder. *Hardman v. Railroad Co.* 544

6. A denial that he is a stockholder now, or when the notes were made, is demurrable, for it does not deny as to the time when the debt was incurred. *Ib.*

7. A denial of ever having subscribed to stock, or had in his possession, is demurrable, for he may have been a stockholder in other ways, as by transfer. *Ib.*

8. The averment, in answer to a petition upon contract, of a material stipulation in addition to what is set forth in the petition as the contract, amounts at the most, only to a denial of the contract set forth, and does not entitle defendant to open and close. *Fiedeldey v. Reis.* 296

9. In Ohio, under a general denial in a replevin suit, defendant, a sheriff, may make any defense he has, and may under such denial prove his writ and levy on the goods in controversy. *Moravec v. Buckley.* 226

10. Not necessary to aver in action for personal injuries that plaintiff's injury was sustained without fault on his part. *Voss v. Young.* 48

11. When the same transaction will give rise to one cause of action or another according to the existence or non-existence of a fact primarily within the knowledge of defendant, the plaintiff may set out the same in separate causes of action and recover on either. *Bank v. Railroad Co.* 702

12. In such case plaintiff will not be required to elect when by direct averment, or from the nature of the case, it is apparent that he can not safely determine before the develop-

ment of the trial which will prove to have been the true nature of the transaction on the defendant's part. *Ib.*

13. The statement of matters of inducement are within the discretion of the court, and when germane will not be stricken out unless it appear that they will prejudice the opposing party or materially encumber the record. *Ib.*

14. In suing a corporation for refusal to transfer stock, copies of the certificate should not be set out, and will be struck out on motion. *Ib.*

15. Joinder of action for rent under a lease and for possession as upon forfeiture is a misjoinder. *Coun-tee v. Armstrong.* 62

16. That plaintiff prayed only partial relief will not prevent entire relief if the partial relief would be no protection to him. *Hafer v. Railroad Co.* 370

17. Omission of the notary to sign and seal, if the party has actually sworn to the petition, is not reason to strike it from the files, but an entry may be made authorizing the notary to complete the certificate, for that is merely evidence of the fact. *Venne-man v. Sievering.* 459

The substitution of copies of lost pleadings does not require notice to the opposite party. *Marks v. Harris.* 332

PLEDGE—

Debtor designating and setting aside shares of stock, to take effect after his death, as collateral security to his creditor, without creditor's knowledge, and without actual delivery to him, and calling witness to the act, will pass the stock to creditor after debtor's death. *Clerk's Estate.* 850

PRACTICE—

Setting of cases for trial in the Hamilton county common pleas is governed, not by sec. 5132, Rev. Stat., but rules of court prescribed and under sec. 464, Rev. Stat. *Carlo v. Beckman.* 163

PROCEEDINGS IN AID OF EXECUTION—

In proceedings in aid of execution, the court has power to order the examination of other witnesses than the judgment debtor when satisfied on application of a party that additional witnesses should be examined. *Manning v. Manning.* 173

QUO WARRANTO—

In a proceeding in quo warranto the time for answer stated in the summons was the third Saturday after the

Railroads—Roads.

return day: *Held*, the summons should be quashed. *State v. Robinson* 249

RAILROADS—

1. The rule applicable to steam railroads, in cases involving the question of negligence, does not apply to horse or street railroads. *Street Ry. Co., v. Meyer.* 266

2. Branch tracks may be permitted by a city for the convenience of shippers. This is in the nature of street purposes to transfer freight as a dray or wagon would do. *Railroad Co. v. Cincinnati.* 695

3. Whether sec. 3207, Rev. Stat., and subsequent sections, giving liens on railroads to persons performing labor, etc., on the road means to give such lien to a subcontractor because he has obtained work and labor of others and furnished them upon a railroad, *quere?* *Bartlett v. Patterson.* 73

RECEIVER—

1. A receiver will be appointed to take possession of mining property, although the persons interested in it are not partners, where there are a number of joint proprietors who cannot agree as to the working of the mines, or the disposition of the property. *Barbour v. Lockard.* 254

2. A receiver will be appointed to take possession of property in a foreign country where all the owners are within the jurisdiction of the court and it is otherwise a proper case for the appointment of a receiver. *Ib.*

REFORMATION—

To reform an instrument the evidence must be clear: First, that the contract is erroneous; Second, that a specific contract was made; Third, to prove definitely the terms of the contract as made. *Jung v. Weyand.* 485

RELIGIOUS SOCIETIES—

Where property is given to that part of the Baptist brethren called Dunkers, and part of the congregation or a separate organization, with the consent of the rest, but afterwards change their usages as to matters of church polity, though not as to belief, so as not to be the same as the Dunkers, when it becomes necessary to sell the property and divide the proceeds, the latter are not entitled to demand a share. *Ex parte, Shoup.* 648

REPLEVIN—

1. In an action in replevin before a justice of the peace no bill of

particulars need be filed. The first step is the making and filing of the statutory affidavit. *Sanderson v. Pullmann.* 175

2. When a jury is waived and the cause is submitted to the justice, he must give judgment within four days of the trial and submission; but a judgment given subsequent to that time is not absolutely void; it is an irregularity which may be waived by consent of parties. *Ib.*

3. In Ohio, under a general denial in a replevin suit, defendant, a sheriff, may make any defense he has, and may under such denial prove his writ and levy on the goods in controversy. *Moravec v. Buckley.* 226

4. In replevin for possession of certain chattels, it was set up that in a former action between the same parties for conversion of the chattels, in which a verdict and judgment in damages was obtained by plaintiff. *Held*, that evidence as to the damages claimed for conversion be excluded from the jury. *Krebs Lithograph Co. v. Studor.* 199

5. The owners of separate mortgages upon the same chattels cannot be properly joined as plaintiffs in an action of replevin based upon the mortgages, but where so joined the court may render judgment against all. *Wehlen v. Macke.* 565

6. A landlord can not bring an action of replevin against a tenant, of land rented on shares, for his share of the crop before a sufficient time has elapsed to allow the tenant to deliver it. *Mouser v. Davis.* 237

ROADS—

1. Notice to a land owner of the time and place of meeting of the viewers, is not jurisdictional, where due publication of the fact of the petition for county road has been made, and its omission does not render proceedings void. *Hasler v. Hittler.* 233

2. Where a landowner relinquishes all claims to compensation and damages this cures the error and no one else can object thereafter. *Ib.*

3. Proceedings to lay out a county road, where the petition recites that the twelve signers thereto are freeholders, and the record shows that the board of commissioners are satisfied that the papers filed were regular and in compliance with the law—held that the fact that the petitioners were freeholders will be presumed to have been established by competent proof. *Miller v. Commissioners.* 312

Sales—Sentence.

ROADS—Continued.

4. When the record shows that the commissioners in their order appointing viewers and surveyor to lay out such road, "are satisfied that the notices required by law have been given" after application therefor, it will be presumed that they made their finding and order upon competent proof. *Ib.*

5. If, to the bond required by sec. 4638, the same names appear to be signed as to the original petition, they will not be presumed in the absence of recital or proof to that effect to be the same persons, and if they were, it would only be a defective, and not a void bond; if such defect be waived by the commissioners without objection, a landowner cannot thereafter avail by such defect. *Ib.*

6. When such commissioners find that the viewers by them appointed "are disinterested freeholders resident in the county," the proof on which their finding is made need not appear of record, it will be presumed to have been competent and sufficient. *Ib.*

7. Notice to John Miller of the meeting of the board of viewers: *Held*, to be notice to John E. Miller, if he in fact be the same landowner, and if he be not, then John E. Miller is not prejudiced by the record and order. *Ib.*

8. The notice to the landowner if personally served on him by the principal petitioner, is good even if it be not signed by such petitioner. *Ib.*

9. The commissioners are not required to incorporate in the record of their proceedings the proof on which their judgments are founded; nor need they sign the minutes or seconds of their sessions and proceedings. *Ib.*

10. A change of twenty feet at the end of the road is not a change of terminus, constituting error in the proceedings, the cost not being increased and the variation not being on plaintiff's land. *Ib.*

SALES—

1. Upon a so-called renting to two persons, one of the conditions was that it should be used by them in their residence, giving the street and number, afterward one of the two gave up his residence there and moved out, leaving the other in possession of the property. *Held*: there was no breach of the condition. *Louis & Co. v. Hogan.* 342

2. Another condition was, that the renting might be terminated at option, "by any other circumstances that may give the 'lessors' reason to fear for the safety or proper treatment of their said property." *Held*, that mere fear was not sufficient; there must be reason for it. *Ib.*

3. Where, in a contract of sale, the price to be paid is agreed to be an amount arrived at by computing certain items of credit and expense, the accidental omission of a certain item of expense in the computation, discovered after the execution of the contract, is a mere error in the performance of the contract, for which the purchaser may recover from the sellers. *Waldheim v. Shane.* 560

4. A factor for distillers, who contracts in his own name, to sell and deliver on board the cars by transfer of bill of lading barreled spirits in bond for export, and does so deliver them, undertakes by implication that the barrels shall be fit and properly filled for such transportation, and is liable for leakage caused by the breach of such undertaking, though such leakage was due to latent defects in the wood of which such barrels were made. *Stevens v. Pincoffa.* 479

SCHOOLS—

1. A board of education has no authority to purchase material, such as copy books, ink, etc., for free distribution among pupils without regard to the ability of parents to provide them. *Parker v. Bd. of Ed.* 335

2. Section 4026 permits the board to furnish such supplies to indigent pupils and payment for such supplies will not be enjoined in absence of proof that the contracting parties knew they were for distribution to other than indigent pupils, but the improper distribution only will be enjoined. *Ib.*

SENTENCE—

1. The court has power to admit a prisoner to bail after conviction and before sentence. *State v. Granville.* 628

2. Where, upon plea of guilty of a misdemeanor under a city ordinance, the accused, after judgment of imprisonment is pronounced, requests the court to suspend execution of sentence that he may leave the city limits, and is released from custody, but fails to leave and is arrested and confined as provided in the judgment, the suspension of sentence, if erroneous, was not prejudicial to him, and he is not in a position to complain. *Bird v. Cincinnati.* 301

Services—Sheriff.

SERVICES—

1. One partner is not entitled to compensation for his services to his firm, unless there is a special agreement for it. *Myers v. Kirby.* 297

2. On employment for a year, with a right in either to terminate it on ninety days notice, defendant's custom being to employ by the month, and the plaintiff continues in such employment after the year. *Held*, that such continuation may be construed in the light of such defendant's custom, and is not necessarily on the same condition as the prior year, and plaintiff is entitled to payment for ninety days. *Creasey v. Insurance Co.* 315

3. Physicians' bills, though not specially contracted for and still unpaid, are a proper element of damages in an action for loss of services. *Cincinnati Omnibus Co. v. Kuhnell.* 197

4. A mother suing for loss of service by injury to her minor son, may recover for value of nursing, but not for loss of her time in having to nurse him instead of earning money. *Ib.*

5. It is not error in an action by a parent, for loss of services, to charge that the parent is entitled to recover for the diminished ability to earn money until the son is twenty-one years old, without deducting the cost of his maintenance. *Ib.*

6. To recover for injury to an infant for the future, a parent or person entitled to the services, must specially aver loss of prospective service. *Ib.*

SET-OFF—

A bank may hold a deposit account as against an assignee for creditors to cover an unmatured note which it had discounted for an insolvent, except as against checks given by the assignor before assignment. *Skunk v. Bank.* 684

SEWERS—

1. The statutory provisions relating to construction of sewers, and assessing property to pay for them, have always been distinct from the provisions for the improvement of streets and assessments therefor; and remain distinct though now both are incorporated in the Revised Statutes. *Cincinnati v. Wewell.* 677

2. "Cost and expenses of constructing" in sec. 2379, is equivalent to "cost of improvement" in sec. 2284. *Ib.*

3. The provision that not the entire cost of main sewers shall be assessed, but only such portion as would

be required to construct a sewer for local drainage of the abutting lots, etc., are the provisions which fix the amount and limit of assessment, adjust the regard to be paid to special benefits, and protect property owners in the construction of sewers. *Ib.*

4. Sec. 2271 fixing the limit of assessment, and sec. 2275, as to street intersections, do not apply to sewer assessments. *Ib.*

5. Where by the improvement of a district a sewer is built in the street along the front, and another through the alley along the rear of a lot, which lot has only one improvement on it, and that at the front of the lot, the assessment for the district is not invalidated by the council assessing only the front and exempting the rear of such lot. *Ib.*

6. Lots draining directly into an extensive sewer which runs to the river, and which, though not constructed by the city, has been repaired by the city, and used by it as part of the system of city sewage, are so supplied with local drainage as to be exempt from assessment. *Ib.*

7. Lots drained by a wooden box drain, placed as a temporary expedient in anticipation of regular sewerage, or drained simply by flowage over the surface, are not so supplied. *Ib.*

SHERIFF—

1. County commissioners have power to make an extra allowance to the sheriff for mending and washing for prisoners. *State v. Serviss.* 460

2. The allowance of fifty cents a day, under sec. 1235, relates to custody and not to care, and does not include his duties under sec. 7379. *Ib.*

3. A sheriff can not refuse to serve a writ directed to him in a civil action because his fees are not paid or secured in advance, unless the suit is brought by a non-resident or firm in the firm name. *Whitley v. Long.* 731

4. A sheriff is not entitled to receive in addition to the compensation provided by sec. 719, railroad fare, carriage hire, or other incidental expenses incurred in conveying insane persons to and from lunatic asylums of the state. *Commissioners v. Lodwick.* 567

5. When there is an infirmary in a county, but no room for insane persons either in the asylum of the state or county infirmary, the sheriff cannot be allowed more than seventy-five cents per day for keeping and boarding such insane persons. *Ib.*

Sidewalks—Street Railways.

SHERIFF—Continued.

6. The probate court in such case cannot contract for the keeping and boarding of insane persons with the sheriff as if he were not a public officer. Ib.

7. In cases of felony and misdemeanor where the state fails to convict; or where in case of conviction defendant proves insolvent, the sheriff cannot be paid by the county his fees for receiving, or discharging a prisoner from jail, or taking a prisoner before a court or judge, his fees therefor, except to be applied on the allowance of \$300 per year, provided by sec. 1231. Ib.

SIDEWALKS—

Street improvement without majority petition covering up a sidewalk laid on established grade and after lapse of several years city builds new walk and attempts to assess abutting owners. *Held*, they are exempt. *Cincinnati v. Gay*. 175

SLANDER AND LIBEL—

1. It is not within the jurisdiction of a court of equity to restrain by injunction the publication of an anticipated libel or slander, even though business and reputation is involved, and the intended publisher is insolvent. *Dopp v. Doll*. 423

2. When words claimed to be libellous are a privileged communication made by a commercial agency, it is not error for the court to refuse to charge that the defendant is liable if careless and negligent in collecting the information. *Crist v. Bradstreet Co.* 751

3. Or to charge that the question is one of good faith, and that, unless the negligence was so reckless as to be equivalent to want of good faith, or to amount to evidence of want of good faith, the defendant is not liable. Ib.

4. In libel against a commercial agency, where there is no evidence of publication except confidentially to subscribers, the statements complained of being privileged, the only question for the jury if they find the statements false and injurious, is whether or not, in seeking information about plaintiff, and in preparing and communicating such statements, the agents of defendant acted in good faith, on information which they had no reason to suspect, but honestly believed to be true. *Crist v. Bradstreet*. 618

5. In such case there is no presumption of bad faith from the mere falsity of the statements, and the burden of showing bad faith is with plaintiff. Ib.

STATUTES—

1. "Cost and expenses of constructing" in sec. 2379, is equivalent to "cost of improvement" in sec. 2284. *Cincinnati v. Wewell*. 677

2. Section 2271, fixing the limit of assessment, and sec. 2275, as to street intersections, do not apply to sewer assessments. Ib.

3. The amendment of sec. 7278, as amended March 18, 1884 (81 O. L., 53), is not an *ex post facto* law. *Palmer v. State*. 377

STREET RAILWAYS—

1. A municipality may grant a street railway company right to extend its line, although it necessitates use of a track already built by another company. *Broadway & Newburgh St. Ry. Co. v. Brooklyn St. Ry. Co.* 25

2. When such extension does not contemplate a new track for the whole distance, the consent of the abutting property owners on the part already built is not required. Ib.

3. Where a street railway company accepts a renewal of its charter with condition that the city may grant the right to use the track to any other company on such terms as the city council shall deem equitable, and the city has granted such right and prescribed the terms, the court will not interfere with them if they are reasonable. Ib.

4. And the company, the use of whose tracks has been granted, cannot object because a part of their business will be taken away. Ib.

5. The written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public highway along which it is proposed to construct a street railway or extension of one, as provided for in sec. 3439, Rev. Stat., means the consent of all the owners of property along the route no matter whether it be upon one street or upon several. *Rapp v. Street Ry. Co.* 302

6. The "owner" must be the owner of at least a freehold estate in the property in order to give the consent. Ib.

7. The "written consent" provided for cannot be given by an agent, the power given by the legislature cannot be delegated to another.

Sub-contractors.

8. A person holding a life estate under a will may consent. Ib.

9. A father cannot consent for a daughter. Ib.

10. The president of a corporation cannot consent without authority from the board of directors. Ib.

11. Husband cannot consent for his wife. Ib.

12. Tenant by curtesy or dower may consent. Ib.

13. One of tenants in common cannot consent. Ib.

14. Guardians for minors cannot consent for minors. Ib.

15. Executors with power to sell cannot consent. Ib.

16. *Quære*, whether council may consent for a municipal corporation. Ib.

17. A turnpike company may grant the use of its road bed for street railway purposes. *Cincinnati v. Street Ry. Co.* 782
Ib. *Harrison v. Cable Ry. Co.* 806

18. A village could under sec. 5 of the street railway act of 1861, have prevented such railway being constructed without consent of council. Ib.

19. The city succeeding to the ownership of the turnpike, took it, subject to all the rights and franchises of the Railway Co., and after the annexation of said village, the city had no more or greater rights, as against said Railway Co., than said village had before the annexation. Ib.

20. After an acquiescence of over 21 years, by the village and city together, in the construction and maintenance of said railroad on said turnpike, the city has no right now, on the ground that said village did not consent to such construction and maintenance, to enjoin the further operation of said railroad and remove its tracks. Ib.

21. A property holder cannot enjoin the construction of a street cable railway half a mile distant from his property on the ground that his access is impaired. *Harrison v. Cable Ry. Co.* 805

22. The street railway operated by an underground cable is not to be classed as a steam railway and is not additional burden entitling owners of the fee of a street to additional compensation, and is within the power of city council to authorize. Ib.

23. Taxpayers have no right under sec. 1777 to complain of want of

consents, to the construction of a street railway; abutting lot owners alone are interested in the subject. Ib.

24. Where, advertised for bids for laying a street railroad track, and plaintiff was the lowest bidder, and defendant was also a bidder, and council rejected both bids and authorized defendant to lay the track as an extension of its existing road, plaintiff is not entitled to an injunction against the construction by defendant and plaintiff not suing as a property holder cannot be heard to question the legality of the extension or to claim that its construction is a nuisance. *Johnson v. West Side St. R. R. Co.* 71

25. A modification of a contract between the city and the owner of a street railroad route, made in good faith, for the better accommodation of the public, is not void by virtue of sec. 2502, as a release of the grantee of such route from an obligation, although in consideration of more rapid transportation involving greater expense a higher rate of fare is permitted. *Clement v. Cincinnati.* 688

26. An extension of the term of the grant on the same consideration is not invalid because made without competitive bidding. Ib.

27. A street railroad does not cease to be such because a grip cable is substituted for horses as the motive power. Ib.

SUB-CONTRACTORS—

1. When a subcontractor takes the steps prescribed by secs. 3193 and 3194, and the head contractor fails, within the time named in sec. 3199, to begin arbitration proceedings or to commence an action to adjust the account, the house-owner is bound to pay such sub-contractor out of any money which he may owe the head contractor. *Busse v. Voss.* 441

2. If, after the expiration of such time, the head contractor and sub-contractor have a conversation about the matter, and agree to meet and adjust the account, and nothing further is done, the sub-contractor repudiating the agreement, the obligation of the house-owner is not affected thereby. Ib.

3. If the house owner, being thereupon sued by the sub-contractor, denies he owes the amount claimed and admits all the steps were taken, but sets up such conversation and repudiation, he is not entitled to pay into court the amount admitted to be due, be dismissed from the action and

Summons—Taxation.

SUB-CONTRACTORS—Continued.

have the head contractor substituted in his place and interplead. *Ib.*

SUMMONS—

1. Service of summons upon a foreign railroad company cannot be made by serving the writ upon a mere traveling solicitor of business for such company. *Wilson v. Railroad Co.* 634

2. In a proceeding in quo warranto the time for answer stated in the summons was the third Saturday after the return day: *Held*, the summons should be quashed. *State v. Robinson.* 249

3. A justice may set aside a judgment void for want of service of summons on defendants, may issue a new summons in the same action, and upon due service thereof may proceed again to judgment. *Wehlen v. Macke.* 565

4. It is proper for the court to strike out from a pleading an allegation of the manner of service of summons upon a defendant in another case, for the manner of service shown by the officer is conclusive. *Thompson & Co. v. Railroad Co.* 209

SURETIES—

1. A surety on paying the debt of his principal is entitled to be subrogated to all the securities, liens and equities which the creditor holds against the principal debtor or as a means of enforcing payment from him. *Pullan v. DeCamp.* 344

2. The sureties of a guardian may, on their own motion, become parties to the settlement of final account, for the purpose of correcting errors in that or a former account. *Porter v. Brown.* 646

3. Continuing an agent who is under bond in the employ, after failure to account, only discharges the surety if the delinquency amounts to dishonesty, or is such as before the bond was given, would have been a fraud not to disclose. *Insurance Co. v. Olhaber.* 842

4. But the employer is not bound to suppose the delinquency dishonest, and if it will reasonably consist with moral integrity, the employer may so construe it, and need not be on guard against every act that might be dishonest when the surety has vouched for the absence of any such dishonest intention. *Ib.*

TAXATION—

1. In ascertaining the value for taxation of a railroad whose line runs through several counties in the

state, the value of the rolling stock is to be apportioned to the different counties and cities not as to value but in proportion to the length of the road in each. *Railroad Co. v. Kelsey.* 227

2. The fixed property is to be apportioned in the proportion that the value of the part in each county or city bears to the total in the state. *Ib.*

3. The value of moneys and credits are to be apportioned in each locality in the same proportion as the fixed property. *Ib.*

4. Shares of stock in a national bank are taxed under the law of the state in the name of the shareholder. *Miller v. Bank.* 291

5. The auditor of a county having reason to believe that in the returns of the resources and liabilities of such bank, under sec. 2765, Rev. Stat., there were false statements, proceeded to correct the same by additions going back not exceeding four years, but placing the amounts upon the tax list against the bank: *Held*, that a petition by the county treasurer would not lie against the bank for the application of money and property of its shareholders to the payment of the taxes. *Ib.*

6. Upon a perpetual lease, although without covenant by lessee to pay taxes, so much of the taxes as are on account of improvement put upon the lot by lessee are chargeable to him. *Joelyn v. Spellman.* 258

7. Under sec. 2689, as amended, 80 O. L., 128, the rate for all purposes of taxation in Cincinnati, above the state and county tax and taxes for Southern Railway, cannot exceed in any year, including the levy by the board of education for schools and school-house purposes, sixteen mills on the dollar of taxable value. *State v. Brewster.* 357

8. Where the levy certified to the county auditor by the board of education, under sec. 8960, and the levy certified by the common council under sec. 2691, in the aggregate exceed sixteen mills on the dollar of the valuation of taxable property in the city, mandamus will not lie against the auditor to put the levy of the board of education on the tax duplicate. *Ib.*

9. An action under sec. 15850, to recover taxes illegally collected by county treasurer, must be brought against the person who, as such treasurer, made the collection. *Herzberg v. Willey.* 426

Telegraph Companies—Trespass.

10. An assessment under the Scott liquor law, collected after the constitutionality of said law had been settled by the Supreme Court, and before the act was, by the same court, held to be unconstitutional, cannot be recovered back, even though paid under compulsion. *Ib.*

11. Property owners may enjoin an illegal street assessment without first applying to the city solicitor, for they do not sue as taxpayers. *Moore v. Cincinnati.* 587

12. It is the duty of county commissioners, under sec. 1038 R. S., to grant application for refund of taxes on property which is exempt from taxation, as part of a place of worship, but erroneously put on the tax duplicate. *Mannix v. Comrs.* 18

13. The idea of a church edifice necessarily carries with it the use of ground ample for its use. To be exempt from taxation it is not necessary that such ground should be indispensable to the use of the church, but if it is no more than is reasonably appropriate to the purpose, and is used for no other, it comes within the statute. *Ib.*

14. Buying and selling at wholesale is "traffic" and the Dow law contemplates a tax upon wholesale dealers. *Senior & Son v. Ratterman.* 741

15. An action to recover back an assessment illegally collected by a county treasurer must be brought against such treasurer individually, and not in his official capacity. *Hornberger v. Case.* 434

16. When alleged illegal assessments were paid on the last day on which they were made payable by law, and were "paid under protest," and those words endorsed on the official receipts given therefor, payment made under such circumstances was not voluntary. *Ib.*

17. Assessments under the act commonly known as the Scott law, made and collected after the decision of the Supreme Court declaring such law valid and constitutional, and before the subsequent decision of the same court declaring it unconstitutional, were not illegal assessments, and cannot be recovered back. *Ib.*

18. Assessments under the liquor law of April 17, 1883, commonly called the Scott Law, collected after the decision of the Supreme Court settling its constitutionality, and before subsequent reversal thereof, declaring it void, were not illegal, and, therefore, though paid under protest

or compulsion, cannot be recovered back from the treasurer. — *v. Wilson.* 432

19. It was the duty of the treasurer to obey the law after such decision, and he cannot be mulcted for so doing. *Ib.*

20. A municipal corporation may, under sec. 9, Act of April 17, 1883, (80 O. L., 164) prohibit ale, beer and porter houses. And in such cases there shall be a refunding of a ratable proportion of the tax paid. *Irwin v. Martinsville.* 31

21. May also prohibit places of habitual resort for tippling and intemperance, but in such cases no part of the tax is to be refunded. *Ib.*

22. To constitute a resort for tippling and intemperance, not only many persons must resort to it, but each must drink often so that he feels the effects of it. *Ib.*

23. Church grounds must be annexed to the church edifice to be exempt from taxation. *Commissioners v. Mannix.* 189

24. This court having held, in what is known as the archbishop's case, that such property as was held by the late archbishop for church uses did not pass to his assignee, but to his successor, the present archbishop. *Ib.*

25. The property in question, if exempt from taxation, was so exempt because it was held for church uses, and did not pass to the assignee. *Ib.*

26. If on the other hand it did pass to the assignee, it passed because it was not held for church uses, but was subject to taxation. *Ib.*

TELEGRAPH COMPANIES--

A broker cannot recover from telegraph company for loss of commission, by incorrect transmission of an offer to buy, where it does not appear that the company had notice of the broker's interest in the transaction to which the dispatch related. *Elden v. Telegraph Co.* 13

TENANTS IN COMMON--

The existence of an ordinary lease for years, under which the tenant is in possession paying rent to the owners of the fee, is no obstacle to partition among such owners. *Werner v. Glass.* 686

TRESPASS--

1. An injunction will lie to prevent a trespass. *Railroad Co. v. Wenger.* 815

Trial—Vendor's Lien.

TRESPASS—Continued.

2. It is a trespass for persons so discontinuing work to go upon the premises of a railroad company and interfere with its business, or, by force, violence, threats, intimidation or request, seek to induce employees to join in such "strike." *Ib.*

3. An injunction will not be granted against a mere act of trespass. *Jefferson Iron Works v. Gill Bros.* 481

4. An action for trespass cannot be maintained against one who caused the seizure of a vessel by libelling her in admiralty, in the proper U. S. district court, the libel being dismissed, but the petition may be amended so as to charge malicious prosecution. *McIntyre v. Iron Works.* 433

TRIAL—

1. Although the practice should be condemned, it is not erroneous to permit plaintiff in rebuttal to restate a portion of the examination in chief. *Strauss & Bro. v. Dashney.* 329

2. Omission to admonish the jury on separation as required by sec. 5193, is not ground of reversal if counsel was present and did not call the attention of the court to its omissions and took no exception at the time. *Johnson v. Matthews.* 339

3. The statement of a physician as to the severe illness of a witness, whose deposition is taken, which statement is accidentally taken to the jury room, will not warrant reversal of the judgment, no allusion being made to the subject-matter of the case, although it may have tended to arouse sympathy for the witness, as one about to die, and cause undue weight to be given to his testimony. *Thompson v. Railroad Co.* 209

TRUSTS—

1. To declare a trust completed, and the title transferred to the beneficial owner, requires litigation, with proper parties and pleadings. *In re Southern Railroad.* 549

2. It cannot be done in a simple proceeding to fill a vacancy occasioned by death of a trustee. *Ib.*

3. A guardian against whom a judgment was recovered for a balance due, being financially embarrassed, convey his property by deed of trust: *Held*, that not only existing debts, but existing liabilities were intended to be satisfied from this trust, and the surety on the guardian's bond having paid the judgment was entitled as against the assignee in bankruptcy to

subject the property remaining in the hands of the trustee to the payment of his claim. *Pullan v. DeCamp.* 344

4. Where one conveys \$100,000 in securities to himself and Y.; in trust to pay the income to himself for life, and, after death to designated beneficiaries, the trust to cease if he survived his wife: *Held*, the trust deed is a valid disposition, and the property disposed of by it forms no part of his estate for the purposes of distribution, and the widow has no claim to it. *Urner v. Yager.* 592

TURNPIKES AND TOLLS—

1. The surface of a turnpike road is the private property of the turnpike company, and is subject to the same rules as other private property. *Turnpike Co. v. Avondale.* 813

2. A turnpike company may grant the use of its road bed for street railway purposes. *Cincinnati v. Street Ry Co.* 782

Ib. *Harrison v. Cable Ry Co.* 805

3. The duty to keep in repair that part of a turnpike road which becomes included in the extension of the limits of a municipal corporation devolves upon the municipal corporation, as it becomes a street under sec. 3491. *Madisonville v. Turnpike Co.* 722

4. The words, "no toll shall be taken thereon," means no toll therefor or for that part. *Ib.*

5. No inspectors can be asked for under sec. 3482, to ascertain if there has been abandonment by reason of non-repair and this is so, although the toll gate has not been removed outside the limits, for the gate was by sufferance and the tolls unlawful. *Ib.*

UNLAWFUL ASSEMBLY—

1. An assembling of men for the purpose of forming a combination and agreement to go upon the premises of a railroad company to obstruct, interrupt or stop its business, and prevent by force, threats or intimidation, its employees from performing their duties, is an unlawful assembling. *Railroad Co. v. Wenger.* 815

2. When such combination is formed for such common purpose, all are responsible for the acts of each. *Ib.*

VENDOR'S LIEN—

A vendor's lien upon chattels can only exist while he retains them actually or constructively in his pos-

Vendor and Purchaser--Water and Watercourse.

session, but the vendor having possession may assert such lien, even in case of sale upon credit, where the vendee becomes insolvent without having paid for the goods. *Rusel v. Levy.* 180

VENDOR AND PURCHASER—

1. Where a contract is to sell land at \$800.00 per acre, and refers to a flat showing ten acres, but the deed calls for ten acres, more or less, and recites a consideration of \$8,000, and it is afterward ascertained that the lot has but seven acres, the purchaser is entitled to compensation, for as the deed does not especially say that the sale is in gross, the contract may be looked to in construing the deed, because not varying it, and such contract shows the sale is by the acre. *Procter v. Bell.* 853.

2. A deed intended as a mortgage, which excepted from the warranty clause three mortgages "agreed to be part of the consideration hereof," was, by agreement redelivered to the grantor without record, and another substituted not containing such exception and reference. In an action by the holder of such mortgages against the grantee in such deeds: *Held*, that, even if such language imported an assumption of payment, it was not absolute, and was discharged by the change of deeds. *Phipps v. Goulding.* 467

VENUE—

A non-resident of the county summoned in another county on three causes of action, in only one of which he is sued jointly with a resident, can have the other two dismissed on motion, disclaiming appearance. *Knight v. Hinton.* 204

VERDICTS—

1. An instruction upon the form of the verdict is an instruction upon the law of the case, and any such instruction in the absence, of and without notice to counsel, is error. *Moravec v. Buckley.* 226

2. Error in arresting testimony from jury and directing verdict for defendant. *Theal v. Stone Lake Ice Co.* 163

WAREHOUSEMAN—

1. A warehouse receipt is not a negotiable instrument, but the delivery of such a receipt by the vender to the vendee of property described in it, will transfer the possession of the property to the latter. *Rusel v. Levy.* 180

2. A warehouse receipt can only be issued by a person having actual custody of the property. *Ib.*

3. A paper issued by a person for property which he has in another's warehouse is not a warehouse receipt, and is not a symbolic delivery of the property described in it. *Ib.*

WATER AND WATERCOURSE—

1. Riparian proprietors are entitled, in the absence of grant or prescription limiting their rights therein, to the usufruct of the waters of a water-course, which washes their lands, in its substantially natural, uninterrupted, undiminished and undefiled flow and current. *Warder v. Springfield.* 855

2. Such use and flow of the waters of a stream is a private property right in the owner of the land through which it passes, as an incident, convenience or easement, which separately connects itself therewith as a part thereof and frequently gives or adds value thereto; and is protected by the 19th section of the Bill of Rights of the constitution. *Ib.*

3. A municipal corporation does not, by the mere fact of owning in fee-simple a tract of land adjacent to a water-course, acquire the rights of a riparian proprietor therein, so as to enable it to lawfully divert the waters thereof to the individual domestic and other uses and benefits of its citizens. *Ib.*

4. The law recognizes no natural, correlative rights in waters spread over or percolating beneath the surface of the ground, or oozing through or suspended in the soil, or the result of the rainfall. *Ib.*

5. If not flowing in any defined channel, water does not constitute a water-course, is not subject to the principles regulating the rights of riparian proprietors, and is not property. *Ib.*

6. A city as a riparian owner has no right to consume all the water by means of water works to the prejudice of other proprietors. *Ib.*

7. But it may, if it can without invading such rights, on its own land in such manner and for such purpose, take surface, subterranean and percolating waters not flowing in any defined channel. *Ib.*

8. If owners have by grant and prescription a right to run the water to their mills through a race, the city can not consume the water without compensation. *Ib.*

Wills—Words.

WILLS—

1. To admit a copy of a will from another state to record in this state, the original will must have been admitted to probate and record, and the court admitting it to record here must be satisfied of that fact. *Robert Barr's will.* 616

2. On the issue of whether a testator has testamentary capacity, witnesses may be asked as to his capacity to transact business, when it does not involve his capacity to make a will. *Brockmeier v. Buck.* 353

3. A life estate given by will is not enlarged to a fee by a power of sale coupled with it, unless such appears to have been the intention of the testator. *Stokes v. Stokes.* 309

4. In the construction of a will its words are to be taken in their primary or ordinary sense, in the absence of anything to show a contrary intention on the part of the testator; "sons and daughters" do not include granddaughters. *Ib.*

5. A legacy of all the residue of the estate, but directing that interests in a certain corporation to remain as they are, so long as a certain person continues its manager, gives the legatee an absolute interest and then seeks to control disposition, such restriction is repugnant, and void. *Hicks v. Stone.* 132

6. A testator having drawn a pen through certain codicils and substituted different legacies by interlining without proper attestation, on contest of will the common pleas has jurisdiction to try the issue of what part of the paper is the will. *Brundige v. Benton.* 786

7. The will not having been revoked in one of the ways named in sec. 5953; a verdict that the writing as admitted to probate, which included the interlined codicils, is not the will, and that the writing striking out the interlined codicils and leaving in the erased codicils is the valid will, will be sustained and judgment rendered upon it. *Ib.*

WITNESSES—

1. The deposition of a party taken during the lifetime of the other party becomes incompetent if the latter die before trial, and his administrator is substituted. *Bettman v. Hunt.* 396

2. A resident witness, not a party to the case, who is in good health, and not intending to depart, and will be able to attend trial, cannot be compelled to give his deposition. *Ex parte Langford.* 597

3. A witness is not excused from giving his deposition under secs. 5285, 5286, on the ground that he is not interested in the action; that he is within the county in which the action is pending, and that he does not intend to depart; that he is in good health, and will be able to attend court as a witness when the case is reached for trial. *Shaw v. Installation Co.* 809

4. The notary need not commit a witness refusing to answer a question, but may consult the court and obtain a ruling upon the question. *Ib.*

5. The power to subpoena and compel the attendance of witnesses and examine them under oath given the board of revision (83 O. L., 169), does not include the power to imprison a witness so attending for refusal to answer questions. *In re Heffron.* 674

6. There is no difference in Ohio as to classes of witnesses. *State v. Darby.* 725

7. The statute fixes the witness fees arbitrarily, regardless of calling profession, and the witness is punishable for contempt for refusing to answer. *Ib.*

8. Judgment against an administrator will not be reversed for error in permitting the adverse party to testify; no objection being made to such testimony at the time, and there being enough to support the judgment without it. *Young v. Langdon.* 367

9. If witnesses for the state, ordered to remain out of hearing, listen at the door, and are subsequently called to testify, a new trial will be granted to the accused, unless the court can affirmatively find that they heard nothing; and the prosecuting attorney will be directed to file informations against them. *State v. Rosa.* 590

WORDS—

The word "published," as used in sec. 4641, does not mean "printed." *Miller v. Commissioners.* 313

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